HIGH COURT OF AUSTRALIA

McHUGH ACJ,
GUMMOW, KIRBY, CALLINAN AND HEYDON JJ

SIEMENS LTD APPELLANT

AND

SCHENKER INTERNATIONAL (AUSTRALIA)
PTY LTD & ANOR RESPONDENTS

Siemens Ltd v Schenker International (Australia) Pty Ltd [2004] HCA 11
9 March 2004
S158/2003

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation:

P H Greenwood SC with I G B Roberts for the appellant (instructed by O'Reilly Sever & Co)

A J Meagher SC with R J H Darke SC for the respondents (instructed by Blake Dawson Waldron)

CATCHWORDS

Siemens Ltd v Schenker International (Australia) Pty Ltd

Contract – Negligence – Limitation of liability – Construction and interpretation – Contract for the international carriage of goods by air – Goods damaged by negligence of carrier – Goods damaged while in transit by road outside perimeter of airport of destination – Limitation of liability clause in air waybill – Whether limitation clause in air waybill applies to carriage by road.

Contract – Air waybill for international carriage of goods by air – Whether limitation clause in an air waybill applies to ground transport beyond the perimeter of the airport of destination – Services incidental to such air carriage – Whether limitation of liability must be, and was, expressed clearly to attract restriction on recovery for admitted negligence in ground transport.

Carriers – Carriage by air – Warsaw Convention, Arts 18 and 22 – Guadalajara Convention, Art 2 – *Civil Aviation (Carriers' Liability) Act* 1959 (Cth), s 11 – Whether statutory limitation of liability applies to goods damaged outside perimeter of airport.

Words and phrases – "carriage", "international carriage", "actual carrier", "contracting carrier", "air carriage", "other services incidental to such air carriage".

Civil Aviation (Carriers' Liability) Act 1959 (Cth), ss 11(1), 25A, Sched 2.
Customs Act 1901 (Cth), ss 40AA, 71E(1), 71(2)(a).
Convention for the Unification of Certain Rules Relating to International Carriage by Air as amended at The Hague 1955 (Warsaw Convention), Arts 1, 18, 22, 31.
Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, Guadalajara 1961 (Guadalajara Convention), Art 2.

1 McHUGH ACJ. The question in this appeal is whether a limitation of liability clause in a standard form *air* waybill applies to the *road* transport of cargo to a bonded warehouse located outside the perimeter of Melbourne Airport. If the clause is applicable, the respondents' liability for damage that occurred to the appellant's goods is reduced from almost A$1.7 million inclusive of interest to US$74,680 plus interest.

2 The specific issues raised by the appeal are:

1. Does the limitation clause in the standard form air waybill concerning the goods apply in circumstances where the Warsaw Convention[1] as amended at The Hague 1955[2] ("the Amended Convention") applies to the carriage in question?

2. Does the reference to "carriage" in the limitation clause of the air waybill:

   (a) mean "carriage by air", as defined in Art 18 of the Amended Convention; and

   (b) include other services or "other services incidental to such air carriage"?

3. Did the air waybill continue to have contractual force after the goods were delivered to the nominated airport of destination?

Statement of the case

3 Siemens Ltd ("Siemens") sued Schenker International (Australia) Pty Ltd ("Schenker Australia") and Schenker International Deutschland GmbH ("Schenker Germany") for damages in the New South Wales Supreme Court as the result of damage to goods that were to be delivered by the Schenker companies to Siemens. The Schenker companies did not dispute that, as bailees of the goods, they were liable for the damage. However, they claimed the benefit of a limitation of liability provision in Art 22 of the Amended Convention or, in the alternative, cl 4 of the standard form air waybill used by the parties.

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1 Convention for the Unification of Certain Rules relating to International Carriage by Air, opened for signature 12 October 1929, 137 LNTS 11 (entered into force 13 February 1933).

2 Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929, opened for signature 28 September 1955, 478 UNTS 371 (entered into force 1 August 1963).

4 In the Supreme Court, Barrett J held[3] that, while the Amended Convention applied to the carriage by air, the limitation provision did not apply to limit the compensation payable because the damage to the goods occurred outside the airport boundary. His Honour also held that cl 4 of the air waybill did not apply because that limitation only related to carriage by air where the Amended Convention did not apply[4]. His Honour held that, in any event, the terms of the air waybill did not extend to that part of the journey consisting of transportation from Melbourne Airport (Tullamarine) to Schenker Australia's warehouse[5].

5 The Schenker companies appealed to the New South Wales Court of Appeal which allowed the appeal. The Court of Appeal (Meagher, Sheller and Stein JJA) held that, while the Amended Convention did not apply beyond the boundary of the airport[6], cl 4 of the air waybill applied to the road carriage[7]. Subsequently, this Court granted Siemens special leave to appeal against the decision of the Court of Appeal.

Factual background and decisions below

6 In late 1996, the Siemens group of companies ("Siemens Group") and the Schenker group of companies ("Schenker Group") had an overarching agreement (the "Richtungsverkehr" – literally "Direct Traffic") for the transportation of goods from Germany to Australia. Under that agreement, Schenker Germany undertook to deliver a consignment of telecommunications equipment from the Berlin factory of Siemens AG ("Siemens Germany") to Schenker Australia's bonded warehouse in Melbourne. Siemens had purchased the equipment from Siemens Germany on an FCA ("free to carrier") basis with the result that both property and risk passed at the FCA point. The FCA point in this case was within Tegel Airport in Berlin.

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3 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 477.

4 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 481.

5 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 480.

6 *Schenker International (Australia) Pty Ltd v Siemens Ltd* [2002] NSWCA 172 at [4] per Meagher JA, [20] per Sheller JA.

7 *Schenker International (Australia) Pty Ltd v Siemens Ltd* [2002] NSWCA 172 at [9]-[10] per Meagher JA, [36] per Sheller JA.

7 The common understanding of the parties was that Schenker Germany and Schenker Australia would together provide all services required to transport the goods to Siemens. Schenker Germany's responsibility commenced at the German airport and ended upon unloading of the aircraft in Australia. Schenker Australia's responsibility commenced at the aircraft unloading point and continued to its bonded warehouse. Schenker Germany arranged for the equipment to be transported by road from Siemens Germany's factory to Tegel Airport in Berlin. It then arranged for Singapore Airlines to carry the goods by air from Tegel Airport[8] to Melbourne Airport. To this end Singapore Airlines issued a master air waybill ("the Master Air Waybill") in respect of the cargo in the standard form of the International Air Transport Association ("IATA")[9]. Schenker Germany issued a house air waybill ("the air waybill") in the standard form of the Fédération Internationale des Associations de Transitaires et Assimilés (International Federation of Freight Forwarders Associations) ("FIATA") for the transportation from Tegel Airport to Melbourne Airport. The air waybill provided for limited liability under the Amended Convention or, if the Convention did not apply, under cl 4 of the waybill.

8 Under the Richtungsverkehr, Schenker Australia was required to collect the goods at Melbourne Airport and transport them by truck for a distance of about four kilometres to the bonded warehouse, which was located outside the boundary of Melbourne Airport. The description of the consignment under the Master Air Waybill was "consolidation cargo as per att[ached] cargo manifest". Delivery of that cargo to Siemens could only be given from the bonded warehouse after the consignment had been "deconsolidated", which involved breaking up the consignment so as to identify the individual consignees, and the cargo had obtained customs clearance.

9 At least by April 1991 Schenker Australia had received permission from the Australian Customs Service to remove consolidations of undelivered cargo from airline freight terminals within Melbourne Airport to a customs approved warehouse, which included the bonded warehouse. Customs clearance would then be obtained after the cargo had been deconsolidated. However, Schenker Australia was not permitted to deliver the deconsolidated cargo until the clearance had been given.

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8 There is a dispute between the parties as to whether the trial judge's findings in this regard are accurate. The respondents argue that Singapore Airlines carried the goods from Frankfurt Airport not Tegel Airport. Ultimately, nothing turns on this issue.

9 Containing the conditions of contract contained in IATA resolution 600b.

10 On or around 13 December 1996, Schenker Australia collected the equipment from Melbourne Airport. On 15 December 1996, shortly after the truck left the airport, some of the equipment fell from the truck as a result of the negligence of the truck driver and was damaged.

Regimes governing transportation of the goods

11 The transportation of the equipment was subject to several complementary regimes which applied to different stages of the journey. Each regime had a separate set of rules relating to liability for damage to the goods. These regimes consisted of the Richtungsverkehr, the Amended Convention, the Guadalajara Convention[10], the Singapore Airlines Master Air Waybill and the air waybill.

