HIGH COURT OF AUSTRALIA

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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 REPLY SUBMISSIONS

1. ***Part I:*** This reply is in a form suitable for publication on the internet.

Part II: Construction of Article III(8)

2. ***Text***. Contrary to RS[41], the words "relieving" and "lessening" are neutral on the present question. BBC asserts, with no explanation, that art III(8) is probabilistic (RS[41]). That is wrong. No modal auxiliary – such as "might" or "will" – is used. Rather, the rule uses the present participle (ie the "-ing participle"), which does not convey any particular probability.

3. Nor is it correct to equate "liability" with legal liability as recognised under our legal system, eg. negligence (cf RS[42]). In the first place, such a submission courts the error of using domestic legal concepts to interpret an international convention.[1] But more to the point, it overlooks that the authoritative language of the Hague Rules (1924), in which art III(8) first appeared, is French, not English.[2] The French term used is "*responsabilité*", which encompasses broader notions of "responsibility", "answerability" and "accountability" in addition to mere liability, according to French-English dictionaries in print in 1924.[3]

4. ***Context***. As to the "benefit of insurance" rider to art III(8), voiding clauses which of their very nature, *might* (not will) lessen liability – because that is conditional upon whether the carrier would succeed in its attempt to seek indemnity from the cargo owner's insurer – BBC seeks to sidestep this by introducing a test of "purpose": RS[51]. It claims that such a clause would fall foul of art III(8) because its "***purpose*** and effect is to lessen the carrier's liability" (RS[51]). Such a construction has no foothold in the text of art III(8) or in any authority ever to have construed the rule. BBC's construction is thus internally inconsistent: in some instances its favoured test is whether a clause "*would* relieve or lessen" liability (RS[26]), whereas in others its favoured test is whether a clause has that "*purpose*". It cannot be both.

5. ***Purpose***. BBC's submissions make no reference to the historical materials collected at AS[16]–[24], which explain that the purpose of art III(8) was to prevent carriers from using "colourable devices" and processes "direct or indirect" (RS[19]) to escape their obligations to compensate owners whose cargo they had damaged. BBC's assertion that art III(8)'s purpose was to protect "part of the compromise" between carriers and shippers (RS[52]) is made without reference to any historical materials. The one authority cited in relation to this proposition is a Canadian case, which, far from supporting it, states that "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***

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1 *Stag Line Ltd v Foscolo, Mango and Co Ltd* [1932] AC 328 at 350 (Lord Macmillan).
2 *Jindal Iron and Steel Ltd v Islamic Solidarity Shipping Inc* [2005] 1 WLR 1363 at 1371 (Lord Steyn).
3 Baker, *Cassell's French-English English-French Dictionary* (Cassell and Co, 4th ed, 1923) 490; Boïelle, *French and English Dictionary* (Cassell and Co, 1913) 486. For the French text of art III(8), see Comité Maritime International, *The Travaux Préparatoires of the Hague Rules and of the Hague-Visby Rules* (1997) at 834.

which is normally drafted by the carrier."[4] This is entirely consistent with the broad and beneficial protective purpose of art III(8), explained in detail at AS[16]–[24].

6. Nor does it matter that the drafters were aware of the existence of exclusive jurisdiction clauses and domestic statutes regulating them (RS[54]–[57]). That that subject matter was not specifically mentioned in the rules does not mean that it is somehow immunised from art III(8). If it were, then *The Hollandia* (among other cases) must have been wrongly decided.

7. ***Authorities***. One error is made repeatedly in BBC's analysis of the authorities. In certain cases, courts have been faced with either evidence or an admission that the foreign litigation *will* in fact lessen the carrier's liability. In such cases, it is unnecessary for the court to decide whether it would have been sufficient for the carrier to show that such a lessening *might* occur. It has been enough in each such case for the court to note that the higher threshold is proved. BBC seeks to read such cases as *holding* that the carrier *must* prove that a lessening *will* occur (see, eg, RS[49]). But not one of the cases holds that, and it does not logically follow: to note that satisfaction of a "will" test is *sufficient* is not to hold that it is *necessary*.

8. As to *Akai*, BBC makes the sufficient/necessary error in the second sentence of RS[59] and again in the third, fourth and fifth sentences of RS[60]. Moreover, to the extent that BBC seeks to recast page 445 of *Akai* as dealing with the presumption that foreign law is the same as the law of the forum, which is debatable, that assists CRN, not BBC. If that is the right analysis of the first full paragraph of 445, then the second paragraph would need to be read accordingly, as holding that an English forum "would apply as the lex causae the proper law, namely that of England … and that this would ***not*** include as a component any relevant provisions of the Act". That is precisely CRN's complaint in this case and that is what this Court held, on either party's reading of *Akai*, that it was for the stay applicant to ***disprove***.

