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## An Australian Maritime Dispute in London: Can the Hague-Visby Rules Render an Arbitration Agreement Null and Void?

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In *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG* [2024] HCA 4 (“*Carmichael v BBC*”), the High Court of Australia (“High Court”) upheld a stay of proceedings in the Federal Court of Australia (“Federal Court”) in favour of a London Maritime Arbitrators Association (“LMAA”) arbitration seated in London. This unanimous judgment of Australia’s highest court reflects the continuing confidence of the Australian judiciary in international arbitration.

The High Court considered the proper construction of Article 3(8) of the Hague-Visby Rules as incorporated into [Australian law](#) (“Australian Hague Rules”), including the requisite standard of proof required for it to render an arbitration agreement null and void.

While its reasoning on Article 3(8) was sufficient to dismiss the appeal, the High Court went on to discuss Article 3(2) of the Australian Hague Rules. The High Court observed, albeit without expressing any concluded view, that “the proper interpretation of Art[icle] 3(2) remains an open question under Australian law”, unlike in the US or UK.

### Background

The appellant (“Carmichael”, the shipper) and the first respondent (“BBC”, the carrier) had arranged for steel rails, manufactured by the second respondent for Carmichael, to be shipped by sea from the Port of Whyalla in South Australia to the Port of Mackay in Queensland. Pursuant to section 10 (1)(b)(ii) of the [Carriage of Goods by Sea Act 1991](#), the Australian Hague Rules apply to a contract of carriage of goods by sea from a port in Australia to another port in Australia.

BBC had issued a bill of lading for the rails to Carmichael, which provided at clause 4 that:

*[A]ny dispute arising under or in connection with this Bill of Lading shall be referred to arbitration in London [on LMAA] terms ... English law is to apply.*

Upon arrival, the rails were found to be damaged and were later sold as scrap.

Parallel proceedings were commenced in relation to the damaged rails: BBC initiated arbitral proceedings in London under clause 4 of the bill of lading; Carmichael filed suit in the Federal Court. By way of interlocutory applications, Carmichael and BBC each sought to restrain or stay the other's proceedings.

## Parties' Positions

The crux of this case was whether the arbitration agreement in clause 4 of the bill of lading was null and void by operation of Article 3(8) of the Australian Hague Rules. Article 3(8) provides that:

*Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to ... goods ... or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.*

That question had to be considered within the framework of Australia's [International Arbitration Act 1974](#) ("IAA"), which incorporates in amended form the UNCITRAL Model Law. Relevantly, section 7(2) requires a court to refer matters the subject of an arbitration agreement to arbitration unless, under section 7(5), the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

Carmichael argued that the carrier's liability might be lessened if the dispute were referred to arbitration in London where there is a risk of the tribunal applying English law per clause 4 of the bill of lading. Carmichael submitted, *inter alia*, that BBC had violated Article 3(2) of the Australian Hague Rules, which it considered potentially easier to satisfy than the English law equivalent.

Article 3(2) of the Australian Hague Rules provides that:

*[T]he carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.*

The obligation this provision imposes on the carrier has been the subject of inconsistent interpretation globally. While US courts have held that Article 3(2) imposes a non-delegable duty on the carrier, UK courts have reached the opposite conclusion. In *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc* [2005] 1 WLR 1363; [2005] 1 All ER 175 ("*Jindal*"), the House of Lords held that the carrier's obligation to load "properly and carefully" applies only to the extent that the agreement provides for those functions to be performed by the carrier. In Australia, the issue of whether Article 3(2) imposes a non-delegable duty remains open.

Carmichael contended that the arbitrators might consider themselves bound to apply English law and follow *Jindal* when interpreting the Australian Hague Rules. Carmichael thus argued that the arbitration agreement may have the effect of lessening BBC's liability, contrary to Article 3(8), if

proceedings were continued by arbitration rather than in the Federal Court.

### The Courts' Reasoning

At first instance, the **Full Court of the Federal Court** ("Full Court") rejected Carmichael's application. The decisive factor was that BBC had proffered an undertaking that the Australian Hague Rules, as applied under Australian law, apply to the bill of lading and that it would adopt that position in the London arbitration. The Full Court considered the question of the differing interpretations of Article 3(2) to be academic in light of the undertaking, and found that Carmichael had otherwise failed to demonstrate that BBC's liability would be lessened in the London arbitration. By consent, the Full Court also made a declaration confirming the application of the Australian Hague Rules to the bill of lading.

On appeal, the High Court agreed that clause 4 of the bill of lading was not rendered null and void by Article 3(8) of the Australian Hague Rules. Thus, the London arbitration could proceed and the Federal Court proceeding was stayed.

The High Court explained that the position in the London arbitration would be no different than before the Federal Court. In either forum, it would be open to Carmichael to point to Australian case law in favour of the US position (*see the obiter dicta* of Sheller JA in *Nikolay Malakhov Shipping Co Ltd v SEAS Sapfor Ltd* [1998] NSWSC 65) and argue that the Article 3(2) duty was non-delegable. Further, it would be as open to the tribunal as to the Federal Court to accept or reject that submission. Accordingly, it could not be said that the availability of this submission lessened BBC's liability such as to fall foul of Article 3(8).

The High Court reasoned that: (i) both Article 3(8) of the Australian Hague Rules and section 7(5) of the IAA, on their proper construction, operate on the ordinary civil standard of proof *i.e.*, the balance of probabilities; (ii) Article 3(8) is to be applied in the circumstances found at the time the court decides the application; and (iii) in the present case, where BBC had given an undertaking and the Full Court had declared that the Australian Hague Rules, as applied (and interpreted) in Australia, applied to the bill of lading, Carmichael had not proved on the balance of probabilities that the London arbitration would relieve or lessen BBC's liability. Insofar as Carmichael's arguments were directed at some lesser standard of proof, such as a "possibility," a "real risk," a "reasonably arguable case," or a "prima facie case" that the London arbitration would relieve or lessen BBC's liability, these were roundly rejected.

The High Court remarked that Carmichael could only have succeeded if Article 3(8) were engaged by "mere speculation," but that falls far short of the requisite standard. The suggestion of "rogue" arbitrators ignoring the parties' agreement to apply the Australian Hague Rules, as well as the expense and practical difficulty of a shipper undertaking arbitration in another country, were rejected as principled bases for enlivening Article 3(8).

An interesting feature of the High Court's reasoning on the standard of proof is the crystal ball exercise asked of courts in making findings of future facts in the context of stay applications. In *Carmichael v BBC*, proof on the balance of probabilities was considered on two levels: proof of *what* laws will be applied and proof of *how* those laws will be applied. The High Court was satisfied that the same law would be applied in the same manner by the domestic and foreign fora given BBC's undertaking and the Full Court's declaration by consent affirming the application of

the Australian Hague Rules. This was reinforced by [section 46 of the English Arbitration Act 1996](#) which provides that the tribunal is to follow the parties' choice of law.

But the solution will not always be so convenient. Where, across fora, the applicable law may differ, or the same law may be applied differently, the crystal ball is sure to become cloudier.

## Conclusion

The High Court's decision in *Carmichael v BBC* provides guidance on the applicable standard of proof in assessing whether an arbitration agreement is null and void. It is not sufficient for a party seeking to avoid arbitration to point to "unknown and unpredictable possibilities". Instead, the facts relied on must be capable of demonstration on the balance of probabilities at the time the court decides the issue. As this judgment exemplifies, the robustness of arbitral processes worldwide will continue to play an important role in founding judicial support for international arbitration.

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