SEMAPHORE

Newsletter of the Maritime Law

Association of Australia and New Zealand

"Young MLAANZ" Case Note – Emma Campbell

The Validity of Foreign Choice of Law and Jurisdiction Clauses in Bills of Lading for Inter-State Carriages of Goods by Sea

Carmichael Rail Network Pty Ltd as Trustee for the Carmichael Rail Network Trust v BBC Chartering Carriers GmbH & Co Kg & Anor (The BBC Nile)

The BBC Nile *[2022] FCAFC 171*

Background

1. The plaintiff/appellant, Carmichael Rail Network Pty Ltd as Trustee for the Carmichael Rail Network Trust (CRN), was the consignee of 8669 lengths of hardened steel rail (Steel Rail) manufactured and supplied by the second defendant/respondent, OneSteel Manufacturing Pty Ltd (OneSteel), to be shipped from Whyalla, South Australia, to Mackay, Queensland under bill of lading WHYMAC01 (BOL).

2. The defendant/respondent, BBC Chartering Carriers GmbH & Co Kg (BBC), carried the Steel Rail by sea from the Port of Whyalla on the BBC Nile, which arrived at the Port of Mackay on 24 December 2020. The voyage was accordingly from one port in Australia to another port in Australia.

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3. Upon discharge it became apparent that the Steel Rail had been damaged when a collapse occurred in the hold of the ship (Damage). The damaged Steel Rail was no longer compliant with specifications for intended use in railway construction and was subsequently sold as scrap.

4. On 2 August 2022, BBC notified CRN that it had commenced arbitral proceedings in London in respect of the Damage. On 12 August 2022 CRN commenced proceedings in Australia against BBC and OneSteel and applied for an anti-suit injunction regarding the London arbitration. BBC in turn brought an application seeking a stay of the whole of CRN's claim against it pursuant to section 7(2) of the International Arbitration Act 1974 (Cth) (IAA). CRN was granted an interim injunction restraining BBC from taking further steps in the arbitration until the determination of the two interlocutory applications.

5. OneSteel took no active role in the interlocutory applications.

Issues

6. CRN relied upon sections 10(1)(b)(ii) and 11(2) of the Carriage of Goods by Sea Act 1991 (Cth) (COGSA 91) to seek a stay of proceedings otherwise than in Australia.

7. Section 10(1)(b)(ii) of COGSA 91 provides that the amended Hague Rules contained in Schedule 1A of COGSA 91 (Australian Rules) apply to a contract of carriage, with some exceptions that are not relevant here, from a port in Australia to another port in Australia. The Australian Rules accordingly apply to the contract of carriage under the BOL in this instance.

8. Section 11(2) of COGSA 91 then has the effect of voiding any agreement which purports to preclude or limit the jurisdiction of an Australian court (or preclude or limit the effect of section 11(1)). The question was then whether that section applied in the context of an inter-state voyage.

9. CRN argued that the choice of law and jurisdiction clauses contained in clause 4 of the BOL, which provides for arbitration in London (Arbitration Clause), operate so as to give rise to a real potential to lessen BBC's liability. Accordingly, the Arbitration Clause is contrary to the mandatory law of the forum and must be rendered null and void according to section 11(2) of COGSA 91 and Article 3 Rule 8 of the Australian Rules.

10. CRN submitted that there are three ways in which there is a risk that the Arbitration Clause would lessen BBC's liability:

    10.1 Firstly, there is a risk that a London arbitration tribunal will apply English law, being seated in England and faced with a bill of lading governed by English law. Consequently, the tribunal may take an English interpretation of clause 3 of the BOL, being the clause paramount, and find that only articles I-VIII of the Hague Rules apply (and consequently lower limitation amounts which apply under the Australian Rules);

Bio

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10.2 Secondly, even if the London arbitrators apply the Australian Rules, there is a risk that they will apply an English interpretation of these rules, specifically the English position on the carrier's responsibility for loading. Under English law, following the decision in *Jindal Iron & Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc (Jordan II)* [2004] UKHL 49 (*The Jordan II*), a carrier may delegate responsibility for loading and a FIOST (Free In/Out, Stowed, and Trimmed) clause to this effect will not be invalid by reason of Article 3 Rule 8. Conversely, the Australian position is not yet settled and CRN in its submissions drew on academic writings and the *obiter dicta* of Sheller JA in *Nikolay Malakhov Shipping Co Ltd v SEAS Sapfor Ltd* (1998) 44 NSWLR 371 (*Nikolay*) to argue that it would be open for a court to find that the carrier's responsibility for loading is non-delegable (Jurisdictional Advantage); and

10.3 Thirdly, the expense and practicality concerns arising out of the London arbitration will impede CRN's pursuit in the claim and will encourage it to settle for less than it might in Australian proceedings.