The Richtungsverkehr

12 The commercial relationship between the Siemens Group and the Schenker Group extended back to the 19th century, at least at the level of the German parent companies. In about 1972, the parties formalised the relationship by appointing the Schenker Group as "Richtungsverkehr Spediteur Luftfracht" (roughly translated, "one-way specific airfreight forwarder") to Australia. This was an exclusive appointment of the Schenker Group as a specific freight forwarder for the Siemens Group's airfreight forwarding requirements on the Germany to Australia route. An important reason for the appointment was the ability of the Schenker Group to receive consolidated cargo for deconsolidation and temporary storage, pending release from the Australian Customs Service. Until 1986, Schenker Australia occupied a warehouse within the Melbourne Airport boundary. In 1986, it moved its warehouse out of the airport to accommodate its increased business.

13 The effect of the Richtungsverkehr was that the Siemens Group had a standing arrangement under which it could contact the Schenker Group and have cargo transported on agreed terms and at agreed rates. In 1991, negotiations between the parent companies in Germany, Siemens Germany and Schenker Germany, produced a new agreed basis for the carriage of goods between Germany and Australia. Although the Australian subsidiaries, Siemens and Schenker Australia, were not involved in the discussions, they acquiesced in the results and were parties to the resultant contracts, which were intended to bind all four companies with respect to the various roles that they were to play.

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10 Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, opened for signature 18 September 1961, 500 UNTS 31 (entered into force 1 May 1964).

14 A letter from Schenker Australia to Siemens, dated 5 May 1994, described the essence of the Richtungsverkehr as encompassing "a variety of services from the origin city in Germany to hand-over of the goods from Schenker stores in Australia". Further evidence of the scope of the Richtungsverkehr is contained in a letter from Schenker Germany to Siemens Germany, dated 17 January 1991, which states that the Richtungsverkehr involved costs arising from:

> "Receipt, handling and despatch.
>
> Transport to Frankfurt.
>
> Consolidation to Siemens 'Richtungsverkehr' including intensive separate documentation.
>
> Open freight account.
>
> Airfreight costs Frankfurt–Melbourne.
>
> Transit to customs controlled warehouse.
>
> Break bulk, physical and documentation.
>
> Information flow.
>
> Hand over in Australia to customs agent.
>
> Monthly status report, both to Siemens Melbourne and 'Vertrieb' in Germany.
>
> Interest loss through delay in payment."

"Break bulk" refers to the process of deconsolidation.

15 This correspondence shows that, under the Richtungsverkehr, the bonded warehouse was to be the end point of the transportation.

16 The evidence does not reveal the exact legal nature and operation of the Richtungsverkehr. However, I see no reason to doubt the correctness of the following statement by Barrett J[11]:

> "It must be accepted that the 'Richtungsverkehr' arrangements, as in force from time-to-time, had contractual effect among the parties in relation to each individual consignment and its transportation according to

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11 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 478.

> the roles they played in that consignment and transportation. It must also be accepted that when, in accordance with practice, a house air waybill was issued in respect of particular transportation, its terms *supplemented* those of the standing arrangement." (emphasis added)

17 There was no limitation of liability provision in the Richtungsverkehr. At the trial, none of the parties disputed that the provisions of the air waybill operated "as a part of or adjunct to the overall contract"[12]. The trial judge's findings in this regard were not challenged in the Court of Appeal.

The Amended Convention

18 The Amended Convention offers a scheme of presumptive air carrier liability for damaged goods[13] combined with a strict monetary limitation on this liability[14]. The Amended Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward[15]. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking[16]. For the purposes of the Amended Convention, the expression "international carriage" means[17]:

> "any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another State, even if that State is not a High Contracting Party. Carriage between two points within the territory of a single High Contracting Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention."

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12 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 478.

13 *Jaycees Patou Inc v Pier Air International Ltd* 714 F Supp 81 at 82 (SDNY 1989).

14 Amended Convention, Art 22.

15 Amended Convention, Art 1.1.

16 Amended Convention, Art 1.1.

17 Amended Convention, Art 1.2.

19 By virtue of s 11(1) of the *Civil Aviation (Carriers' Liability) Act* 1959 (Cth), the Amended Convention has the force of law in Australia. Australia and Germany are both High Contracting Parties[18]. The carriage in question was "international carriage" under the Amended Convention. The parties contemplated that the carriage would be substantially performed by aircraft. It was therefore subject to the rules of the Amended Convention.

20 Article 18 of the Amended Convention imposes liability on the carrier. It provides:

> "1. The carrier is liable for damages [sic] sustained in the event of the destruction or loss of, or of damage to, any registered baggage or any cargo, if the occurrence which caused the damage so sustained took place during the carriage by air.
>
> 2. The carriage by air within the meaning of the preceding paragraph comprises the period during which the baggage or cargo is in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.
>
> 3. The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or trans-shipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air."

21 The carriage to which the Amended Convention applies ends, therefore, when the cargo ceases to be in the charge of the carrier or when it ceases to be within an aerodrome, whichever is the earlier. In this case, the presumption that the damage occurred during carriage by air was rebutted because the Schenker companies established that the damage occurred outside the Melbourne Airport perimeter[19].

22 Article 22 limits the amount recoverable under Art 18. Article 22.2(a) provides:

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18 Australia ratified the Warsaw Convention on 1 August 1935 and the Protocol on 23 June 1959. Germany ratified the Warsaw Convention on 30 September 1933 and the Protocol on 27 October 1960.

19 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 473 per Barrett J.

> "In the carriage of registered baggage and of cargo, the liability of the carrier is limited to a sum of two hundred and fifty francs per kilogramme, unless the passenger or consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that the sum is greater than the passenger's or consignor's actual interest in delivery at destination."

23 Article 31 provides that, where carriage is performed partly by air and partly by another mode of carriage, the provisions of the Amended Convention apply only to the carriage by air[20], where the carriage by air falls within the terms of Art 1.

The Guadalajara Convention

24 During argument in this Court, an issue arose as to whether Schenker Germany was an air carrier for the purposes of the Amended Convention. The Guadalajara Convention, which supplements the Warsaw Convention regime in relation to international carriage by air, differentiates between a "contracting carrier" and an "actual carrier". In this case, Singapore Airlines was the actual carrier of the equipment. Schenker Germany was the contracting carrier who made the agreement for carriage with the consignor and performed part of the carriage contemplated by that agreement. Article 2 of the Guadalajara Convention confirms the application of the Amended Convention to Schenker Germany as the contracting carrier. Both Australia and Germany are parties to the Guadalajara Convention. The Convention had the force of law in both Germany and Australia[21] at the time of the subject carriage.

The air waybills

25 The Amended Convention expressly provides for the use of air waybills. In this case, two air waybills operated in relation to the transportation of the equipment from Germany to Australia, the Master Air Waybill issued by Singapore Airlines and the air waybill issued by Schenker Germany. Air waybills are prima facie evidence of the conclusion of the contract, the receipt of the cargo and the conditions of carriage by air of goods[22] from the place of departure to the place of destination. Master air waybills are typically issued by

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20 *Shawcross and Beaumont: Air Law*, 4th ed, vol 1, div VII at [345].

21 *Civil Aviation (Carriers' Liability) Act* 1959 (Cth), s 25A.

22 Amended Convention, Art 11.1.

a carrier in respect of a consolidated consignment, with a cargo manifest detailing each consignment. House air waybills are issued by the freight forwarder to each shipper in respect of that shipper's consignment.

26 In the absence of an air waybill, a carrier is not entitled to avail itself of the limitation of liability under the Amended Convention[23].

The Master Air Waybill

27 The first of the waybills, the Singapore Airlines Master Air Waybill, was in the IATA standard form. Although Singapore Airlines' liability under the Master Air Waybill is not in issue in these proceedings, the context in which the Master Air Waybill was developed is instructive in relation to the construction of the air waybill.

28 The IATA air waybill is a standard form document. It contains a set of General Conditions of Carriage. These are modelled on the Warsaw Convention. The conditions were developed – originally by the International Air Traffic Association – in order to provide uniformity of liability and conditions for all carriage by air[24]. The IATA air waybill also provides a parallel regime for carriage by air which is not covered by the Warsaw Convention regime (including the Amended Convention)[25]. For example, the IATA air waybill may be used in both international and non-international carriage.

