HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	B32/2023
File Title:	Carmichael Rail Network Pty Ltd as Trustee for the Carmichae
Registry:	Brisbane
Document filed:	Form 27A - Appellant's submissions-Appellant's Submissions
Filing party:	Appellant
Date filed:	28 Jul 2023

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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 SUBMISSIONS

Part I: Certification

1. This submission is in a form suitable for publication on the Internet.

Part II: Issue

2. The issue in this proceeding is whether, for an arbitration clause to be held void as contrary to art III(8) of the Australian Hague-Visby Rules (**AHVR**), it suffices that there is shown to be a *risk* that the arbitration will cause the liability of the carrier to be lessened. The Appellant contends that that is sufficient. To state the issue in another way, must the shipper prove that arbitration *would* lessen the liability of the carrier, or is it sufficient for the shipper to identify ways in which a lessening of liability *might* realistically occur, with it then being for the carrier to exclude that possibility? The Appellant contends that the latter is sufficient.

Part III: Section 78B notice

3. The Appellant considers that no s 78B notice is required in this proceeding.

Part IV: Citations

4. *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co. KG (BBC Nile)* (2022) 295 FCR 81 (**J**).[1]

Part V: Facts

5. The facts are set out at CAB 29 [6]. Briefly, the Appellant (**CRN**, the shipper[2]) was the consignee of a domestic shipment of hardened steel rails from Whyalla to Mackay, under a "BBC Bill of Lading" issued by the First Respondent (**BBC**, the shipowner and carrier).[3] CRN had also entered into contracts with the Second Respondent (**OneSteel**, the manufacturer) to supply the rails, and to load them onto the carrier's ship. On arrival at Mackay, BBC's crew discovered that a collapse had occurred in the hold during the voyage, causing severe damage to the rails and rendering them unfit for use.

6. The bill of lading provided that any dispute arising thereunder shall be referred to arbitration in London. On 2 August 2022, BBC gave notice to CRN informing it that it had commenced arbitral proceedings in London seeking a negative declaration that it was not liable for the damage suffered by CRN, and inviting CRN to nominate an arbitrator. On 12 August 2022, CRN applied for an anti-suit injunction restraining BBC from taking any further steps in the purported arbitration. Anti-suit relief was granted

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1 See Core Appeal Book (**CAB**), pp 24 – 56.

2 While CRN was the consignee, there is no issue that its position was relevantly identical to that of the shipper, and it is accordingly referred to as "shipper" in these submissions for simplicity.

3 See Appellant's Book of Further Material (**ABFM**), page 15 (Exhibit FH5), which incorporated, by reference, the terms contained in a "BBC Booking Note", see ABFM, page 12 (Exhibit FH3).

on an interim basis by SC Derrington J, and then extended pending the determination of the proceedings. BBC also filed a stay application. The Chief Justice then referred both applications (CRN's anti-suit application and BBC's stay application) to the Full Court.

Part VI: Argument

7. Section 8 of the *Carriage of Goods by Sea Act 1991* (Cth) (**the Act**) provides that the "amended Hague Rules" (set out at Sch 1A of the Act) have the force of law in Australia. The amended Hague Rules consist of the Hague-Visby Rules (as amended by the SDR Protocol) with Australian modifications, and are referred to herein as the Australian Hague-Visby Rules or **AHVR**. Art III(8) of the AHVR 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, 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.

8. It is well established that art III(8) is capable of avoiding both choice of law clauses and choice of forum clauses, including arbitration clauses.[4] The issue in this appeal is *when* it will have that effect. In CRN's submission, having regard to its text, context and purpose, and to the almost unanimous consensus of maritime courts around the world (the US being the exception), the proper construction of art III(8) is that a "clause … lessening [the carrier's] liability" includes a clause that results in a "potential and not simply a demonstrable lessening of liability".[5] Once a shipper shows that the clause, if enforced, may *potentially* lessen the carrier's liability, then the clause is to be held void unless the carrier demonstrates that the risk will *not* eventuate. It is contrary to the policy[6] of art III(8) to require the shipper to prove that the lessening *will* eventuate.

9. CRN relies on three ways that the arbitration clause may lessen the carrier's liability.

10. ***First***, the arbitral tribunal, seated in London and applying English law (and thus, free of the overriding application of the AHVR by virtue of s 8 of the Act), may construe the clause paramount[7] in the bill of lading as incorporating only arts I–VIII of the Hague Rules (rather than the Hague-Visby Rules, which would not be compulsorily applicable), reducing the carrier's liability to £100 per package (Hague Rules, art IV(5)).

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4 See, eg, *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 (***Akai (No 1)***) at 446; *The Hollandia* [1983] 1 AC 565 (***The Hollandia***) at 574–5; *Vimar Seguros y Reaseguros, SA v MV Sky Reefer*, 515 US 528 (1995) (***Sky Reefer***) at 540–1.

5 *Indussa Corp v S S Ranborg*, 377 F 2d 200 (1967) (***Indussa***) at 204.

6 Namely, to protect shippers from carriers using their market power to force shippers to agree to terms designed to lessen the carrier's liability: see paragraphs [16]–[24] below.

7 Paraphrased at CAB 34–35 [23] and set out at ABFM, page 13, cl 3(a).

11. ***Secondly***, even if it does apply the AHVR, the arbitral tribunal may apply the text of those rules *as interpreted under English law*, rather than under Australian law, on the basis that English law is the *lex causae*. On that basis, the tribunal would be ***bound*** to interpret art III(2) as permitting the carrier to delegate responsibility for the loading of goods, because the House of Lords so held in *Jindal Iron & Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc*.[8] As a matter of Australian law, however, the proper construction of art III(2) remains an open question, with the obiter dicta of Sheller JA in *Nikolay Malakhov Shipping Co Ltd v Seas Sapfor Ltd*,[9] and the academic writings of the Hon James Allsop AC, Professor Martin Davies and Dr Anthony Dickey KC,[10] all favouring the opposite construction of art III(2) – ie, that the carrier's responsibility for loading is non-delegable. Arbitration in London thus entails the loss of a chance for CRN. If the matter were heard in an Australian court, s 8 of the Act would mandatorily apply, requiring the Court to apply the AHVR as interpreted under Australian law. CRN would thus have the opportunity to persuade the Court to take up the *Nikolay Malakhov* invitation and confirm that Australian law recognises that art III(2) functions as non-delegable. But in English arbitral proceedings, s 8 of the Act will not mandatorily apply, and the tribunal will thus be required to apply the English law interpretation of art III(2).

12. ***Thirdly***, the expense and practical burden that would result from requiring CRN to pursue its claim against BBC through arbitration in London is apt to impede its pursuit of that claim, or at least to encourage it to settle for less. This was a shipment between two Australian ports of steel rails manufactured in Australia by an Australian manufacturer for an Australian buyer. The dispute has no connection with England. All the witnesses and evidence are likely to be in Australia. If the arbitration clause is upheld, CRN will need to pursue two parallel proceedings: arbitration against BBC in London, and litigation against OneSteel in Australia, with the concomitant risk of inconsistent findings. BBC will need to pay for two teams of legal representatives, rather than one. It will need to engage expert witnesses to give evidence in the arbitration as to the content of Australian law, because in a London-seated arbitration, that will be "foreign law" required to be proved as a fact. All of this adds to the "transaction costs" of CRN obtaining redress, which as a matter of practical reality, will

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8 [2004] UKHL 49.