Judgment of the Full Court of the Federal Court

11. The Full Court of the Federal Court comprising Rares, Derrington and Stewart JJ found that the Arbitration Clause was not rendered void by section 10(1) of COGSA 91 and Article 3 Rule 8 of the Australian Rules and that section 11(2) does not prevent parties to a bill of lading from contracting out of a foreign jurisdiction clause for interstate voyages.

12. CRN's application was dismissed, and the proceedings stayed in favour of the London arbitration.

Application of section 10(1)(b)(ii) of COGSA 91

13. In the course of the proceedings, BBC made a formal admission that the Australian Rules applied under Australian law apply to the BOL and gave an undertaking to maintain this position in the London arbitration. CRN argued that BBC's undertaking failed to mitigate the risk that a lessening of liability would occur.

14. The Full Court of the Federal Court took the view that an English court would interpret the undertaking as BBC having submitted to the Australian jurisdiction. The Full Court of the Federal Court concluded that this ensured there would be no lessening of liability.

15. The Full Court of the Federal Court found that in light of BBC's admission and undertaking, it was "undesirable" and "unnecessary" to reach a conclusion as to the construction of the clause paramount under English law. In the context of the undertaking, the Full Court of the Federal Court described this exercise as speculative (and the question moot) and noted that the matter is ultimately for the consideration of a London tribunal.

16. After consideration of the relevant authorities, the Full Court of the Federal Court noted that CRN had failed to establish on the facts that English and Australian law materially differed such that it would produce a different outcome, and that the conduct of arbitration would not be such as to lessen BBC's liability.

17. As to CRN's third ground for a lessening of liability, the Full Court of the Federal Court found that the costs of a dispute do not fall within the scope of Article 3 Rule 8 or the Australian Rules, which are concerned with whether a clause relieves or lessens a carrier's liability arising from "negligence, fault, or failure in the duties and obligations provided".

Construction of section 11 of COGSA 91

18. The issue of whether the Arbitration Clause is voided by the operation of section 11(2) of COGSA 91 turned on whether inter-state carriage of goods, such as that the subject of the claim, fell within the scope of section 11(2)(b) of COGSA 91.

19. The Full Court of the Federal Court noted it was anomalous that that section 11 was silent as to whether foreign choice of law and jurisdiction clauses are invalidated in respect of inter-state carriage of goods and embarked on a construction of the provision within the context of the legislative history of COGSA 91.

20. The Full Court of the Federal Court explained that the purpose of COGSA 91 is to encourage arbitration within Australia and the issue which has arisen is whether is it possible to contract out of the choice of law provision otherwise provided for in COGSA in respect of inter-state carriages.

21. An evaluation of the legislative history produced no evident rationale from Parliament as to why it was not concerned with whether the jurisdiction of Australian courts could be precluded or limited in respect of contracts for inter-state carriage of goods by sea.

22. CRN posited that given bills of lading were included in the meaning of "sea carriage documents", the separate reference to bills of lading must be taken to embrace a wider class of bills of lading than those merely for outbound carriages. The Full Court of the Federal Court rejected this proposition where there was simply no apparent legislative intent to expand the reference to "bills of lading" to include those governing inter-state carriages. It found that this interpretation would result in a different treatment of bills of lading to other sea carriage documents – which would be contrary to the legislative intent apparent from the 1997/1998 amendments to COGSA 91 (which intended these two classes of document to be treated the same).

23. The Full Court of the Federal Court noted that acceptance of CRN's interpretation of "bills of lading" would create far more difficulty than it would solve. A wider interpretation would also necessarily capture intra-state shipments (contrary to the legislative scheme to leave intra-state shipments to the states) and would capture all carriages within the Australian jurisdiction with otherwise no connection with Australia. The latter outcome being "beyond anything comprehended or intended by the regime".

24. Alternatively, CRN argued it was necessary to read words into sections 11(1)(a) or 11(2)(b) to fill the apparent gap. Again, the Full Court of the Federal Court opined this would be contrary to the intention of Parliament, particularly where this "gap" was created in the 1924 version of the act and repeated in COGSA 91. The Full Court of the Federal Court considered that the absence of attention to inter-state carriages is more likely the result of historical oversight or inattention than unarticulated legislative policy.

25. The Full Court of the Federal Court further considered that the gap is more than a simple grammatical or drafting error. To fill the gap would require an insertion "too big, or too much at variance with the language in fact used by the legislature". The Full Court of the Federal Court noted that "however regrettable or absurd the apparent overlooking of inter-state contracts for carriage of goods by sea is in s 11 of COGSA 91, the will of the Parliament as expressed in that law does not allow the Court to stretch that legislative expression far beyond the text of the Act".