9. *William Holyman* is not on point. The primary judge held the impugned clause invalid under ***art IV(5)***. The Court unanimously dismissed an appeal from that decision. While art III(8) was invoked as an alternative basis for invalidity, the issue was unnecessary to decide, as the Court unanimously upheld the conclusion of art IV(5) invalidity. The statements by three judges (Starke, Dixon and Williams JJ) suggesting art III(8) would not be engaged were thus obiter. They could not be binding in any event, as three out of six judges is not "a majority" (cf RS[42]). In any event, the proposition that art III(8) only voids a clause "itself directed to the liability of the carrier" is contrary to *The Hollandia*, and the cases at AS[24] (holding, eg, that art III(8) invalidates clauses shortening limitation periods for claims). Art III(8) is directed to the substantive effect of the impugned clause, not only its form (AS[19]).

[4] *Ontario Bus Industries v The Federal Calumet* [1991] FC 245 at 258 (Strayer J).

10. As to *The Hollandia*, BBC makes the sufficient/necessary error at RS[49] and [61]. Further, Lord Diplock expressly *left open* (rather than denied) the voidability of arbitration clauses, noting that "your Lordships are not concerned with a foreign arbitration clause" (at 576).

11. As to *Baghlaf (No 2)*, the submission at RS[61] that "[t]he case did not concern any application of art III(8)" can only be sustained if one ignores the context of *Baghlaf (No 1)*. In *Baghlaf (No 1)*, the Court reviewed art III(8) at length,[5] concluding that it would have considered the foreign jurisdiction clause "as of no effect" had it not been for the defendants "adopt[ing] the stratagem of undertaking not to rely upon a package limitation under the law of the contractual forum" (at 238). It was the unenforceability of *that very same undertaking* that led the Court to reconsider and reverse that decision in *Baghlaf (No 2)*.

12. As to the Belgian cases, the recognition that cargo disputes in that country are "imperatively governed by Article 91 of the maritime law"[6] (which contains art III(8)), far from being some Belgian idiosyncrasy (cf RS[62]), is exactly the same as the position in Australia, where such disputes are also mandatorily governed by the Rules, by virtue of s 8 of the Act. Nor is this jurisprudence called into question by the other matters raised at RS[62]. The legislative interventions discussed in Brekoulakis (RS fn 56) are irrelevant as they related only to insurance contracts and distributorship agreements. The ECJ case of *Tilly Russ* (RS fn 57) had nothing to do with (and does not mention) art III(8), but instead considered whether a jurisdiction clause must be expressly accepted by a shipper, and whether it binds third parties. The case of *Thibelo BV* (RS fn 58) examined whether a Belgian law on distribution agreements was invalid under the Rome I Regulation, which has no application here.

13. As to the Hong Kong cases, the first sentence of RS[63] is wrong. In *The Andhika Samyra*, the exclusive jurisdiction clause was struck down on the basis that it *might* lead to a lessening of liability, not that it *would* (AS[40]–[41]). Even if that were not so, and the Court *had* found as a fact that it *would* do so, to treat that as laying down a standard to be met in all cases is yet again to commit the sufficient/necessary error. The decision in *William Co* (RS[63]) (a case marshalled by BBC) is plainly wrong: it misinterprets *The Hollandia* as having held that arbitration clauses can never be struck down under art III(8), and it holds that even if the Chinese arbitrators "would not give effect to the Hague-Visby Rules but would, instead, give effect to the terms of Bill of Lading" (which contained a financial limitation clause, a clause excluding the carrier's liability for fire damages, and a clause to the effect that the cargo owner shall be responsible for damage incurred in the course of transportation), this is "the natural consequence of the agreement of the parties" (at 150).

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5 *Baghlaf Al Zafer Factory Co v Pakistan National Shipping Co* [1998] 2 Lloyd's LR 229 at 237–238.

6 *S S Puerto Somoza* at 314.

That fails to recognise that the very subject matter of art III(8) is, in terms, an "agreement" between the parties, which the rule nonetheless renders "null and void and of no effect".

14. As to the Singaporean case of *The Epar*, BBC again makes the sufficient/necessary error at RS[63]. Likewise, as to the Canadian case of *The Regal Scout*, BBC makes that same error in the second sentence of RS[64]. The analysis in those cases continues to support CRN.