9 (1998) 44 NSWLR 371 at 387–8.

10 Martin Davies, "Two Views of Free In and Out, Stowed Clauses in Bills of Lading" (1994) 22 *Australian Business Law Review* 198 at 206: Martin Davies and Anthony Dickey, *Shipping Law* (Thomson Reuters, 4th ed, 2016) [12.310]; James Allsop, "Maritime Law: The Nature and Importance of its International Character" (2010) 84 *Australian Law Journal* 681 at 698–9.

exert downward pressure on what the carrier would be likely to pay as a settlement.[11]

13. These risks were sloughed off by the Full Court as "moot" (CAB 36 [31]), "academic" (CAB 39 [41]), "speculat[ive]" (CAB 40 [43]), and irrelevant (CAB 40 [45]). As to the increased transaction costs involved in an Australian shipper being compelled to participate in an arbitration in London, the Court held, with no explanation, that this was not a matter to which art III(8) is directed (CAB 40 [45]). As to the risk of the tribunal adopting an English interpretation of art III(2), the Court's view was that this was "a matter for the Tribunal" (CAB 39 [41]). That is to say, it may happen or it may not; and the shipper must wear that risk. Implicit in this is that the only way to avoid this conclusion would be for the shipper to have proved that the risk ***will*** materialise. That places a heavy onus on the shipper. As to the clause paramount issue (and again, the art III(2) issue), the Court made a declaration that the Australian Rules "as applied under Australian law apply",[12] and BBC gave an undertaking to the Court in those same terms.[13] The Court held that these steps "***ensure*** that BBC will not be able to lessen its liability in the arbitration" (CAB 35 [27]) and that the risk accordingly "falls away" (CAB 36 [28]). However, as explained below, neither of these steps will be binding on BBC or the tribunal in the arbitration, and even if they were, it has not been declared or admitted that the Australian law *interpretation* of art III(2) will apply, as distinct from the text of that rule simpliciter applying.

14. With these matters in mind, we turn now to the proper construction of art III(8).

15. ***Text***. The text of art III(8) is neutral on the question presently before this Court. It is neither stated to apply only to clauses that "***will*** lessen" the carrier's liability (which would assist BBC), nor to clauses that "***may*** lessen" the carrier's liability (which would assist CRN). It follows that both interpretations are textually open.

16. ***Purpose***. The purpose of the Hague-Visby Rules, and art III(8) within them, is well known. Its purpose is to protect shippers. The background was described by Isaacs J in *Australasian United Steam Navigation Co Ltd v Hiskens*[14] as follows (emphasis added):

> Carriers endeavoured constantly to narrow their responsibilities, particularly where they had ***a virtual monopoly***. ... It is common knowledge that shipowners everywhere were able by reason of ***their absolute control of the subject*** to frame their conditions ***as strictly as they pleased***. A bill of lading, once accepted, constituted the contract,

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11 *Sky Reefer*, 551, 552 (Stevens J).

12 CAB, p 58, order [5]. The declaration is inaccurately described as being "by consent." CRN did not consent to the declaration. Instead, it made submissions that the declaration did not address the key issue of *interpretation* of the Rules, and that the declaration would have no utility in any event: see Plaintiff's Supplementary Submissions, ABFM, p 25-27.

13 ABFM, p 28-29, para B.

14 (1914) 18 CLR 646 at 670 (in dissent as the outcome, but without majority demur as to this summary).

> and consignees must in practice stand by its terms. If transferred or sued on at all, it must be taken as it stands. … The basic common law responsibility to carry without requiring unreasonable stipulations, though still existing, could not, at all events without extreme difficulty, be insisted upon by those entitled to require it, and ***shipowners held shippers at their mercy***. Common law relations based on reasonableness and fairness were in practice destroyed at the will of the shipowners, and as fast as Courts pointed out loopholes in their conditions, so fast did they fill them up, until at last ***the position of owners of goods became intolerable***.

17. This passage was cited with evident approval in *The Bunga Seroja*[15] by Gaudron, Gummow and Hayne JJ, who explained that the catalyst for the United States passing the *Harter Act* – section 1 of which was the progenitor of art III(8)[16] – was that "carriers [had begun] to include more and wider exculpatory clauses in their bills of lading."

18. Likewise in the Court of Appeal's decision in *The Hollandia* (which was affirmed on appeal), Lord Denning MR "sketch[ed] the policy behind the legislation" as follows:[17]

> Up till 1921 shipowners were in ***a strong position vis-a-vis the cargo owners***. They could issue bills of lading with ***all sorts of exceptions and limitations***: and these were binding not only on the shippers but also on consignees, bankers, insurers and others who had not been parties to the original contract and had no control over it. This was most unsatisfactory.

19. The Master of the Rolls went on to explain that the effect of art III(8) was that "parties should not by ***any device, directly or indirectly***, be able to contract out of the Rules."[18] Likewise, Sir Sebag Shaw held: "Contracting out by ***whatever process, direct or indirect***, is inhibited by the objectives as well as by the terms of the Act and the Protocol."[19] This same purpose was endorsed in the House of Lords by Lord Diplock (with whom the other Law Lords agreed), who said this of the Hague-Visby Rules:

> They should be given a ***purposive rather than a narrow literalistic construction***, particularly wherever the adoption of a literalistic construction would enable the stated purpose of the international convention, viz., the unification of domestic laws of the contracting states relating to bills of lading, to be ***evaded by the use of colourable devices*** that, not being expressly referred to in the Rules, are not specifically prohibited.[20]

20. Rejected in that case was the appellant's submission that art III(8) "is not apt to invalidate procedural provisions governing methods of dispute settlement, such as

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15 *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad ("The Bunga Seroja")* (1998) 196 CLR 161 at 168–9 [11]–[14].

16 Ibid; *William Holyman & Sons Pty Ltd v Foy & Gibson Pty Ltd* (1945) 73 CLR 622 at 626–7 (Latham CJ); 641 (Williams J); *Knott v Botany Mills*, 179 US 69 at 72 (1900), and see generally Sturley, vol 1, 8–9, 527; vol 2, 129–144 (especially 131).

17 *The Hollandia* [1982] QB 872 at 881–2 (emphasis added).

18 *The Hollandia* [1982] QB 872 at 884 (cleaned up) (emphasis added).

19 *The Hollandia* [1982] QB 872 at 886 (emphasis added).