26. Accordingly, the Full Court of the Federal Court held that CRN's application for a stay of proceedings must fail.

Special Leave to Appeal

27. On 9 June 2023, CRN was granted special leave to appeal to the High Court on the grounds that the Full Court of the Federal Court erred in finding the Arbitration Clause was valid. CRN submitted that the Full Court of the Federal Court ought to have held the Arbitration Clause was void by operation of Article 3 Rule 8 of the Australia Rules, on the basis there was a risk that BBC's liability would be lessened on the three grounds relied upon before the Full Court of the Federal Court.

Submissions to the High Court

28. The issues on appeal boiled down to:

    28.1 The construction of Article 3 Rule 8 of the Australia Rules; and

    28.2 The degree of risk of a lessening of liability necessary to render the Arbitration Clause null and void, including whether the relevant test is a 'might' or 'would' test.

CRN's Written Argument and Oral Submissions at Hearing

29. With respect to the Full Court of the Federal Court's findings that section 11(2) of COGSA 91 would not invalidate the Arbitration Clause, CRN made no further submissions on this point on appeal.

Lessening of Liability

Whether a Risk is Sufficient

30. CRN argued that the existence of a risk that the Arbitration Clause would lessen the carrier's liability is sufficient to invalidate the clause under Article 3 Rule 8. It submitted that the implication of upholding the Full Court of the Federal Court's finding that such risks are speculative is that wherever uncertainty exists, the carrier will have the benefit of the doubt.

31. CRN submitted that the inclusion of the reference to the "benefit of insurance" within Article 3 Rule 8 indicates that the provision was intended to be subject to a "might" test. Whether such clauses lessen liability depends on whether the shipper's insurer will agree to indemnify the carrier. CRN referred to the *travaux préparatoires*, which it argued showed it was contemplated that Article 3 Rule 8 would invalidate clauses which might lessen the carrier's liability.

32. CRN sought to distinguish the case from the previous authorities, noting that in the relevant cases there was either evidence or an admission that foreign litigation would lessen liability (for example, in *The Hollandia* [1983] 1 AC 565 (*The Hollandia*) and *The Regal Scout* (1983) 48 DLR (3d) 412 (*The Regal Scout*)). CRN argued that in these cases it was therefore unnecessary for the courts to decide whether it was sufficient to show a clause might lessen liability. CRN noted that just because the courts held that the higher threshold was proved, it does not mean that a "will" test is necessary nor does it rule out that a "might" test may be sufficient.

33. CRN also argued that there should be a shifting burden of proof, such that once it is identified that there is a risk liability which could be lessened under a choice of law or jurisdiction clause, the onus shifts to BBC to provide that the Jurisdictional Advantage will be enjoyed by CRN in the English courts. CRN argued the shipper ought to have discharged its onus by showing that the clause, if enforced, might lessen the carrier's liability.

Whether Undertaking Binding in Arbitration

34. CRN continued to express concern about BBC's undertaking, arguing that it would not be binding on BBC during arbitration despite section 46 of the Arbitration Act 1996 (UK), which provides that an arbitral tribunal will decide a dispute in accordance with the law chosen by the parties as applicable to the dispute. CRN argued that there was a risk that a tribunal would apply English law because that is the choice of law in the BOL and there has been no further agreement of the parties to change the applicable law. CRN posited that BBC's undertaking does not constitute a further agreement and is merely a position taken for the purpose of the application to stay proceedings.

35. CRN noted that United Kingdom law provides that BBC would be entitled to make statements for the purposes of obtaining a stay, which will not subsequently bind them in the London proceedings. CRN argued that accordingly, the risk that BBC may resile from its position during arbitration remains real.

36. CRN submitted that "application" and "interpretation" are different concepts. CRN queried that if these words are interchangeable as argued by BBC, why then did BBC decline to amend the wording of its undertaking from "as applied" to "as interpreted" under Australian law, when invited by the Full Court of the Federal Court to do so.

37. CRN explained to the High Court that there is a reasonable basis to assume that BBC will act in its own best commercial interests and follow the actions of People's Insurance Co in Akai, to resile from the position taken during the present hearings and adopt a different position in the London arbitration. CRN also pointed out that the preferred arbitrator selected by BBC was the same judge who decided *The Jordan II*, which further increases the risk that CRN will lose the Jurisdictional Advantage in the London arbitration.