29 As the authors of *Air Law* note[26], the Warsaw Convention regime does not apply to carriage that falls outside the definition of "international carriage". In addition, the regime does not provide a comprehensive set of rules to govern all aspects of international carriage.

30 Accordingly, in order to extend the area covered by uniform rules, the airlines that were members of the International Air Traffic Association agreed to introduce General Conditions of Carriage and uniform documents of carriage. The first set of agreed conditions and forms was adopted in 1931. Since 1945, IATA has continued this work. IATA members are obliged to use the standard form air waybill[27]. The IATA waybill is also used by non-members who

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23 Amended Convention, Art 9.

24 *Schmitthoff's Export Trade*, 10th ed (2000) at 335.

25 *Samuel Montagu & Co Ltd v Swiss Air Transport Co Ltd* [1966] 2 QB 306 at 316 per Salmon LJ.

26 *Shawcross and Beaumont: Air Law*, 4th ed, vol 1, div VII at [1162].

27 *Shawcross and Beaumont: Air Law*, 4th ed, vol 1, div VII at [1162].

participate in carriage involving IATA members or who merely wish to adopt the international standards set by IATA[28].

31 The Master Air Waybill in the present case named Singapore Airlines as the carrier, Schenker Germany as the shipper and Schenker Australia as the consignee. The airport of departure was given as "Frankfurt" and the airport of destination "Melbourne Tullamarine". The Master Air Waybill noted that the cargo was "consolidation cargo" and that it was "bond delivery approved", a reference to Schenker Australia having permission to transport the cargo to a bonded warehouse prior to customs clearance.

The air waybill

32 The second waybill, the air waybill issued by Schenker Germany, was in the FIATA standard form. The FIATA standard form air waybill is modelled on the IATA standard form air waybill. Like the IATA air waybill, the FIATA air waybill contains a set of "Conditions of Contract" on the reverse side of the document. These conditions adopt the same wording as the IATA form, although the FIATA waybill contains an additional note at the foot of the reverse side.

33 Freight forwarders use the FIATA standard form air waybill when they act as a consolidator and assume the capacity of contracting carrier, or when they act as an agent of a named actual carrier.

34 The air waybill named Schenker Germany as carrier, Siemens Germany as shipper and Siemens as consignee. The conditions shown on the reverse of the air waybill included the following:

> "1. As used in this contract 'carrier' means all air carriers that carry or undertake to carry the goods hereunder or perform any other services incidental to such air carriage ...
>
> 2.1 Carriage hereunder is subject to the rules relating to liability established by the Warsaw Convention unless such carriage is not 'international carriage' as defined by that Convention.
>
> 2.2 To the extent not in conflict with the foregoing, carriage hereunder and other services performed by each carrier are subject to: ...
>
> 4. Except as otherwise provided in carrier's tariffs or conditions of carriage, in carriage to which the Warsaw Convention does not apply carriers' liability shall not exceed USD 20.00 or the

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28 *Schmitthoff's Export Trade*, 10th ed (2000) at 335.

equivalent per kilogram of goods lost, damaged or delayed, unless a higher value is declared by the shipper and a supplementary charge paid.

...

7. Any exclusion or limitation of liability applicable to carrier shall apply to and be for the benefit of carrier's agents, servants and representatives and any person whose aircraft is used by carrier for carriage and its agent[s], servants and representatives. For purpose [sic] of this provision carrier acts herein as agent for all such persons.

8.1 Carrier undertakes to complete the carriage hereunder with reasonable dispatch. Carrier may use alternate carriers or aircraft and may without notice and with due regard to the interests of the shipper use other means of transportation. ...

11. Notice of arrival of goods will be given promptly to the consignee or to the person indicated on the face hereof as the person to be notified. On arrival of the goods at the place of destination, subject to the acceptance of other instructions from the shipper prior to arrival of the goods at the place of destination, delivery will be made to, or in accordance with the instructions of the consignee."

35 The additional note at the foot of the reverse side of the document reads:

"WHEN USED AS AN AIR WAYBILL ISSUED BY A FORWARDER IN A CAPACITY AS CONTRACTING CARRIER FOR AIR TRANSPORTATION IT SHALL BE AGREED, THAT TRANSPORTATION TO THE AIRPORT OF DEPARTURE (AS SHOWN ON THE FACE HEREOF) DOES NOT CONSTITUTE PART OF THIS CONTRACT OF AIR CARRIAGE.

AS FAR AS THE ISSUER OF THIS AIR WAYBILL TAKES OVER THE ARRANGEMENT OR PERFORMANCE OF SUCH SERVICES, THIS IS DONE UNDER A SEPARATE CONTRACT WHICH IS SUBJECT TO THE CONDITIONS OF NATIONAL FORWARDERS ASSOCIATIONS ONLY. WHERE SUCH CONDITIONS DO NOT EXIST, COMPANY'S CONDITIONS AND THE RESPECTIVE NATIONAL AIR TRANSPORT LEGISLATION APPLY."

36 Schenker Germany as "carrier" under the air waybill is able to rely on the limitation clause. The trial judge found that Schenker Australia, in performing its part of the carriage, was performing a function as an agent, servant or

representative of Schenker Germany[29]. This formed the basis of a finding by Sheller JA that Schenker Australia was entitled to the benefit of cl 4 by virtue of cl 7 of the waybill[30].

1. Application of cl 4 of the air waybill

37 In this case, the carriage in question was "international carriage" as defined by the Amended Convention. However, Barrett J found that the damage to the equipment did not occur "in an aerodrome" for the purposes of the Amended Convention[31]. Accordingly, the Convention's liability regime did not apply. After referring to the effect of cll 2.1 and 4 of the air waybill, his Honour said[32]:

> "The clear assumption in each of these provisions is that the carriage *as a whole* will or will not be within the [Amended] Convention's definition of 'international carriage' and that the carriage *as a whole* will or will not be carriage to which the Convention applies. No half measures are contemplated. The carriage is not regarded as consisting of segments, with some being 'international carriage' for the purposes of the Convention and others not, or with the Convention applying to some but not to others. It is all or nothing." (original emphasis)

38 Accordingly, his Honour held that cl 4 of the air waybill did not apply unless the whole of the carriage was "carriage to which the Warsaw Convention does not apply". He concluded that, as the Amended Convention applied to the carriage in this case – although its liability regime extended only up to the point where the cargo crossed the boundary of the airport – cl 4 did not apply[33].

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29 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 479 per Barrett J.

30 *Schenker International (Australia) Pty Ltd v Siemens Ltd* [2002] NSWCA 172 at [23].

31 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 479.

32 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 481.

33 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 481.

39 The Court of Appeal rejected Barrett J's reasoning concerning the operation of cl 2.1. Meagher JA said[34]:

> "His Honour read into these words an intention that the airway bill [sic] did not apply unless no part of the carriage was governed by the Warsaw Convention; if the Warsaw Convention did not apply to any part of the carriage, the airway bill [sic] did. I confess to being quite unable to understand this reasoning. In truth, the Schenker companies were transferring the cargo under two régimes: one covering the route from Berlin airport to Melbourne airport, one covering the route from [Siemens'] Berlin factory to [Schenker Australia's] Melbourne bondstore. If the latter, contractual, régime [the Richtungsverkehr] is different from the former, statutory, one, it still operates to the extent it can. It thus covers the short trip from Melbourne airport to the bondhouse."

40 Sheller JA said that cl 2.1 was consistent with that part of the carriage to be performed under the air waybill being subject to the rules relating to liability established by the Amended Convention and part of it not being so subject because it was carriage outside an aerodrome[35]. His Honour[36] referred to a dictum of Lord Denning MR in *Samuel Montagu & Co Ltd v Swiss Air Transport Co Ltd*[37], where his Lordship said that cl 2.1 was "just another way of saying that the carriage is subject to the rules so far as the same are applicable."

41 Siemens contends that, as Barrett J held, cl 4 has no application to carriage by air where the carriage is governed by the Amended Convention. It contends that the circumstances in which cl 4 operates are not predicated on a failure to limit liability pursuant to the provisions of the Amended Convention. Accordingly, in this case, as the Amended Convention did apply, cl 4 was inapplicable. The Schenker companies contend that the rules of the Amended Convention applied for the whole of the carriage contemplated but that the rules concerning liability only applied during the period of "carriage by air" as defined in Art 18. Because this period ceased when the goods were taken beyond the boundary of Melbourne Airport, the rules relating to liability had no application.