20 *The Hollandia* [1983] 1 AC 565 at 572–3 (emphasis added).

arbitration or forum selection clauses".[21] Acceptance of that absolute proposition would have permitted carriers to succeed, by the use of such devices, at evading liability. Lord Diplock instead took a more nuanced approach, holding that whether a procedural clause lessens a carrier's liability is to be considered on a case-by-case basis.[22]

21. While freedom of contract is undoubtedly to be supported as a general principle in the ordinary course, contracts of carriage of goods by sea evidenced by sea carriage documents (including a bill of lading) are a *sui generis* category of contract in respect of which, owing to the historical recognition of a lack of equality of bargaining power between carriers and shippers, the contracting states to the Hague-Visby Rules (and in turn, their domestic legislatures) have seen fit to override that freedom by the mandatory imposition of a regime designed to redress the imbalance.[23] This was recognised in the 1921 Report of the Imperial Shipping Committee on the Limitation of Shipowners' Liability by Clauses in Bills of Lading and on Certain Other Matters Relating to Bills of Lading, which led to the making of the Hague Rules, in which the Committee stated:[24]

> Freedom of contract, which is the basic principle of modern commerce, assumes, of course, that both the parties to a bargain are free. It has been represented to us, on the part of the shippers, that they are ***not wholly free*** when contracting with shipowners, because the Liner Companies or Conferences enjoy in many cases a ***position approximating to a monopoly***, and that, as a consequence, shippers are not able to obtain the elimination of the clauses objected to without the help of legislation. … We are content to accept the broad fact that, from whatever cause, ***the practice of inserting the contracting-out clauses in Bills of Lading continues***, notwithstanding that there is a widespread and persistent demand among commercial organisations throughout the Empire for legislation to render such clauses illegal.

22. As Anthony Diamond QC said of the pre-1924 commercial practice in an influential article: "It had become recognised that true freedom of contract did not exist in the case of bills of lading whose terms were usually dictated by the shipowners. The only freedom of the shipper was to take the bill of lading or to leave it."[25] Colinvaux likewise noted the "virtual monopoly" formerly enjoyed by shipowners, which was exploited "to adopt clauses in their bills of lading very seriously and unduly limiting their obligations as carriers … [which were] so unreasonable and unjust in their terms as to exempt them from almost every conceivable risk and responsibility as carriers of goods".[26]

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21 *The Hollandia* [1983] 1 AC 565 at 567–8.
22 *The Hollandia* [1983] 1 AC 565 at 574H–575C.
23 *Dampskibsselskabet Nordon A/S v Gladstone Civil Pty Ltd* (2013) 216 FCR 469 at [19] (Mansfield J); [60] (Rares J), citing *Canada Moon Shipping Company Ltd v Companhia Siderurgica Paulista-Cosipa* 2013 AMC 319 (2012) (Federal Court of Appeal, Canada, 8 November 2012) at [59]–[61].
24 Sturley, vol 2, 125 [14] (emphasis added).
25 Anthony Diamond QC, "The Hague-Visby Rules" [1978] LMCLQ 225 at 246.
26 Raoul P Colinvaux, *The Carriage of Goods by Sea Act 1924* (Stevens & Sons, 1954) 3, citing *The Delaware* (1896) 161 US 459 at 472–3 and Knauth, *Ocean Bills of Lading* (1953) 120.

23. Of course, the provisions of the Hague-Visby Rules are not all one way. Many are self-evidently for the benefit of the carrier: see, eg, arts III(5), III(6), IV(1), IV(2), IV(4), IV(5), IV(6), and IVbis(1)–(3). The quid pro quo for the carrier's exemptions, immunities and limitations on liability was the shipper's protection from exculpatory clauses in art III(8). As the Federal Court of Canada has observed:[27]

> It appears to me that one of the fundamental purposes of the Hague-Visby Rules is to protect both carriers and shippers: carriers are protected from undue liability by the limits stated in the Hague-Visby Rules which can be modified upward only if the shipper declares a higher value and is prepared to pay higher rates; and ***the shipper is protected by provisions such as Article 3, section 8 from being excluded from the level of recovery provided by those Rules by means of some obscure provision in the bill of lading which is normally drafted by the carrier***.

24. In these circumstances, art III(8) should be given a broad and purposive construction, representing, as it does, a central measure in the Rules aimed at protecting shippers. Consistent with that broad purpose, art III(8) and its cognates have been applied to strike down a broad variety of clauses, including clauses shortening limitation periods for claims,[28] redefining the meaning of "package",[29] and rendering conclusive a surveyor's certificate as to the value of goods or as to the carrier's exercise of due diligence.[30]

25. ***Context***. A relevant matter of context is art III(8)'s second sentence, which provides that "[a] benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability." As the *travaux* show, this provision was included for the avoidance of doubt, confirming the scope of art III(8)'s first sentence, with one delegate noting "we are all quite clear that we mean to prohibit such a clause", and another stating that "there is no doubt that the general principle would already cover it, but … 'things which go without saying go even better if you mention them'".[31] A benefit of insurance clause[32] is thus to be understood as one authoritative example of a type of clause that relieves or lessens liability. That is important, because whether such a clause[33] will in fact lessen the carrier's liability is intrinsically

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27 *Ontario Bus Industries Ltd v The Federal Calumet* [1991] FCJ No 535 (Federal Court of Canada, Strayer J) (emphasis added).

28 *Australasian United Steam Navigation Company Ltd v Hunt* [1921] 2 AC 351; *Colonial Sugar Refining Co Ltd v British India Steam Navigation Co Ltd* (1931) 32 SR (NSW) 245 at 257–8; *Coventry Sheppard v Larrinaga S S Co* (1941) 72 Lloyd's LR 256 at 260.

29 *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA* (2004) 140 FCR 296 at 360 [260].

30 *Studebaker Distributors Ltd v Charlton Steam Shipping Co* [1938] 1 KB 459 at 464–6; *The Australia Star* (1940) 67 Ll LR 110 at 116.

31 Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules* (1990) (**Sturley**), vol 2, 453 (Sir Norman Hill), 471–2 (Mr Louis Franck) (cleaned up).

32 That is, a clause entitling the carrier to the benefit of the cargo owner's insurance: *Carver on Bills of Lading* (5th ed, Thomson Reuters at [9-212].

33 Described in the *travaux préparatoires* as a clause which "provides that the shipowner having incurred a liability and having paid can step into the shoes of his cargo owner and recover from the cargo owner the amount for which the cargo was insured": ibid 471.

conditional: it depends on whether the carrier would succeed in obtaining an indemnity from the cargo owner's insurer. Notwithstanding that conditionality, the clause is void.

26. ***Authorities***. As Lord Diplock observed in *The Hollandia*:[34]

> The Hague-Visby Rules, or rather all those of them that are included in the Schedule, are to have the force of law in the United Kingdom: they are to be treated as if they were part of directly enacted statute law. But since they form part of an international convention ***which must come under the consideration of foreign as well as English courts***, it is, as Lord Macmillan said of the Hague Rules themselves in *Stag Line Ltd v Foscolo, Mango and Co Ltd* [1932] AC 328, 350 … "desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that ***the language of the rules should be construed on broad principles of general acceptation***."

27. It is therefore relevant to consider how maritime courts around the world have interpreted art III(8). On this count, the trend is clear: the overwhelming weight of international authority supports the construction of art III(8) advanced at [8] above. Indeed, the only clear outlier is the (universally criticised[35]) decision of the Supreme Court of the United States in *Sky Reefer*,[36] which overruled the decision of a nine-judge bench in *Indussa*[37] that had stood for three decades as the "leading case".[38]

28. We turn now to consider the position in Australia, the United Kingdom, Belgium, Hong Kong, Singapore, Canada, and lastly, the United States.