38. At the hearing, the High Court queried why CRN did not then take steps to establish an arbitral tribunal and seek a determination as to what law the tribunal would apply.

Construction of Article 3 Rule 8

39. In its submissions, CRN argued that the text of Article 3 Rule 8 is neutral and does not prescribe a standard of proof. Further, Article 3 Rule 8 ought not to be interpreted in according with narrow notions of liability. CRN implored the Court to interpret the word "liability" in accordance with the broader concept of "responsabilité" contained in the authentic French text, meaning "responsibility, answerability, accountability", in addition to mere liability.

40. CRN submitted that the purpose of Article 3 Rule 8 is to protect shippers from carriers using "creatively drafted clauses and colourable devices" to avoid liability to shippers (quoting Lord Diplock in *The Hollandia*). It argued that to construe Article 3 Rule 8 narrowly would be to destroy the balance and bargain between shippers and carriers embodied in the Australian Rules.

Timing for Determining Invalidity

41. CRN argued that because the lessening of liability will arise throughout the arbitral process of applying foreign law, an Australian court is required to predict, to an extent, what will happen in the foreign arbitration.

42. CRN relied on The Hollandia to argue that the timing for determination of whether a foreign choice of law or jurisdiction clause is invalid should be determined when the clause is invoked. Such questions should not be deferred until post-award review, where the appellant would have to show that review should be conducted on public policy grounds.

43. The scope of the public policy ground requires something contrary to the fundamental conceptions of morality and justice. Any post-award review that relies on public policy is therefore of little comfort to an appellant.

44. Jagot J queried whether the cases relied upon by CRN on this point assisted its position (namely *Baghlaf Al Zafer Factory Co v Pakistan National Shipping Co (No 2)* [2000] 1 Lloyd LR 1, Re *The Andhika Samyra* [1988] HKCFI 111 and *The Regal Scout*). She noted that the exercises undertaken by the various courts in the authorities were different to that presently asked of the Court. Jagot J noted that CRN was requesting the Court to do the very things which the authorities say not to do, which is to determine what the law may be at a future time.

45. CRN submitted that the implication of courts declining to undertake the predictive exercise is that carriers will be able to lessen their liability without any real recourse or remedy for the cargo claimant until after the arbitral award is made. It would render Article 3 Rule 8 nugatory and ineffective as a protective mechanism for shippers where the carrier can use foreign choice of law and jurisdiction clauses whenever there was uncertainty as to what the foreign law was.

46. Jagot J commented that the authorities undertake a probabilistic determination of what the law will be. These exercises do not involve a prediction of any kind and what CRN is asking of the Court (to predict facts which may or may not occur) is a whole new intellectual exercise without any case authority.

47. Jagot J further noted that if CRN is wrong about the way the undertaking may operate in the United Kingdom (and the associated risk of lessening of liability), the only remaining risk is that of the rogue arbitrator. She noted that all the cases relied upon by CRN do not assume a rogue arbitrator and CRN's case then comes down to finding some loophole in the undertaking given by BBC.

BBC's Written Argument and Oral Submissions at Hearing

Construction of Article 3 Rule 8

48. BBC argued that Article 3 Rule 8 contains a higher threshold than that submitted by CRN. Article 3 Rule 8 refers to an existing state of affairs and therefore the burden is on the party relying on Article 3 Rule 8 to establish as a fact that the Arbitration Clause itself would relieve or lessen liability.

49. It submitted that a "might" test would extend Article 3 Rule 8 beyond its intended reach. CRN's interpretation of the provision renders any arbitration or jurisdiction clause invalid, as there is always a hypothetical risk that an arbitrator will "go rogue" or erroneously fail to apply the Australian Rules. A court should not make assumptions about whether a tribunal will do anything other than resolve the dispute before it in accordance with the applicable law.

50. BBC acknowledged at the hearing that the application of Article 3 Rule 8 necessitated somewhat of a predictive test of whether the application and circumstances lessen liability. However, BBC argued that determining whether the Arbitration Clause is null and void based on the possibility of a rogue arbitrator is not something that can be proved on the balance of probabilities. Article 3 Rule 8 does not operate on mere speculation.

51. Gageler J noted that nor can one find a lessening of liability by comparing a certainty of liability with a possibility of liability.

52. BBC argued that there is no such thing as an *Australian interpretation* of Article 3 Rule 8 which would afford CRN the Jurisdictional Advantage. BBC submitted that whether Article 3 Rule 8 renders the Arbitration Clause null and void should be determined within the meaning of section 7(5) of the IAA given that it is on the basis of this provision that a court is required to stay proceedings (unless the arbitration clause in question is null and void).