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34 *Schenker International (Australia) Pty Ltd v Siemens Ltd* [2002] NSWCA 172 at [8].

35 *Schenker International (Australia) Pty Ltd v Siemens Ltd* [2002] NSWCA 172 at [29].

36 *Schenker International (Australia) Pty Ltd v Siemens Ltd* [2002] NSWCA 172 at [29].

37 [1966] 2 QB 306 at 314.

They contend therefore that cl 4 of the air waybill operates to limit the liability of Schenker Germany.

42 In my opinion, Barrett J correctly construed cll 2.1 and 4 of the air waybill. A combined reading of those clauses indicates that the liability regimes in the Amended Convention and the air waybill operate exclusively of each other. If the Amended Convention does not apply, cl 4 provides the relevant liability regime. Which liability regime applies is determined by reference to whether or not the carriage in question was "international carriage". It is erroneous to determine the applicability of the Amended Convention by reference to whether or not its liability provisions apply to the particular loss in question.

43 The effect of cll 2.1 and 4 is as follows. Carriage under the air waybill is subject to the rules relating to liability in the Amended Convention unless such carriage is not "international carriage" as defined in the Amended Convention. "[C]arriage to which the [Amended] Convention does not apply" in cl 4 is, therefore, carriage which is not "international carriage". The reference to "international carriage" in cl 2.1 confirms that whether or not the carriage is "carriage to which the [Amended] Convention does not apply" in cl 4 is determined by reference to the criteria in Art 1 of the Amended Convention. Clause 4 does not refer to carriage to which "the liability provisions in" the Amended Convention do not apply.

44 None of the cases relied on to support the reasoning of the Court of Appeal assists the Schenker companies. In one of them – *Read-Rite Corporation v Burlington Air Express Ltd*[38] – the Court of Appeals for the Ninth Circuit held that, where the loss to the goods occurs outside the airport, the Warsaw Convention does not apply. However, *Read-Rite Corporation* concerned the application of federal common law, not the construction of an air waybill. The Court did not consider the effect of clauses similar to cll 2.1 and 4.

45 In another – *Samuel Montagu & Co Ltd v Swiss Air Transport Co Ltd*[39] – the issue was whether the limitation of liability provision in the IATA air waybill complied with requirements of Art 8(q)[40] of the Warsaw Convention. In that

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38 186 F 3d 1190 (9th Cir 1999); followed in *Albingia Versicherungs AG v Schenker International Inc* 344 F 3d 931 (9th Cir 2003).

39 [1966] 2 QB 306.

40 Article 8(q) provides that the air waybill "shall contain ... a statement that the carriage is subject to the rules relating to liability established by [the] Convention." Article 8(q) is omitted from the Amended Convention.

case, Lord Denning MR said that Art 8(q) is satisfied "if the statement says that the carriage is subject to the rules *so far as the same are applicable* to the carriage."[41] (original emphasis) His Lordship was referring to the fact that the carriage under the air waybill "cannot be subject to *all* the rules relating to *liability* established by the Convention: for some relate to goods, others to passengers, others to luggage."[42] (original emphasis) Danckwerts and Salmon LJJ both agreed with his Lordship. *Samuel Montagu* is not authority for the proposition put forward by the Court of Appeal in this case.

46 Accordingly, the Court of Appeal erred in finding that cl 2.1 is consistent with part of the carriage to be performed under the air waybill being subject to the rules relating to liability established by the Amended Convention.

47 As I have indicated, the carriage in this case was "international carriage" within the meaning of Art 1 of the Amended Convention. Accordingly, the provisions of that Convention apply. As the carriage was not "carriage to which the Warsaw Convention does not apply", cl 4 of the air waybill is inapplicable. The fact that the Amended Convention's liability provisions do not apply to the particular loss in question is beside the point. In these circumstances, it is strictly unnecessary to consider the remaining issues. Nevertheless, as they raise important points, and as the Court of Appeal has dealt with them – erroneously, as I think – it is proper to discuss them.

2. Meaning of "carriage"

48 Barrett J held that by its terms the air waybill was confined to air carriage and did not purport to cover any land element, except where land transportation became a substitute for air carriage under cl 8[43]. His Honour said that in cl 8 "other means of transportation" stands in contrast to "alternate carriers or aircraft", thus indicating that "the principal and expected means is transportation by air."[44] His Honour found that the reference to "other services incidental to such air carriage" in the definition of "carrier" in cl 1 was confined to land elements such as loading, unloading, transhipment or other aspects directly

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41 *Samuel Montagu & Co Ltd v Swiss Air Transport Co Ltd* [1966] 2 QB 306 at 314.

42 *Samuel Montagu & Co Ltd v Swiss Air Transport Co Ltd* [1966] 2 QB 306 at 314.

43 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 480.

44 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 478-479.

related to transportation by air[45]. Barrett J also held that the fact that either the Amended Convention or the air waybill applies exclusively to the carriage indicates that the concept of "carriage" adopted by the air waybill is intended to correspond with that under the Amended Convention[46].

49 On appeal, Sheller JA noted that cl 4 refers to "carriage" – not "air carriage"[47] – and that the air waybill was not limited in its operation to carriage by air[48]. His Honour said[49]:

> "With due respect, it would seem to me that the definition of air carrier which includes one who undertakes to perform other services incidental to such air carriage suggests that air carriage includes the performance of services such as warehousing."

The Court of Appeal held that the removal of the cargo from the airport to the bonded warehouse where delivery could be effected was a service "incidental to such air carriage"[50]. It also held that "carriage hereunder" could be read as applying to the carriage of goods by air and/or by other means[51].

50 Siemens contends that the Court of Appeal erred in construing "carriage" in cl 4 as having a meaning other than "carriage by air" as used in the Amended Convention. It contends that in cl 1 "air carriage" is differentiated from other services performed that are "incidental to such air carriage". Siemens submits that the reference to "carriage hereunder" in cl 2.1 is to carriage under the air

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45 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 480.

46 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 481.

47 *Schenker International (Australia) Pty Ltd v Siemens Ltd* [2002] NSWCA 172 at [17].

48 *Schenker International (Australia) Pty Ltd v Siemens Ltd* [2002] NSWCA 172 at [36].

49 *Schenker International (Australia) Pty Ltd v Siemens Ltd* [2002] NSWCA 172 at [37].

50 *Schenker International (Australia) Pty Ltd v Siemens Ltd* [2002] NSWCA 172 at [6] per Meagher JA, [28] per Sheller JA.

51 *Schenker International (Australia) Pty Ltd v Siemens Ltd* [2002] NSWCA 172 at [8] per Meagher JA, [29] per Sheller JA.

waybill. It is more restricted than the carriage under the Richtungsverkehr. Siemens also contends that the transport of the goods to the bonded warehouse was not a service "incidental to *such air carriage*", as it was provided under the Richtungsverkehr, not the air waybill. It contends that services incidental to air carriage would include tasks such as loading and unloading the cargo at the airport, loading the cargo into and unloading the cargo from the aircraft and moving the cargo by truck around the aerodrome. The transportation of the equipment to the warehouse did not fall within such incidental service.

51 The Schenker companies, in contrast, contend that cl 4 is concerned with "carriage" not "air carriage". They submit that the definition of "carrier" in cl 1 indicates that it at least extends to the performance of services that are incidental to the air carriage contracted for. This includes carriage by land performed outside an aerodrome in performance of the contract for carriage by air for the purpose of delivery. The Schenker companies contend that this interpretation is also supported by cl 8, under which the carrier may use "other means of transportation" to complete the carriage under the air waybill. Accordingly, they contend that "carriage hereunder" refers to the activities of carriage identified under the contract evidenced by the air waybill.

52 "Carriage" is not defined in the air waybill. However, cl 1 defines "carrier" to mean "all air carriers that carry or undertake to carry the goods hereunder or perform any other services incidental to such air carriage". The references to "air carrier" and "such air carriage" in that clause indicate that the air waybill is intended to apply to air carriage. In cl 1 "air carriage" is differentiated from other services performed that are "incidental to such air carriage". Similar distinctions are made in cll 2.2 and 8.1 of the air waybill. Clause 7 provides that the limitation provisions in the air waybill also apply in relation to "any person whose aircraft is used by carrier for carriage". As an aircraft is not used for any carriage but air carriage, "carriage" in cl 7 must refer to air carriage.