29. ***Australia***. In Australia, the leading case is *Akai Pty Ltd v The People's Insurance Company Ltd*.[39] This Court held that s 54 of the *Insurance Contracts Act 1984* (NSW) invalidated a choice of law clause in favour of English law and a choice of forum clause in favour of the Courts of England. Justices Toohey, Gaudron and Gummow likened s 52 to art III(8), holding that the decisions in *The Hollandia* and *The Regal Scout*[40] on

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34 *The Hollandia* [1983] 1 AC 565 at 572–3.

35 See, eg, Michael F Sturley, 'Bill of Lading Forum Selection Clauses in the United States: The Supreme Court Charts a New Course' (1996) *LMCLQ* 164 (**Sturley 1996**); Christine N Schnarr, 'Foreign Forum Selection Clauses under COGSA: The Supreme Court Charts New Waters in the Sky Reefer Case' (1996) 74 *Washington University Law Quarterly* 867 (**Schnarr**); Cherie L LaCour, 'The Enforceability of Foreign Arbitration Clauses under the *Carriage of Goods by Sea Act* after *Vimar Seguros y Reaseguros, SA v M/V Sky Reefer*' (1996) 4 *Tulsa Journal of Comparative & International Law* 127 (**LaCour**); Michael F Sturley, 'Overruling Sky Reefer in the International Arena: A Preliminary Assessment of Forum Selection and Arbitration Clauses in the New UNCITRAL Transport Law Convention' (2006) 37 *Journal of Maritime Law and Commerce* 1 (**Sturley 2006**); Tetley, Marine Cargo Claims (2008, Yvon Blais) 1941 (**Tetley**); Martin Davies, 'Forum Selection, Choice of Law and Mandatory Rules' (2011) *LMCLQ* 237 (**Davies 2011**); Robert Force, 'The Position in the United States on Foreign Forum Selection and Arbitration Clauses, Forum Non Conveniens, and Antisuit Injunctions' (2011) 35(2) Tulane Maritime Law Journal 401 (**Force**); LeRoy Lambert, 'What I Wish the Supreme Court Would Decide: Review by a US Court of a Foreign Arbitration Award Issued in a Dispute to which COGSA Applies – What Standard Applies?' (2015) 46(4) *Journal of Maritime Law and Commerce* 487 (**Lambert**).

36 *Vimar Seguros y Reaseguros, SA v MV Sky Reefer*, 515 US 528 (1995).

37 *Indussa Corp v S S Ranborg*, 377 F 2d 200 (1967)

38 As the majority in *Sky Reefer* itself recognized at 533.

39 (1996) 188 CLR 418.

40 *Agro Co of Canada Ltd v The "Regal Scout"* (1983) 48 DLR (3d) 412.

art III(8) are "indicative of the approach to be taken in construing s 52 of the Act".[41] That approach was exemplified in the following key passage (at 445):

> Akai responds to the application for the stay of the proceeding in New South Wales by ***asserting*** that s 54 of the Act confers upon it a legitimate juridical advantage in any forum in which the Act will be applied as part of the lex causae and that the Supreme Court of New South Wales is such a court. ***It would then be for People's Insurance to show that in truth*** enjoyment by Akai of a legitimate juridical advantage is not confined to the New South Wales court and that, in particular, s 54 ***would be*** applied as part of the lex causae in the English courts. ***That task People's Insurance did not attempt***.

30. This same analysis that applies to s 52 applies equally to art III(8):

(a) The party arguing for invalidation (in *Akai*, the insured; here, the shipper) begins by "asserting" that a provision of the Act (in *Akai*, s 54; here, art III(2)) "confers upon it a legitimate juridical advantage in any forum in which the Act will be applied as part of the lex causae". CRN has done that here.

(b) "It would then be for" the party arguing that the foreign jurisdiction clause should be enforced (in *Akai*, the insurer; here, the carrier) "to ***show*** that in truth", the enjoyment of that legitimate juridical advantage is not confined to the Australian court, and that, in particular, the provision on which the plaintiff relies "***would be***" applied as part of the lex causae in the English courts. This describes a shifting onus: once the insured/shipper identifies the juridical advantage it stands to lose, the onus shifts to the insurer/carrier to prove that, in truth, that juridical advantage will not be lost in the foreign forum.

(c) "That task People's Insurance did not attempt". That is, the insurer's failure to attempt – much less to discharge – its burden of showing that the juridical advantage would be equally enjoyed in English courts was fatal. Likewise in this case, it was for BBC to prove that the juridical advantages CRN would enjoy in this forum ***would be*** enjoyed in an English-seated arbitration. The Full Court held that it should not "speculate" (CAB 40 [43]) and that the arbitration should thus proceed; but to find that the future course of the arbitration was "speculative" necessarily entailed that BBC did not prove that CRN's legitimate juridical advantage would not be lost.

31. This also reflects the Australian approach more generally to anti-suit injunctions sought on the vexatious or oppressive ground or to protect the Court's processes, which are granted where "the foreign proceedings interfere with ***or have a tendency to interfere with*** proceedings in that court" or are "***prima facie*** unjust or oppressive".[42]

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41 *Akai (No 1)* at 446.

42 *CSR v Cigna Insurance Aust Ltd* (1996) 189 CLR 345 at 392, 376 (emphasis added).

32. ***The United Kingdom***. In *Baghlaf (No 1)*,[43] the Court of Appeal recognised that the effect of art III(8) and of *The Hollandia* was that "the English Court is required to treat as of no effect an exclusive jurisdiction clause if the application of that clause will result in the plaintiffs' recovery being restricted to less than the Hague-Visby limit".[44] There, the issue was whether the Pakistan court would treat the plaintiff's claim as time-barred (which in England it was not). To defuse that issue, the defendant gave an undertaking that it would waive any limitation defence available to it in the Pakistan court, which the Court initially accepted, permitting the foreign litigation to proceed on that basis.

33. However, it subsequently emerged that there was doubt about whether the Pakistan court would itself permit the defendant to waive the limitation defence. The defendant sought to counter this discovery by arguing that s 14 of the *Limitation Act 1908* (Pk) might nonetheless operate to rescue the plaintiff's ability to bring its claim. It contended that the "position simply has not been tested" and the plaintiff was "obliged to try to commence proceedings in Pakistan".[45] This was rejected. Lord Justice Waller in *Baghlaf (No 2)* (Chadwick LJ agreeing) entertained doubts about whether s 14 would indeed revive the plaintiff's ability to prosecute its claim, and held:[46]

> ***All I for my part would say is that the position is very unclear and it would seem to me that the plaintiffs, if they were forced to argue the s 14 point in Pakistan, would have an uphill struggle and they would be by no means certain of success***. That is so despite the assurance given by Mr Young in this Court that the defendants would advance all the submissions that they could in order to assist the plaintiffs. I hope he will forgive me for saying that I unreservedly accept the good intentions of himself, but some of the correspondence does not lead me to trust absolutely that the defendants would necessarily assist the plaintiffs as far as they could.