53. Instead, BBC submitted that the relevant provisions should be interpreted according to the customary law principles within the Vienna Convention on the Law of Treaties 1969 (Vienna Convention) and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). BBC argued that CRN's construction of Article 3 Rule 8 is contrary to the principles contained in the New York Convention, including:

    53.1 The public policy principle encouraging arbitration agreements which facilitate the smooth working of international commerce;

    53.2 The presumptive validity of arbitration agreements, with the burden resting on the party resisting to prove the agreement is null and void; and

    53.3 The principle that courts ought not to predetermine how arbitrators will resolve disputes.

54. In its reply, CRN countered that the Vienna Convention does not apply to the Hague-Visby Rules because the Vienna Convention does not apply to treaties entered into before 1969. Further, CRN argued that the New York Convention could not alter meaning of a convention concluded decades earlier, between different states, on more specific subject of bills of lading. BBC argued in return that the Vienna Convention was a statement of customary law and would apply in any event.

Lessening of Liability

55. BBC argued that even if the threshold for invalidity under Article 3 Rule 8 was that the Arbitration Clause had the potential to lessen liability, CRN failed to meet this lower threshold.

56. It maintained the position that there is no risk that a lessening of liability would arise by application of English law or from an English interpretation of the Australian Rules because the parties agreed that the Australian Rules apply *as applied* under Australian law. BBC stated that there is no difference between "as applied" and "as interpreted" and that CRN has not lost the opportunity to persuade a tribunal to follow *Nikolay*.

57. BBC also posited that CRN had failed to demonstrate how the undertaking would not be binding on BBC in the arbitration. It noted that even if it did resile from its undertaking, CRN would retain the option of coming back to Australia and applying to lift the stay of proceedings.

58. With respect to the third ground, BBC submitted that any expense or burden of commencing arbitration in London simply does not fall within the meaning of liability in Article 3 Rule 8. The High Court noted it was indeed difficult to reconcile the word "liability" with the discouragement of pursuing proceedings.

Purpose of Article 3 Rule 8

59. BBC accepted that the purpose of Article 3 Rule 8 is to protect shippers but contended that it was also to protect the compromise reached between shippers and carriers. Article 3 Rule 8 seeks to prevent the carrier from including terms and conditions which would result in a departure from this compromise to the detriment of the shipper. Article 3 Rule 8 does not seek to confer a wider benefit on shippers.

60. BBC further noted that Article 3 Rule 8 does not intend to restrict party autonomy as to the venue in which parties may resolve disputes, nor does it seek to invalidate jurisdiction clauses on the speculative basis that they may lessen a carrier's liability.

61. If Article 3 Rule 8 sought to adopt a lesser burden of proof than that typical under international law, it would do so expressly (for example, articles 4(1) and 4A(1) which expressly alter the usual burden of proof).

62. As to the appointment of one of the judges on The Jordan II as arbitrator, BBC contended this should be of no concern to CRN. She would resolve the dispute based on the evidence and facts before her. In any event, the Arbitration tribunal must apply the Australian Rules due to section 46 of the Arbitration Act 1996 (UK).

Takeaways

63. The High Court is yet to hand down its decision. Regardless of the outcome, the issue of whether section 11(2) applies to inter-state carriages of goods by sea did not form part of the issues on appeal. The decision of the Full Court of the Federal Court indicates that parties to a bill of lading for an inter-state voyage will have the option of contracting out of the Australian Rules through inclusion of foreign choice of law and jurisdiction clauses.

64. It will therefore be a matter for Parliament as to whether it addresses the discrepancy between international voyages and inter-state carriages through amendment of section 11 of COGSA 91. Until such time, Australian shippers should be mindful that foreign choice of law or jurisdiction clauses in bills of lading will not necessarily be invalidated by section 10(1)(b)(ii) of COGSA 91 read together with Article 3 Rule 8 of the Australian Rules (unless of course it is clear that liability will be lessened under the foreign law) and parties may find themselves before foreign tribunals or courts in respect of disputes arising under inter-state bills of lading.

65. Subject to the specific reasoning of the High Court, a judgment in favour of CRN may give rise to a very low threshold for finding that a foreign choice of law or jurisdiction clause in a bill of lading for an inter-state carriage of goods by sea is rendered void by Article 3 Rule 8 of the Australian Rules.

66. Alternatively, should there be a judgment in favour of BBC, parties to bills of lading for inter-state carriages of goods by sea will retain autonomy to contract out of the Australian Rules and select a foreign jurisdiction of their choice (with the risk that a foreign law will then be applied), until such time as Parliament is inclined to extend section 11 of COGSA 91 to include inter-state carriages of goods by sea.

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December 2023