53 Taken as a whole, the various provisions of the air waybill indicate that "carriage" in cl 4 is confined to "air carriage". In that respect, the provisions of cl 2.1 of the air waybill are compelling. Clause 2.1 provides that "carriage hereunder" is subject to the liability provisions in the Amended Convention. However, a conflict arises if "carriage hereunder" means any carriage, including that which comprises both air and road segments. In such a case, cl 2.1 would render such carriage (including the road segment) "subject to the rules relating to liability established by [that] Convention". This would contradict Art 31 of the Amended Convention, which provides that the provisions of the Convention apply only to air carriage. The FIATA standard form air waybill is intended to supplement, not contradict, the Amended Convention. Accordingly, for the liability provisions in the air waybill to apply, the "carriage hereunder" must be air carriage.

54 In my opinion, Barrett J correctly held that "services incidental to such air carriage" are confined to land elements such as loading, unloading, transhipment or other aspects closely related to transportation by air. This conclusion reflects the terms of Arts 18.2 and 18.3 of the Amended Convention.

55 In *HIH Marine Insurance Services Inc v Gateway Freight Services*, however, in determining whether the holding of goods by the air carrier's agent at the destination (outside the boundary of the airport) for delivery to the consignee was a service "incidental" to air carriage, the Californian Court of Appeal (First District) said[52]:

> "It is beyond question that a contract for air carriage embraces the responsibility to hold the goods at the destination for delivery to the consignee. The proper delivery of the goods is as essential as the transportation itself."

56 However, *HIH Marine Insurance Services* is not a persuasive precedent in the present case. While the delivery of cargo outside an airport *may* constitute a service incidental to the air carriage in some contexts – as the Californian court found in *HIH Marine Insurance Services* – such a delivery cannot be subject to the limitations in cl 4 because delivery outside the airport is not "air carriage" within the terms of cl 1.

57 In this case, as Siemens contends, the delivery was not incidental to the air carriage because it arose under the Richtungsverkehr, not the air waybill.

58 The Court of Appeal relied upon three authorities – *Read-Rite Corporation v Burlington Air Express Ltd*[53], *Aerofloral Inc v Rodricargo Express Corporation*[54] and *Quantum Corporation Ltd v Plane Trucking Ltd*[55] – in support of its holding that delivery outside the airport was carriage for the purpose of cl 4. But these authorities are of little assistance in determining the issues in this case.

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52 *HIH Marine Insurance Services Inc v Gateway Freight Services* 116 Cal Rptr 2d 893 at 899 per Swager J, Stein APJ and Marchiano J agreeing (Cal App 1 Dist 2002).

53 186 F 3d 1190 (9th Cir 1999).

54 756 So 2d 234 (Fla App 3 Dist 2000).

55 [2001] 2 Lloyd's Rep 133. Reversed on appeal in *Quantum Corporation Inc v Plane Trucking Ltd* [2002] 1 WLR 2678; [2003] 1 All ER 873.

59 In *Read-Rite Corporation v Burlington Air Express Ltd*[56] the damage to the goods occurred at a freight facility outside Heathrow Airport, prior to the goods being transported by air from Luxembourg to San Francisco. The limitation clause in the master air waybill was in the same form as the present air waybill. Although the Court of Appeals held that the air waybill did apply in such circumstances, the Court did not consider the construction issues that arise in the present appeal. As noted above, the issue before the Court was the enforceability of the air waybill under United States federal common law, rather than the waybill's applicability to the circumstances of the case.

60 In *Aerofloral Inc v Rodricargo Express Corporation*[57], cargo was lost at a warehouse located almost a mile from Miami International Airport before the air carriage commenced. The air waybill used by the parties contained a limitation of liability provision in the same terms as the present air waybill. The majority of the District Court of Appeal of Florida, Third District, Goderich and Ramirez JJ, indicated that the warehousing of goods for carriage was a service "incidental to such carriage" as contemplated by the definition of "carrier" in the air waybill[58]. They remitted the case to the trial court to consider whether the warehousing fell within the word "carriage". Green J, dissenting, said that it was not disputed that the cargo was not "in carriage" at the time it was lost[59]. Accordingly, the limitation provision did not apply. On the remitter, the trial judge held that the cargo was not in carriage at the time it was lost because the carton had been opened by United States Customs for inspection and was no longer ready for transport. This decision was affirmed on appeal[60].

61 In *Quantum Corporation Ltd v Plane Trucking Ltd*[61] the issue was whether a contract for the carriage of goods from Singapore to Dublin, under which goods were flown from Singapore to Paris and then trucked from Paris to Dublin, could be characterised as a contract for the carriage of goods by road to

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56 186 F 3d 1190 (9th Cir 1999).

57 756 So 2d 234 (Fla App 3 Dist 2000).

58 *Aerofloral Inc v Rodricargo Express Corporation* 756 So 2d 234 at 235 (Fla App 3 Dist 2000).

59 *Aerofloral Inc v Rodricargo Express Corporation* 756 So 2d 234 at 236 (Fla App 3 Dist 2000).

60 *Aerofloral Inc v Rodricargo Express Corporation* 798 So 2d 756 (Fla App 3 Dist 2001).

61 [2001] 2 Lloyd's Rep 133. Reversed on appeal on another point in *Quantum Corporation Inc v Plane Trucking Ltd* [2002] 1 WLR 2678; [2003] 1 All ER 873.

which the Convention on the Contract for the International Carriage of Goods by Road[62] applied. The relevant air waybill expressly provided that the transportation of the cargo from Paris to Dublin was to be by road. In the present case, the air waybill simply refers to the airport as the place of destination. The relevant limitation provision in *Quantum Corporation Ltd* was contained in the air carrier's conditions of contract. Accordingly, Tomlinson J did not consider whether the limitation provision in the air waybill would have been applicable.

3. The air waybill's contractual force following delivery of the cargo to Melbourne Airport

62 At first instance, Barrett J held that the parties' intention as objectively manifested determined the point at which the carriage referred to in the air waybill concluded[63]. His Honour said that, in discovering that intention, it must be borne in mind that the air waybill was used in the context of the wider Richtungsverkehr[64]. He held that what he termed the "umbrella contract" provided for a continuum of services, with individual contractual relationships arising between different parties in relation to different aspects of the transportation of any individual consignment[65]. His Honour concluded that the air waybill did not extend to the part of the journey consisting of the transportation from Melbourne Airport to Schenker Australia's warehouse, even though it was included in the Richtungsverkehr[66].

63 In the Court of Appeal, Meagher JA said that under the air waybill the place of destination was Melbourne and delivery was to be made to Siemens at Schenker Australia's warehouse. His Honour said that under cl 4 the carrier

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62 Opened for signature 19 May 1956, 399 UNTS 189 (entered into force 2 July 1961).

63 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 479.

64 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 479.

65 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 480.

66 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 480.

remained liable for the goods during the period they were in its charge or the charge of its agent[67]. Meagher JA concluded[68]:

> "In these circumstances, I fail to see how the airway bill [sic] was not either a contract or evidence of a contract whereby the Schenker companies came to take the goods to its bondhouse for delivery to [Siemens]. In particular, I cannot see how the contract could be construed as one which involved [Schenker Australia] in no duties at all once the goods arrived at Tullamarine airport."

64 Sheller JA acknowledged that delivery to the warehouse was not expressed in the air waybill but said that "the parties had agreed that the goods would be available for collection and the carrier or its agent would deliver them at the under bond warehouse"[69]. His Honour said that the parties had no choice in the matter as the cargo was consolidation cargo and therefore was required to be moved by Schenker Australia from the freight terminal to the warehouse before it could be delivered[70]. Siemens conceded that it was not possible for the parties to agree for the goods to be collected from the carrier at any earlier or different point in the transportation. Sheller JA said[71]:

> "To effect delivery in accordance with the [air waybill] and the instructions of the shipper, the carrier was bound to arrange for the goods to be carried to the under bond warehouse and therefore bound within the meaning of cl 1 to perform a service incidental to the air carriage. That was part of the contract evidenced by the [air waybill]. With due respect there is no sound basis for treating the [air waybill] as evidencing a contract which terminated before delivery to the consignee at the point where the goods crossed the boundary at Melbourne airport."

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67 *Schenker International (Australia) Pty Ltd v Siemens Ltd* [2002] NSWCA 172 at [6].

68 *Schenker International (Australia) Pty Ltd v Siemens Ltd* [2002] NSWCA 172 at [6].

69 *Schenker International (Australia) Pty Ltd v Siemens Ltd* [2002] NSWCA 172 at [26].