34. On that basis, the Court of Appeal in *Baghlaf (No 2)* reversed its earlier decision, holding that the possibility that the foreign court ***might*** apply the limitation, to the detriment of the shipper and notwithstanding the carrier's undertaking to waive the point, was sufficient to deny enforcement of the foreign jurisdiction clause.[47]

35. This was consistent with *The Hollandia*, where Lord Diplock observed that if a matter was referred to arbitration notwithstanding art III(8), and in the course of that arbitration the arbitrator applied a choice of law that made the arbitration clause void, the arbitrator would be required to treat the clause as void.[48] That unattractive prospect (of an

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43 *Baghlaf Al Zafer Factory Co v Pakistan National Shipping Co* [1998] 2 Lloyd LR 229 at 237.
44 [1983] AC 565. The present issue did not squarely arise in *The Hollandia* as it was common ground that the foreign court *would* apply a lower limitation for the carrier.
45 *Baghlaf Al Zafer Factory Co v Pakistan National Shipping Co (No 2)* [2000] 1 Lloyd LR 1 at 4.
46 *Baghlaf Al Zafer Factory Co v Pakistan National Shipping Co (No 2)* [2000] 1 Lloyd LR 1 at 5.
47 *Baghlaf Al Zafer Factory Co v Pakistan National Shipping Co (No 2)* [2000] 1 Lloyd LR 1 at 2, 5, 6.
48 *The Hollandia* [1983] AC 565 at 576.

arbitration clause being valid one moment, and invalid the next) shows why the law should require the party contending for a stay to demonstrate, once and for all, that the possibility of invalidity has been excluded, and that the arbitration can thus proceed.

36. ***Belgium***. Belgian authority strongly supports CRN's case. First, in *SS Puerto Somoza*,[49] faced with an exclusive jurisdiction clause in favour of the country where the carrier has its principal place of business, the Court of Appeal held:

> Whereas the imperative nature of Article 91[50] means that the "Jurisdiction clause" in general, and the one stipulated in particular, ***can only have legal effect if the Belgian judiciary is reasonably certain*** that the national law of the foreign court to which jurisdiction has been conferred by agreement, not only authorises it not to apply its national law but also ***imposes on it the duty*** to respect the will formally expressed by the parties and to judge in accordance with Article 91 of the Belgian Maritime Law respecting ***the interpretation that Belgian case law gives*** to the public policy provisions of that Article…

37. As "there is no such reasonable certainty in this case", the clause was struck down.

38. Secondly, in *SS Germania*,[51] faced with a Greek exclusive jurisdiction clause, the Court of Appeal noted that there was uncertainty as to how the Greek courts would approach the issue as to whether the limitation period applies, and that "the [carriers] ***may*** benefit from a limitation period of less than one year in Greece, which would constitute a wider exemption than is provided for in art 91". The Court held that the carriers were "***required to prove***" that the Greek court would not approach the limitation period that way. As there was no "***reasonable certainty***" ("*certitude raisonnable*") that the Greek court would adopt the pro-shipper interpretation, that clause, too, was struck down.

39. Lastly, in *Afromar*,[52] Belgium's highest court, the Court of Cassation, dismissed an appeal from a decision of the Court of Appeal striking down a Spanish exclusive jurisdiction clause on the basis that, while the Spanish court was required to apply the Hague Rules, these "can be understood as referring to the manner in which said rules are applied in Spain". Because the bill of lading did not expressly refer to article 91 of the Belgian Maritime Law "their application (ie. the application of the provision of article 91) is therefore not ***guaranteed***". Consistently, then, Belgian courts have held that unless there is "reasonable certainty" or a "guarantee" that the foreign forum will apply the pro-shipper Belgian interpretation of the Rules, which the carrier is "required to prove", a foreign jurisdiction clause will be invalid under art III(8).

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49 Cour d'Appel de Bruxelles [Court of Appeal of Brussels], 19 May 1961, JPA 1961, 313 at 315.
50 Which contains the Belgian instantiation of art III(8), at section 19, § III, 8°.
51 Cour d'Appel de Bruxelles [Court of Appeal of Brussels], 5 October 1963, JPA 1963, 129 at 140.
52 Cour de Cassation [Court of Cassation], 11 January 1985, Arr Cass 1984–5, Nr 283, 632 at 634–5.

40. ***Hong Kong***. In *The Andhika Samyra*,[53] the defendant carriers sought to stay proceedings brought by shippers in Hong Kong in favour of proceedings in Indonesia, relying on an Indonesian choice of law clause. The risk this created for the shippers was the Indonesian court might calculate the tonnage limitation on the basis that 1 rupiah represented 1 guilder, which would result in a lower limit of liability for the carrier. The Court adopted as correct findings made in an earlier Court of Appeal case, as follows:[54]

> The Court had before it, like myself, various affidavits of law sworn by experts in Indonesian law. Hunter JA who delivered the decision of the Court referred to the following findings at page 916:
>
> "(1) That ***Indonesian law is so uncertain that no finding can be made***.
>
> (2) The ***possibility of the court*** basing its calculation upon 1 Rupiah to 1 Guilder ***cannot be excluded***.
>
> (3) It is ***perhaps more likely*** that the court would make some adjustment in some way to reflect current values ***but the probabilities are*** that any such adjustment would produce a figure very much less than the limitation figures for Hong Kong and Taiwan appropriate to this casualty which are respectively $1,276, 103 and $607, 135.
>
> In summary, therefore, if a stay is granted, the plaintiff would ***lose the certainty*** of the Hong Kong limit of $1.27m and ***face the uncertainty*** of an unknown limit which could be as low as $2,541 but is more likely to be adjusted upwards from that figure to some unascertainable amount."
>
> The plaintiffs issued a notice pursuant to Order 38, rule 7 in accordance with s 59 of the Evidence Ordinance (Cap. 8) to the effect that the Court of Appeal had found that Article 474 aforesaid was "***at best uncertain and at worst derisory***". … I am satisfied that I am bound by the notice. … [In any event,] I would have come to a similar conclusion to that of the Court of Appeal.

41. The Court then recorded the defendants' argument which placed "considerable reliance" on the choice of law clause selecting Indonesian law ("condition 19"), to which the parties "had of their own volition agreed" (at 202). The Court held that while "on the face of it [this] is an attractive argument" (at 203), the position was affected by art III(8). After quoting from *Hollandia*, the Court concluded as follows (at 204):

> [The Defendants] sought to overcome this difficulty by suggesting that as no one as yet had attempted to invoke any limitation provisions ***it was premature to argue that condition 19 was null and void. I disagree. It is evident from the tenor of Lord Diplock's speech that he had in mind a situation where such a departure was only anticipated.*** … I am satisfied that ***even at this early stage in the litigation*** that condition 19 is ***void*** and that the defendants can place no reliance upon it.

42. Thus, it is no answer in Hong Kong for the carrier to say that a lessening of liability that

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53 *The Owners of Cargo Lately Laden on Board the ship or vessel "Andhika Samyra" (Indonesian Flag) v The Owners and/or Demise Charterers of the Ships or Vessels "Andhika Samyra"* [1998] HKCFI 463.

54 *The Andhika Samyra*, at 201–2.

the shipper fears will occur is "uncertain" or "premature" to consider. Unless it is shown that that lessening will ***not*** occur, the foreign choice of law clause is void.