15. As to *Sky Reefer*, it now seems to be common ground – for it is not contradicted in BBC's submission – that the consensus view of the maritime law community is one that is critical of this decision and supportive of Justice Stevens' powerful dissent (AS[27]). As noted at AS[56], the majority judgment in that case was expressly predicated on an opportunity for later review. But contrary to RS[50], at least in Australia, no opportunity will exist for curial review at the post-award stage of whether the arbitration clause did succeed in lessening the carrier's liability, as the "public policy" exception to enforcement is highly restrictive.[7]

Collateral issues

16. BBC contends that there is "no risk" that the English tribunal will apply an English law interpretation to AHVR (RS[9]–[15]), on the basis of the undertaking and the condition on the stay, which, BBC now says, despite using the words "as *applied* under Australian law", means "as *interpreted* in Australia" (RS[10]). There are four problems with this. ***First***, BBC does not dispute CRN's point that neither the undertaking, nor the Full Court's orders and reasoning, will be binding on BBC or the tribunal (AS[64]–[65]). Indeed, at the special leave hearing, BBC accepted that "that may well be right".[8] ***Secondly***, a law's application and its interpretation are entirely different concepts.[9] ***Thirdly***, if they meant the same thing, then why did BBC decline to amend its undertaking to include interpretation when specifically invited by the Court to consider doing so? (AS[62]–[63]). ***Fourthly***, the contention that Australian law will govern is a reversal of BBC's position below, where it maintained that the lex causae was English law alone.[10] It submitted "the Australian Amended Rules will apply to the Bill of Lading (including thereby the Plaintiff's claim thereunder) *under English law*" (at [33]). BBC can hardly pretend there is no risk of it resiling from its position before the tribunal when it has done just that before this Court (cf. RS[8]). In any event, since the undertaking does not refer to interpretation, BBC would not even need to "resile" from it to make the opposite argument; it could simply say, rightly, that it never gave an undertaking as to interpretation, and then argue that *Jindal Iron & Steel* is binding on the tribunal.

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7 Holmes and Brown, *The International Arbitration Act 1974: A Commentary* (3rd ed, 2018) 102.

8 *Carmichael Rail Network Pty Ltd as Trustee for the Carmichael Rail Network Trust v BBC Chartering Carriers GmbH & Co. KG & Anor* [2023] HCATrans 79, T13.464–467.

9 Leeming, *Common Law, Equity and Statute: A Complex Entangled System* (Federation Press, 2023) 70–74.

10 First Defendant's Outline of Submissions at 8 September 2022 at [32]–[37], [40], [48].

17. BBC also seems to submit that the English-seated arbitral tribunal would nonetheless apply mandatory law of Australia, in contrast to an English court which it rightly accepts would not do so (RS[44]).[11] But there is no reason to consider that an arbitral tribunal seated in London, with the lex causae, lex arbitri and law of the arbitration agreement all being English law, would, in applying any "mandatory law of the forum", apply any mandatory law other than of England. The parties' choice of law in their agreement is English law, and the agreement has not been varied. There will simply be no occasion for the tribunal in these circumstances to give effect to the mandatory law of the forum that applies *in Australia*.[12]

18. Next, BBC appears to submit that it is not even possible for an Australian interpretation of the rules to differ from the English interpretation (RS[11]). That is empirically wrong.[13]

19. BBC often also invokes the Vienna Convention on the Law of Treaties (eg. RS[11]). But that does not apply to treaties entered into before 1969, such as the Hague-Visby Rules.[14]

20. BBC also invokes a range of authorities on the IAA. Those cases – eg. *Mitsubishi* and *Francis Travel* – concern different issues entirely, such as arbitrability and construction. They do not concern validity. They certainly do not support the striking submission now made by BBC in this appeal that "it is difficult to conclude that an arbitration agreement in and of itself could ***ever*** fall foul of art III(8) of the Australian Rules" (RS[40]). Such an absolute proposition is self-evidently overstated and suggests error in BBC's construction.

21. More fundamentally, the IAA recognises in s 7(5) that an arbitration agreement may be "null and void", which may be the result of rules of common law, equity, or statute. The IAA takes notice of such invalidating laws and recognises their effectiveness. But it does not alter their interpretation, and BBC has not identified any case holding that it does. Statutory unconscionability provisions, for example, do not have a different meaning when applied to arbitration agreements. Like any other invalidating law, art III(8) falls to be construed by reference to its ***own*** text, context, purpose and jurisprudence. So construed, a shipper discharges its onus under the rule by demonstrating that a lessening of liability might occur. In any event, the NY Convention could not alter the meaning of a convention concluded decades earlier, between different States, on the *more* (not less) specific subject of bills of lading.

14 September 2023

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11 As to which, see *The Amazonia* [1990] 1 Lloyd's LR 236 at 249.

12 Accordingly, allowing the matter to be arbitrated in London would enable BBC to circumvent s 11 of the Act (giving force of law to the AHVR in Australia), which was designed to stamp out the practice of parties contracting out of the Rules by foreign choice of law clauses: *The Hollandia* [1982] QB 872 at 881–4, discussing the statutory response to the holding in *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277.

13 See, eg, the English rejection of an Australian interpretation of art III(2) in *Volcafe Ltd v Compania Sud Americana De Vapores SA* [2018] UKSC 61 at [27].

14 VCLT, art 4; Corten and Klein, *The Vienna Conventions on the Law of Treaties* (Oxford, 2011) vol 1, 79–82.