70 *Schenker International (Australia) Pty Ltd v Siemens Ltd* [2002] NSWCA 172 at [28].

71 *Schenker International (Australia) Pty Ltd v Siemens Ltd* [2002] NSWCA 172 at [28].

65 Siemens contends that nothing in the evidence suggests that the parties intended that the provisions of the air waybill would apply beyond the nominated "Airport of Destination" stated on the front of the waybill. Rather, the air waybill shows that the parties intended for it to conclude at Melbourne Airport. Siemens contends that the instruction to deliver the goods, upon arrival at Melbourne Airport, into the possession of a land carrier for conveyance to another location and preparation for collection was given as part of the Richtungsverkehr before the air waybill was issued. It submits that the Court of Appeal wrongly assumed that such instructions could extend the operation of the air waybill beyond the nominated destination.

66 The Schenker companies submit that the air waybill did not cease to have contractual effect when the consignment passed beyond the boundary of the airport. They argue that the parties contemplated and agreed that delivery would take place at the bonded warehouse, not the airport. It was to be effected following deconsolidation of the cargo and the obtaining of customs approval for the release of the goods to Siemens' customs agent. This was in accordance with a longstanding course of dealing and was at least in part dictated by practical constraints upon dealings with consolidated cargo.

67 In my opinion, the contention of Siemens is correct. As noted above, cl 11 of the air waybill provides that:

> "[o]n arrival of the goods at the place of destination, subject to the acceptance of other instructions from the shipper prior to arrival of the goods at the place of destination, delivery will be made to, or in accordance with the instructions of the consignee."

Clause 11 does not identify "the place of destination". It is clearly the "Airport of Destination" given on the front of the air waybill. The word "to" in the phrase "delivery will be made to" indicates that the issue is *how* and *to whom* delivery is to be made at the place of destination, not *where* the delivery is to be made. Clause 11 gives effect in practical terms to the provisions of Arts 12 and 13 of the Amended Convention[72]. Those Articles refer to the delivery of the cargo to "the place of destination". This indicates that cl 11 also contemplates delivery to the place of destination indicated on the face of the air waybill – in this case, Melbourne Airport.

68 Moreover, the instructions concerning delivery to the bonded warehouse were given under the Richtungsverkehr not the air waybill. If the parties had intended that the terms of the air waybill were to extend to the delivery to the warehouse, clear words would surely have been used in the air waybill, as

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72 *Shawcross and Beaumont: Air Law*, 4th ed, vol 1, div VII at [1164].

occurred in *Jaycees Patou Inc v Pier Air International Ltd*[73]. In that case, the air waybill provided for door to door delivery from France to the plaintiff in the United States. It included separate lines and fees for air shipment and land transportation. The air waybill was therefore evidence of the entire contract for transportation. In the present case the parties could have indicated on the air waybill that there was to be delivery to the bonded warehouse for deconsolidation and customs clearance. A stamp to this effect, such as the "bond delivery approved" stamp on the face of the Master Air Waybill, may have been sufficient. However, they did not take this step, and the air waybill must be construed according to its terms.

69 The Schenker companies made much of the fact that the cargo could only be delivered from the warehouse following deconsolidation and customs clearance. But this does not mean that *under the air waybill* Siemens impliedly gave instructions for the delivery of the goods to the warehouse. Clause 2.2.1 of the air waybill provides that carriage thereunder and other services performed by each air carrier are subject to "applicable laws ..., government regulations, orders and requirements". This does not mean that the permission granted under the *Customs Act* 1901 (Cth) (and the restrictions on the release of goods prior to clearance by the Australian Customs Service) so operated as to include the delivery to the bonded warehouse within the ambit of the air waybill. Clause 2.2 is prefaced by the words "[t]o the extent not in conflict with the foregoing". If cl 2.2 is interpreted to mean that delivery to the bonded warehouse was within the ambit of the air waybill, it would conflict with the preceding provisions of the waybill – including cl 2.1 – concerning the applicability of the liability provisions of the Amended Convention. As I have indicated, land transportation does not fall within the meaning of "air carriage" and therefore the Amended Convention would not apply.

Order

70 In my opinion, the appeal should be allowed.

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73 714 F Supp 81 (SDNY 1989).

71 GUMMOW, CALLINAN AND HEYDON JJ. This is an appeal from the orders of the Court of Appeal of New South Wales[74] allowing in part an appeal from the orders of the primary judge[75].

The facts

72 The facts giving rise to the appeal may be shortly stated. In December 1996, the appellant, Siemens Ltd ("Siemens Australia"), purchased a large consignment of telecommunications equipment valued at $1,657,234.33 from its German parent company, Siemens AG ("Siemens Germany"). The equipment was obtained by Siemens Australia in order to meet a contract between Siemens Australia and Telstra Corporation Ltd ("Telstra") for the supply and delivery of a synchronous digital hierarchy transmission system required for a Telstra installation in Western Australia.

73 The equipment was purchased on an FCA ("free to carrier") basis, meaning that, as between seller and purchaser, the property and risk passed at the "FCA point", being in this case the airport of departure, Tegel Airport, at Berlin. Transport of the equipment from Germany to Australia was organised by the second respondent, Schenker International Deutschland GmbH ("Schenker Germany"). The consignment was consolidated with cargo from other customers of Schenker Germany and forwarded by Schenker Germany to Tullamarine Airport ("Tullamarine"), the journey from Frankfurt am Main to Tullamarine being on Singapore Airlines flights SQ7387 and SQ7294. After arriving at Tullamarine on 13 December, the consignment was collected by an employee of the first respondent, Schenker International (Australia) Pty Ltd ("Schenker Australia"), on 15 December and placed on a truck in readiness for its delivery to the Schenker Australia bonded warehouse some four kilometres from Tullamarine's main gate. However, as a result of the negligence of the truck driver employed by Schenker Australia, a portion of the consignment fell off the truck in transit and was damaged. The accident occurred after the truck had left Tullamarine but prior to its arrival at the Schenker Australia warehouse.

The litigation

74 By summons filed in the Supreme Court of New South Wales, Siemens Australia sought damages, interest and costs from Schenker Australia and Schenker Germany (together, "the Schenker Companies"). The Schenker

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74 *Schenker International (Australia) v Siemens Ltd* [2002] NSWCA 172.

75 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469.

Companies did not dispute their liability for the accident. However, they sought to limit that liability by reference to the Convention for the Unification of Certain Rules relating to International Carriage by Air as amended at The Hague ("the Warsaw Convention"), as incorporated into Australian law by Sched 2 of the *Civil Aviation (Carriers' Liability) Act* 1959 (Cth) ("the Carriers' Liability Act"), and, in the alternative, by reference to the house air waybill ("the waybill") issued by Schenker Germany in relation to the consignment.

75 The primary judge (Barrett J) rejected the applicability of the limitation provisions contained in both the Warsaw Convention and the waybill and found the Schenker Companies jointly and severally liable to Siemens Australia in the amount of $1,688,059.50 including interest. The Court of Appeal (Meagher, Sheller and Stein JJA) agreed with the primary judge's holding that the Warsaw Convention did not apply. However, their Honours held that the terms of the waybill governed the rights and obligations of the parties with respect to the accident and that this included the limitation on liability contained in cl 4 of the waybill. The Court of Appeal set aside the orders of Barrett J and, in lieu thereof, entered judgment for Siemens Australia in the limited amount of $US74,680 plus interest. Siemens Australia now appeals to this Court.

76 Two primary issues arise: first, whether the Warsaw Convention, as incorporated into Australian law by the Carriers' Liability Act, applies to limit the liability of the Schenker Companies; and, secondly, whether the limitation of liability clause contained in the waybill issued by Schenker Germany in respect of the consignment applies. As will appear from these reasons, the first question should be answered in the negative and the second in the affirmative, with the result that the appeal should be dismissed.

Richtungsverkehr – "Direct Traffic"

77 However, before considering these issues it is convenient to outline in further detail the contractual arrangements pursuant to which the consignment left Germany and arrived in Australia. The starting-point is the commercial relationship then in existence between Siemens Germany and Schenker Germany known as the "Richtungsverkehr" (literally, "Direct Traffic"). That relationship appears to have commenced at some point in the nineteenth century and has seen Schenker Germany regularly act as a carrier of goods for Siemens Germany. Evidence before the primary judge suggested that the subsidiary companies of Siemens Germany and of Schenker Germany were permitted to take advantage of the relationship between their parent companies when desired.