43. This remains the law in Hong Kong today, *The Andhika Samyra* having been cited with approval by the Hong Kong Court of Appeal in 2022 in *The Milano Bridge*.[55]

44. ***Singapore***. In *The Epar*,[56] the defendant carrier sought a stay of proceedings brought by a shipper in Singapore, relying on an exclusive jurisdiction clause in favour of Indonesia. The holding of the High Court of Singapore is accurately summarised in the headnote: "As the defendant failed to satisfy the court that a stay would not deprive the plaintiff of a personal or judicial advantage which would be available to it in the Singapore courts, the stay of proceedings was refused". The difference between Singaporean law and Indonesian law, as in *The Andhika Samyra*, was whether Indonesian law would apply a lower package limitation.

45. It was "not seriously in dispute that if effect were given to the exclusive choice of jurisdiction clause and the claim was disputed in the court of Djakarta the maximum liability of the carriers to the shippers would be limited to a much smaller sum than what they would be liable to in Singapore under the Hague-Visby Rules."[57] This was fatal to the defendants' attempt to enforce the choice of jurisdiction clause. As the Court held, again after quoting from *The Hollandia*:[58]

> I therefore rule that the choice of exclusive jurisdiction clause giving the court in Djakarta exclusive jurisdiction is rendered null and void and of no effect.

46. The defendants having failed to put it "seriously in dispute" that a lower limitation would be applied in Indonesia, the clause was void. The defendants nonetheless sought a stay on discretionary grounds, but there the Court held:[59]

> In these circumstances the defendants, to succeed in their motion for a stay of proceedings here, must satisfy two conditions[.] [A]s I have stated earlier they clearly do not satisfy the condition that a stay would not deprive the plaintiffs of a legitimate personal or judicial advantage which would be available to them in this court.

47. This shows how the general discretionary considerations that apply to the granting of a stay can raise similar questions to those that govern invalidity under art III(8). In both cases, the court asks whether sending the parties to the foreign forum has the potential to deprive the plaintiff of a legitimate juridical advantage (relevantly, in the art III(8) context, by lessening the carrier's liability). If so, it is then for the defendant to satisfy

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55 [2022] HKCA 157 at [34(5)], fn 5, and [36] (Hong Kong Court of Appeal).
56 [1984] SGHC 16; [1983–1984] SLR(R) 545.
57 [1984] SGHC 16; [1983–1984] SLR(R) 545 at 551 [21].
58 [1984] SGHC 16; [1983–1984] SLR(R) 545 at 552 [28].
59 [1984] SGHC 16; [1983–1984] SLR(R) 545 at 552 [28] (emphasis added).

the court that that will ***not*** occur, or else to abide by the plaintiff's litigation.

48. ***Canada***. In *The Regal Scout*,[60] which was discussed with approval in *Akai*, the defendant carrier sought a stay of proceedings brought against it by the shipper in Canada, relying on an exclusive jurisdiction clause in favour of the Tokyo District Court. Both parties led expert evidence as to the content of Japanese law. The plaintiff's expert opined that Japanese precedent made it impossible for the shippers to effect any recovery whatsoever in Japan. The defendant's expert expressed the view that there was a good chance that the shipper would recover from the shipowner on the basis of a possible change in the precedents. Rather than treating the question as "speculative" and sending the parties on their way to take their chances, the Court grappled with the evidence and reached a view as to what was likely to happen in Japanese proceedings. Preferring the plaintiff's evidence, the Court found (at [31]):

> Thus, the difference in Canadian law and Japanese law is that under Canadian law a Canadian court would construe the shipowner as being a party to the contract whereas a Japanese court, on the authorities to date, would not construe the shipowner to be a party to the contract of carriage.

49. The Court accordingly held: "Under Japanese law the shipowner would not be a party to the contract of carriage and this would not only have the effect of lessening the liability but of totally obliterating it" (at [34]). The Court thus treated the choice of forum clause as "of no effect" (at [40]).

50. ***United States***. In the United States, the position was for decades governed by the leading case of *Indussa*, decided by a nine-judge bench of the United States Court of Appeal. The defendant carriers sought a stay of proceedings brought against them by shippers, relying on an exclusive jurisdiction clause in favour of the courts of Norway.

51. On the issue of what law would be applied, the defendants contended that "Norway had ratified the Brussels Convention and that the provisions of Norwegian law governing Indussa's claims were in all substantial respects identical with the *Carriage of Goods by Sea Act*, 46 USC § 1300".[61] Citing numerous admiralty texts and commentaries,[62] Judge Friendly (writing for the Court) held:

> Even when the foreign court would apply one or the other of these regimes [the Carriage of Goods by Sea Act or the Hague Rules], requiring trial abroad ***might*** lessen the carrier's liability since ***there could be no assurance that it would apply them in the same way*** as would an American tribunal subject to the uniform control

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60 *Agro Co of Canada Ltd v The "Regal Scout"* (1983) 48 DLR (3d) 412 at [26]–[34].

61 *Indussa Corp v S S Ranborg*, 377 F 2d 200, 201 (2nd Cir, 1967).

62 Gilmore and Black, *Law of Admiralty* (1957) 125, n 23; 'Ocean Bills of Lading and Some Problems of Conflict of Laws' (1958) 58 *Columbia Law Review* 212 at 22; 'Effect of the Jurisdiction Clause in Admiralty (1959) 34 *St Johns Law Review* 72 at 78.

of the Supreme Court, and ***§ 3(8) can well be read as covering a potential and not simply a demonstrable lessening of liability***.

52. Relevantly to this case, Judge Friendly recognised the lack of real control that it could exert over the litigation once it moved to the foreign forum. It noted that "despite hortatory efforts", there was no way for a forum court to prevent a foreign court or tribunal from applying a body of law disadvantageous to the shipper, and thus for the foreign jurisdiction clause to result in a lessening of liability for the carrier.[63] This is in sharp contrast to the approach taken by the Full Court in this case, which assumed a power to dictate to the English tribunal what law should apply in the arbitration. Australian courts who imagine they have such far-reaching power should heed the lesson of *Akai (No 2)*,[64] the English sequel to this Court's decision in *Akai*. There, Justice Thomas sitting in the Queen's Bench held that "the judgment of the High Court of Australia is not one that is recognized as giving rise to a decision binding on PIC that the proper law and the jurisdiction clause in the policy is void and unenforceable",[65] and moreover, that the Court "should not, as a matter of comity, give effect to the decision of the High Court".[66] Experience thus teaches the need for caution before presuming to dictate to foreign courts and tribunals, or assuming parties will not alter their approach.

53. The other basis for striking down the foreign jurisdiction clause in *Indussa* was the transaction costs involved in litigating abroad. On this issue, Judge Friendly held:

> From a practical standpoint, to require an American plaintiff to assert his claim only in a distant court lessens the liability of the carrier quite substantially, particularly when the claim is small. Such a clause puts "a high hurdle" in the way of enforcing liability, Gilmore & Black, supra, 125 n. 23, and thus is an effective means for carriers to secure settlements lower than if cargo could sue in a convenient forum.