78 No doubt the terms of the Richtungsverkehr have been regularly re-negotiated over the last century or more. Less certain, however, is the precise legal basis on which that arrangement is founded. The parties before this Court

were able to provide little in the way of assistance in that regard. Nor were they able to point to a single document setting out the specific and current terms upon which consignments made under the Richtungsverkehr were to be transported.

79 However, both parties relied upon a letter dated 17 January 1991 from Mr W Gruber of the Schenker Germany head office in Frankfurt to Mr A Damm of Siemens Germany. That letter was written in the context of a re-negotiation of the rates charged by Schenker Germany in respect of cargo carried between Germany and Australia. Mr Gruber sought to justify a refusal on Schenker Germany's part further to reduce its standard rate as follows:

> "[Schenker Germany] have to recover from the margin [the] following cost factors –
>
> Receipt, handling and despatch.
>
> Transport to Frankfurt.
>
> Consolidation to Siemens 'Richtungsverkehr' including intensive separate documentation.
>
> Open freight account.
>
> Airfreight costs Frankfurt – Melbourne.
>
> Transit to customs controlled warehouse.
>
> Break bulk, physical and documentation.
>
> Information flow.
>
> Hand over in Australia to customs agent.
>
> Monthly status report, both to Siemens Melbourne and 'Vertrieb' in Germany.
>
> Interest loss through delay in payment."

In submissions to this Court, each party relied upon the items listed by Schenker Germany in the above letter, in conjunction with the applicable monetary rate for the consignment, as evidencing the terms of the Richtungsverkehr currently agreed between the parties.

80 Given the limited specificity of the evidence, it is not surprising that the primary judge approached the matter at a level of some generality[76]:

> "It must be accepted that the 'Richtungsverkehr' arrangements, as in force from time-to-time, had contractual effect among the parties in relation to each individual consignment and its transportation according to the roles they played in that consignment and transportation. It must also be accepted that when, in accordance with practice, a house air waybill was issued in respect of particular transportation, its terms supplemented those of the standing arrangement."

For present purposes, it is sufficient to accept his Honour's analysis of the contractual underpinnings of the Richtungsverkehr, with the additional observation that the terms of the standing arrangement must be taken to reflect the statements contained in the 17 January 1991 letter set out above. It will be necessary to return to the terms of the standing arrangement when construing the waybill later in these reasons.

Warsaw Convention

81 Article 1.1 of the Warsaw Convention provides that the Convention applies to "all international carriage of persons, baggage or cargo performed *by aircraft* for reward" (emphasis added). For the purposes of the Convention, "international carriage" is relevantly defined to mean[77]:

> "any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another State, even if that State is not a High Contracting Party".

Both Germany and Australia are High Contracting Parties to the Warsaw Convention. Although the evidence indicates that the consignment was first flown to Frankfurt prior to its departure from Germany, Art 1.3 of the Warsaw Convention provides that carriage to be performed by several successive air carriers is deemed to be one undivided carriage if it has been regarded by the

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76 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 478.

77 Warsaw Convention, Art 1.2.

parties as a single operation. It follows that the carriage of the consignment was "international carriage" within the meaning of the Convention.

82 Accordingly, it is necessary to consider whether the limitations on liability contained in the Warsaw Convention apply in the present case. Those limitations are contained in Ch III which is headed "LIABILITY OF THE CARRIER". The starting-point is Art 18.1 read in the light of the introductory provision in Art 1.1 which speaks of carriage by aircraft. Article 18.1 provides that:

> "The carrier is liable for damages sustained in the event of the destruction or loss of, or of damage to, any ... cargo, if the occurrence which caused the damage so sustained took place during the carriage by air."

Where the damage sustained took place during "carriage by air", the liability of the carrier is prima facie limited to the sum of 250 francs per kilogramme of the cargo damaged, irrespective of the monetary value of that cargo[78]. Where damage to a portion of a consignment affects the value of part of the consignment that has remained undamaged, the weight of that undamaged cargo may also be taken into account[79].

83 The critical phrase in Art 18.1 is "carriage by air". In Art 18.2 that phrase is defined as follows:

> "The carriage by air within the meaning of [Art 18.1] comprises the period during which the baggage or cargo is in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever."

This definition and, in particular, the phrase "whether in an aerodrome or on board an aircraft" appears implicitly to deny the application of the liability regime contained in the Warsaw Convention in respect of damage occurring outside an aerodrome but in circumstances where the cargo remains in the charge of the carrier, other than in the case of landing outside an aerodrome. That construction of Art 18.2 is made express by the statement in Art 18.3 that[80]:

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78 Warsaw Convention, Art 22.2(a).

79 Warsaw Convention, Art 22.2(b).

80 In the present case, the Court is not concerned with the rebuttable presumption contained in the second sentence in Art 18.3. That is because the location and cause of the damage sustained to the consignment is not in doubt.

"[t]he period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome".

84 What is meant by "outside an aerodrome" in this context? The primary judge held that the phrase should be interpreted to mean the physical boundary of Tullamarine, as identified by reference to the definition of "airport site" in s 5 of the *Airports Act* 1996 (Cth) in conjunction with reg 1.03 and Pt 1.12 of Sched 1 of the Airports Regulations 1997[81]. That approach was adopted with approval by the Court of Appeal. It was not argued by the Schenker Companies that it was incorrect. It follows that the regime established by the Warsaw Convention does not apply to limit the liability otherwise arising as a result of the damage sustained to the consignment.

The waybill

85 The waybill relied upon by the Schenker Companies was issued by Schenker Germany on 9 December 1996. The waybill is in a standard form recommended by the International Federation of Freight Forwarders Associations. Several parties are identified on the form: the "Shipper" as Siemens Germany; the "Consignee" as Siemens Australia; the "First Carrier" as "SQ", being the code for Singapore Airlines; and the "Issuing Carrier" as Schenker Germany. Clause 7 of the waybill provides that any limitation of liability applicable to the carrier shall apply to, and be for the benefit of, the carrier's agents, servants and representatives. Although Schenker Australia is not identified as a party to the waybill, the primary judge accepted that Schenker Australia was acting as the agent of Schenker Germany during the accident and was, therefore, able to take advantage of the waybill to the extent it applied to the accident by virtue of cl 7[82]. His Honour also accepted that a sub-bailment or

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81 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 473, 477. "Airport site" is defined in s 5 as "a place that is:

(a) declared by the regulations to be an airport site; and

(b) a Commonwealth place; and

(c) used, or intended to be developed for use, as an airport (whether or not the place is used, or intended to be developed for use, for other purposes)".

82 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 479.

sub-contract arose when Schenker Australia took possession of the cargo at Tullamarine[83]. Both aspects of his Honour's decision were upheld by the Court of Appeal. Neither aspect of his Honour's decision was challenged before this Court. Accordingly, it is unnecessary to determine the scope of the so-called *Himalaya*[84] clause found in cl 7 of the waybill.

86 A printed statement on the front of the waybill provides that the goods described in the waybill are accepted in apparent good order and condition for carriage, and that carriage is subject to the conditions of contract on the reverse of the waybill. The reverse of the waybill sets out a variety of information. A statement at the head of the page is introduced by the words "NOTICE CONCERNING CARRIERS' LIMITATION OF LIABILITY" and reads:

> "If the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of the carrier in respect of loss, damage, or delay to cargo to 250 French gold francs per kilogramme, unless a higher value is declared in advance by the shipper and a supplementary charge paid if required."

87 However, as noted earlier in these reasons, the articles of the Warsaw Convention summarised in that statement do not apply to the damage sustained in the present case. Beneath that statement is a set of provisions entitled "CONDITIONS OF CONTRACT". The Schenker Companies rely upon cl 4 of those conditions. Clause 4 provides:

> "Except as otherwise provided in carrier's tariffs or conditions of carriage, in carriage to which the Warsaw Convention does not apply carriers' liability shall not exceed USD 20.00 or the equivalent per kilogram of goods lost, damaged or delayed, unless a higher value is declared by the shipper and a supplementary charge paid."

Four preliminary points may be noted. First, the waybill does not contain a choice of law clause. Secondly, no point was taken against the proposition that the governing law of the waybill for present purposes is the common law of Australia as modified by federal and State legislation. Thirdly, "carrier" is

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83 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 478.