54. This has been substantiated by an empirical study conducted by Professor Martin Davies and Robert Force. Surveying plaintiffs and defendants after *Indussa* was overruled by *Sky Reefer*, they showed that in 81.8% of cases where local proceedings had been dismissed or stayed on *Sky Reefer* grounds, the case then settled for less or much less than it would otherwise have done, concluding: "Judge Friendly was right. Forum selection clauses lessen the carrier's liability".[67]

55. We come then to *Sky Reefer*, in which a carrier sought a stay of proceedings in favour of a foreign arbitration. The shipper argued that the arbitration clause was invalid under

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63 *Indussa Corp v S S Ranborg*, 377 F 2d 200, 203 (2nd Cir, 1967).
64 *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Law Reports 90 (***Akai (No 2)***) (Thomas J).
65 *Akai (No 2)* at 98 (Thomas J).
66 *Akai (No 2)* at 98, 100. See similarly ***The Amazonia*** [1990] 1 Lloyd's LR 236 at 249.
67 Martin Davies, 'Forum Selection, Choice of Law and Mandatory Rules' (2011) LMCLQ 237 at 247.

art III(8) on bases similar to those identified at [9]–[12] above.[68] The first argument was that "a foreign arbitration clause lessens COGSA liability by increasing the transaction costs of obtaining relief". Overruling *Indussa*, the majority differentiated "between explicit statutory guarantees and the procedure for enforcing them", holding that the latter could not engage art III(8), and that it would in any event be "unwieldy" 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" (at 533–7). It may immediately be noticed that this was to embrace the same substance/procedure distinction that was rejected by the House of Lords in *The Hollandia*, as discussed at [20] above.

56. The second argument considered was that "there is a risk foreign arbitrators will not apply COGSA". Recognising that this argument has "substance", the Supreme Court nonetheless rejected it, on the basis "the arbitrators ***may*** conclude that COGSA applies of its own force or that Japanese law does not apply" (at 539–40). Like the Full Court in this case, the Supreme Court thus recognised the ***risk*** of an adverse interpretation of the law as a real one, and yet required the shipper to wear that risk. This conclusion appeared to rest upon the Court's assumption that the District Court would have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the laws has been addressed (at 540). On that basis, ruled the shipper's argument "premature". Were it not for that opportunity for later review, the Court added, it would have reached the opposite conclusion (at 540). Whatever merit the *Sky Reefer* approach might be thought to have, it cannot apply in a case like the present where there is *no* opportunity for the Federal Court to review the award to ensure that the reference to arbitration has not resulted in the carrier's liability being lessened.

57. Justice Stevens dissented, describing the majority's approach as "overzealous formalism" (at 556). As to the first argument, his Honour held that the arbitration clause "imposes potentially prohibitive costs on the shipper, who must travel – and bring his lawyers, witnesses, and exhibits – to a distant country in order to seek redress. The shipper will therefore be inclined either to settle the claim at a discount or to forgo bringing the claim at all" (at 548). His Honour observed that courts have always held that such clauses "lessen" or "relieve" the carrier's liability (at 549). The majority's construction of art III(8) was too narrow, for it meant that "contractual provisions that lessen the amount of the consignee's net recovery, or that lessen the likelihood that it will make any recovery at all, are beyond the scope of the statute" (at 549–50). It was explained that the narrow construction was "flatly inconsistent with the purpose of

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68 *Vimar Seguros y Reaseguros, SA v M/V Sky Reefer*, 515 US 528 (1995) (***Sky Reefer***).

[art III(8)]", which "responds to the inequality of bargaining power inherent in bills of lading and to carriers' historic tendency to exploit that inequality whenever possible to immunize themselves from liability for their own fault" (at 550). His Honour pointed out that if the majority's construction were correct, and the practical expense of arbitration were irrelevant to the carrier's liability within the meaning of art III(8), it would be possible for carriers to include a clause in their bills of lading requiring consignees to pay all of their costs (at 551). That must surely be right.

58. As to the second argument, his Honour endorsed a statement in Gilmore and Black, explaining that a "stipulation for suit abroad seems also to offend Cogsa, most obviously because it destroys the shipper's certainty that Cogsa will be applied".[69] After approving *Indussa*'s holding that "requiring trial abroad "***might*** lessen the carrier's liability", and that this sufficed, Justice Stevens again quoted from Gilmore and Black, as follows:

> Cogsa allows a freedom of contracting out of its terms, but only in the direction of increasing the shipowner's liabilities, and never in the direction of diminishing them. This apparent onesidedness is a commonsense recognition of the inequality in bargaining power which both Harter and Cogsa were designed to redress, and of the fact that one of the great objectives of both Acts is to prevent the impairment of the value and negotiability of the ocean bill of lading (at 547).

59. As noted at [27] above, *Sky Reefer* has been the subject of a large body of sustained criticism by maritime academics. It has been said it "flies in the face of precedent"[70] and "violates the purposes of both COGSA and the [Federal Arbitration Act]".[71] Commentators have noted the obvious commercial reality that "[t]he whole value to the carrier of foreign arbitration clauses, as with choice-of-forum clauses, is to limit their liability", because they make it more likely that "the costs of using a [foreign] forum to arbitrate a claim would greatly overshadow the amount that would be recovered", such that "many shippers would choose not to file a claim".[72] The whole tenor of the majority's reasoning runs contrary to the purpose of art III(8) identified above, and to the interpretation thereof adopted in other maritime jurisdictions.

60. ***The undertaking and declaration***. The Full Court placed reliance on an undertaking to be proffered by BBC that the Australian Hague Rules "as applied under Australian law" will apply to the bill of lading and the plaintiff's claims thereunder in the arbitration. It

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69 *Sky Reefer* at 546, citing Gilmore and Black, *Law of Admiralty* (1957) 125, n 23.

70 LaCour at 141, citing *Knott v Botany Mills* 179 US 69 (1900); *Indussa Corp v S S Ranborg*, 377 F 2d 200 (2nd Cir, 1967); *Union Insurance Society of Canton Ltd v S S Elikon*, 642 F 2d 721 (4th Cir, 1981); *Conklin & Garrett Ltd v M/V Finnrose*, 826 F 2d 1441 (5th Cir, 1987); *State Establishment for Agricultural Product Trading v M/V Wesermunde*, 838 F 2d 1576 (11th Cir, 1988). See also Tetley at 1442, 2105.

71 LaCour at 141.

72 LaCour at 137–8; and see Schnarr at 877, 879; Tetley at 2008.

also made a declaration to that effect. Neither measure solves the problem, however.

61. An initial problem with the undertaking is that BBC adduced no evidence that it has any assets within the jurisdiction, and so the undertaking may be assumed to be worthless. If BBC were to seek to resile from its undertaking in the arbitration, CRN would have no effective recourse against it in Australia, especially as its claim is for $7,959,320.[73]

62. A further problem with the undertaking and declaration is that question is not only whether the Australian Hague Rules as ***applied*** under Australian law will apply in the arbitration, but whether the Australian Hague Rules as ***interpreted*** under Australian law will so apply. BBC conspicuously offered no undertaking as to interpretation. Its approach preserves its ability to argue that the English law interpretation of art III(2) binds the Tribunal. This cannot have been an accident. At the hearing, CRN made this submission about the undertaking that had been foreshadowed by BBC:

> MR COX: The first point to note is that the only undertaking currently offered is as to the ***applicability*** of the Australian rules, which, as Justice Derrington has already observed,[74] may not be much of an offer. … Now, in terms of what is not offered in the undertaking, and, in our submission, the critical matter is to waive reliance on English law and accept that the arbitration would be governed by Australian law in ***interpreting*** the Australian rules. And - - -
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> STEWART J: I thought that Mr Nell accepted that. ***He said the Australian*** - - -
>
> MR COX: ***No***. I - - -
>
> STEWART J: - - - ***rules as interpreted by Australian law***.
>
> MR COX: ***That's not the undertaking that is currently being proffered*** as foreshadowed in the submissions. And, in my submission - - -
>
> STEWART J: But he amended the submission orally.
>
> MR COX: Well, that undertaking has not been given by his client.
>
> DERRINGTON J: No. But that's the purpose of the conditions.
>
> MR COX: I suppose there is a - - -
>
> RARES J: That's why we're waiting to see … exactly what he's going to commit to when he gets some instructions, and his client says, "What on earth did you try and say we're going to do."[75]

63. Seven days after the hearing, after a full opportunity to seek instructions, BBC filed its proposed undertaking.[76] Despite the exchange above, the proposed undertaking had not changed from "applied" to "interpreted": the proposal was that the proceeding be stayed

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73 ABFM, page 19 (Exhibit FH14) at [11].

74 Her Honour had earlier said at T66.19–24: "What is relevant is the interpretation of the rules", with Stewart J then remarking that "the undertaking as proffered doesn't meet that need, doesn't meet that concern" (ABFM, p 21).

75 ABFM, p 23 (emphasis added).

76 ABFM, p 28-30.

"on condition that … the First Defendant admits that the Australian Amended Rules as ***applied*** under Australian law apply to the Bill of Lading and the Plaintiff's claims against the First Defendant thereunder and undertakes that it will maintain that admission and position in the London arbitration". This was plainly a deliberate choice, and BBC has acted to preserve its ability to argue before the tribunal that the ***text*** of art III(8) as contained in the AHVR (which are relevantly identical to its English counterpart) applies, but the Australian law interpretation of that article does not apply. That BBC has selected as its chosen arbitrator Sir Nigel Teare, the very same judge that decided *Jindal Iron & Steel* at first instance, further confirms BBC's intent.

64. This problem is not fixed by the Full Court's reasoning on the meaning of "applies" (CAB 36 [30]), nor its declaration. Neither that reasoning nor that declaration will bind the tribunal. The first prerequisite of the tribunal's recognition of the court's declaratory judgment is that the court was exercising a jurisdiction that the tribunal will recognise.[77] Relevantly, that could only be so if BBC made a voluntary submission to this forum. But s 33(1) of the *Civil Jurisdiction and Judgments Act 1982* (UK) provides that it has not done so, for BBC appeared only to contest jurisdiction (sub-s (1)) and to ask the court to stay the proceedings so that the dispute in question could proceed to arbitration (sub-s (2)). The mere fact that, in doing so, it consented to a declaration, does not alter the conditional nature of its appearance here, because (contrary to CAB 35 [27])), it will have submitted to the jurisdiction only if it has taken some step which is necessary or useful ***only*** if the objection to the jurisdiction had been waived.[78] Far from being in that territory, the step of consenting to a declaration was an integral part of BBC's strategy to avoid Australian jurisdiction. The declaration and undertaking provide not even illusory comfort, and the risk originally identified still exists: that is, the risk that the tribunal will consider itself bound by the English law interpretation of the Rules.

65. The court "cannot effectively dictate to foreign courts or arbitrators what law should be applied to contracts, nor whether forum selection clauses should be regarded as valid or void",[79] and it is vain to try. Even if the undertaking and declaration did extend to interpretation (which they do not), it cannot be assumed that the tribunal, deciding for itself what the contract means, will abide by them. The risks identified remain real.

66. ***Timing***. If the Full Court's approach to art III(8) is right, then any uncertainty about whether a lessening will or will not occur necessarily enures to the benefit of the carrier.

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77 Davies, Bell, Brereton and Douglas, *Nygh's Conflict of Laws in Australia* (10th ed, LexisNexis) [40.4].

78 Dicey, Morris and Collins, *The Conflict of Laws* (15th ed, Sweet & Maxwell) Vol I, [14-073]; *AES Ust-Kamenogorsk Hydropower Plant LLP v AES Ust-Kamenogorsk Hydropower Plant JSC* [2010] EWHC 772 (Comm), [2010] 2 Lloyd's Rep 493 at [42]–[52].

79 Davies 2011 at 241.

The logical result of this is that a clause may in fact end up ***succeeding*** in lessening the carrier's liability, yet it will not have been struck down before that happens, only because the shipper had been unable to prove that the lessening would occur before it in fact did occur. This places a premium on conditionality and introduces commercial uncertainty. It encourages carriers to insert clauses in their bills of lading that are apt to lessen their liability conditionally upon certain future events occurring, with that conditionality operating to shield the clause from the prospect of effective invalidation. Lord Denning MR explained in *The Hollandia* the policy to the contrary.[80]

67. This also raises a question as to the time at which the validity of an arbitration clause under art III(8) falls to be considered. The foregoing argument has been premised upon that question falling for determination as at the date of the hearing of the stay or anti-suit application. However, an alternative approach, and one suggested by Lord Diplock in *The Hollandia* at 575, is that validity falls to be determined "when the condition subsequent is fulfilled and the carrier seeks to bring the clause into operation and rely upon it". That approach has the advantage of enabling the validity of the clause to be determined once and for all, avoiding the unattractive possibility discussed above at [35] of an arbitration clause being valid one moment, and invalid the next. If Lord Diplock's alternative approach is right, then BBC's undertaking was irrelevant,[81] as it was proffered months after the arbitration clause had been invoked by BBC.

Part VII: Orders

68. The Appellant seeks the orders contained in its Notice of Appeal.

Part VIII: Estimate

69. The Appellant estimates that it will need half a day to present its argument.

Part IX: Relevant statutory provisions

70. See Annexure.

Dated 28 July 2023

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80 *The Hollandia* [1982] QB 872 at 884.

81 Contrast the position of exclusive jurisdiction clauses, where later-offered undertakings *can* have relevance, as they were held to do in *Baghlaf (No 1)*, as the local court can assume jurisdiction even if the exclusive jurisdiction clause is not found to be invalid, contrary to the position with arbitration clauses.

ANNEXURE TO THE APPELLANT'S SUBMISSIONS

Pursuant to paragraph 3 of the Practice Direction No 1 of 2019, the Appellant sets out below a list of the particular constitutional provisions and statutes referred to in its submissions.

Limitation Act 1908 (Pk), s 14 (Act No. IX of 1908).

Hague Rules (Brussels August 25th, 1924)

The Hague-Visby Rules (23rd February 1968)

Civil Jurisdiction and Judgments Act 1982 (UK), s 33(1) (1 September 1982)

Insurance Contracts Act 1984 (NSW), s 52, 54 (6 January 2022).

Carriage of Goods by Sea Act 1991 (Cth), s 8 (6 September 2017).

Carriage of Goods by Sea Act, 46 USC § 1300 (16 April 1936).