84 See *Adler v Dickson* [1955] 1 QB 158; *New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd* [1975] AC 154; *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* (1980) 144 CLR 300.

defined in cl 1 of the waybill to mean "all air carriers that carry or undertake to carry the goods hereunder or perform any other services incidental to such air carriage". That definition should be taken to encompass both the First (or actual) Carrier, being Singapore Airlines, and the Issuing (or contracting) Carrier, Schenker Germany. Such a construction is consistent with the two carriers identified on the front of the waybill and is reinforced by the articles of the Guadalajara Convention[85], which provide that the Warsaw Convention applies in its terms to both actual carriers and contracting carriers. The Guadalajara Convention has been incorporated into Australian law by virtue of s 25A and Sched 3 of the Carriers' Liability Act. Fourthly, the terms of cl 4 of the waybill are made subject to the "carrier's tariffs or conditions of carriage". Perhaps because of the difficulties encountered by the parties in identifying with particularity the documentation evidencing those tariffs and conditions in the present case, neither side now seeks to rely on any such tariffs or conditions of carriage when construing cl 4.

The construction of cl 4

88 The primary point of difference between the parties is the extent to which cl 4 has an operation in respect of events occurring beyond the boundaries of the airport of destination nominated as the place for delivery in the waybill; in this case, Tullamarine. Siemens Australia submits that the waybill operates only in respect of "carriage by air" within the meaning of the Warsaw Convention. Given the conclusion reached earlier in these reasons that the Warsaw Convention did not apply to the consignment once it had left the geographical boundaries of Tullamarine, acceptance of Siemens Australia's submission would result in the absence of an applicable limitation clause upon which the Schenker Companies could rely.

89 The primary judge adopted a variation of these submissions. His Honour held that the waybill was "confined to air carriage" and, with an exception not now relevant, did not purport to cover any "land element"[86]. Critical to his Honour's reasoning was the relationship between cl 4 and cl 2.1. The latter provides that:

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85 Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, Guadalajara 1961.

86 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 480-481.

> "Carriage hereunder is subject to the rules relating to liability established by the Warsaw Convention unless such carriage is not 'international carriage' as defined by that Convention."

Clause 2.1, when read with cl 4, was said to evidence an assumption that the carriage "as a whole" will, or will not, fall within the Warsaw Convention's definition of "international carriage". In other words, the waybill, including cl 4, would only operate in circumstances where the *entire* carriage performed pursuant to that waybill did not fall within the Convention. Given that the Convention applied prior to the point in time at which the consignment was removed from the boundaries of Tullamarine, cl 4 could not be relied upon by the Schenker Companies. This was so notwithstanding that, at the point in time at which the consignment was damaged, the operation of the Convention was spent.

90 The Schenker Companies dispute that construction of the waybill. In their submission, the waybill must be read in conjunction with the terms of the Richtungsverkehr and, in particular, the requirement that the consignment would be transported from Tullamarine to the bonded warehouse of Schenker Australia. It is said to follow that the waybill in the present case continued to operate in its terms at least until delivery to the warehouse had taken place and, as a result, applied to the damage sustained to the consignment en route. The submissions of the Schenker Companies should be accepted.

91 The limitation of liability contained in cl 4 is only available in respect of "carriage". "Carriage" is not defined in the waybill. However, as noted earlier, "carrier" is defined to mean any air carrier which undertakes to carry goods pursuant to the waybill "or perform any other services incidental to *such air carriage*". Siemens Australia relies on the emphasised phrase as supporting its contention that "carriage" within the meaning of cl 4 is limited to carriage by air. However, several factors suggest a different construction.

92 First, as noted earlier in these reasons, cl 4 itself operates only in respect of carriage to which the Warsaw Convention does not apply. In so providing, the waybill contemplates a disjunction between carriage to which the Convention applies (international carriage by air) and carriage which is governed solely by the terms of the waybill itself. It must follow that "carriage" in cl 4 has a meaning different from that contained in Art 18 of the Warsaw Convention.

93 Secondly, the definition of "carrier" relied upon by Siemens Australia speaks of the carriage of goods "hereunder", ie pursuant to the terms of the waybill. Importantly, the terms of the waybill provide for the transportation of goods other than through carriage by air. This is made clear by cl 11, which provides as follows:

> "Notice of arrival of goods will be given promptly to the consignee or to the person indicated on the face hereof as the person to be notified. *On arrival of the goods at the place of destination, subject to the acceptance of other instructions from the shipper prior to arrival of the goods at the place of destination, delivery will be made to, or in accordance with the instructions of the consignee*. If the consignee declines to accept the goods or cannot be communicated with, disposition will be in accordance with instructions of the shipper." (emphasis added)

94 In the present case, the terms of the Richtungsverkehr appear to have included the transportation of the consignment to Schenker Australia's bonded warehouse. So much is suggested by the 17 January 1991 letter set out earlier in these reasons. Evidence from Mr Jones, the shipping officer at Siemens Australia, was to similar effect. In a statement filed on behalf of Siemens Australia, he noted:

> "With the subject shipment, as with all shipments carried by [Schenker Germany] from [Siemens Germany] to [Siemens Australia], the destination point of the carriage agreed with [Schenker Germany] was the deconsolidation point in Australia, which meant either a Schenker Australia warehouse or another customs bonded store. To the best of my knowledge, deconsolidation always took place in a bonded store away from the airport. That occurred with the subject shipment where it was then made available for pick up by [Siemens Australia] or our agent."

It follows that delivery to the Schenker Australia bonded warehouse was contemplated by Siemens Germany, the Schenker Companies and, most importantly, Siemens Australia in its capacity as consignee.

95 Thirdly, the statutory regime in effect at the time of the consignment's arrival at Tullamarine permitted no other possibility. Evidence before the primary judge indicated that Schenker Australia was permitted by an officer of the Australian Customs Service ("Customs"), from at least April 1991, to transport consolidated cargo from Tullamarine to its warehouse for deconsolidation without being required to submit that cargo to customs inspections prior to its removal from the airport. That permission was sought because Schenker Australia lacked facilities to deconsolidate cargo within the boundaries of Tullamarine after 1986 due to the change in location of its bonded warehouse. The permission, which was in evidence, included a condition which provided:

> "Goods must be moved direct and without delay to the specified premises and not, except with the specific approval of the relevant Collector, be

delivered into home consumption pursuant to a Customs Entry, prior to their arrival at those premises."

96 The permission to which this condition attached was granted pursuant to s 40AA of the *Customs Act* 1901 (Cth) ("the Customs Act"). Sub-sections (1) and (3) of that section stated[87]:

> (1) A Collector[88] may give permission in writing to a person specified in the permission to remove goods of a kind specified in the permission that are subject to the control of the Customs from a place so specified to another place so specified and, until the permission is revoked, the permission is authority for the person to remove goods of that kind that are subject to the control of the Customs accordingly.
>
> …
>
> (3) Permission under sub-section (1) … may be given subject to the condition that the person to whom the permission is given complies with such requirements as are specified in the permission, being requirements that, in the opinion of the Collector, are necessary for the protection of the revenue of the Customs or for the purpose of ensuring compliance with the Customs Acts."

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87 Section 7 of the *Customs and Excise Amendment Act* 1982 (Cth) was to amend s 40AA of the Customs Act to allow the Governor-General to make regulations governing the permission regime. The section was to commence by proclamation but no date for proclamation was ever fixed. Consequently, those amendments never entered into force and s 40AA remained as it appears above until its repeal in 1992.

88 "Collector" was relevantly defined as any principal officer of Customs or any officer doing duty in the matter in relation to which the expression is used: s 8(1)(a).

97 Section 40AA was repealed prior to the events giving rise to this appeal[89], but there is no dispute that an equivalent regime existed at the time of the accident and was to be found primarily in s 71E of the Customs Act[90].

98 Moreover, it appears to have been accepted by all parties that an equivalent condition to that in evidence was contained in the permission given to

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89 See s 8 of the *Customs and Excise Legislation Amendment Act* 1992 (Cth).

90 The relevant provisions of s 71E were as follows:

> "(1) Where particular goods, or goods of a particular kind, are, or after their importation will be, subject to Customs control, application may be made to Customs, by document or by computer, in accordance with this section, for permission to move those goods, or goods of that kind, or to move them after their importation, to a place specified in the application.
>
> (2) A documentary movement application must:
>
> (a) be made by the owner of the goods concerned; and
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> (b) be communicated to Customs by giving it to an officer doing duty in relation to import entries or to the movement of goods subject to Customs control.
>
> ...
>
> (3) When an application is communicated to Customs under subsection (2) … an officer of Customs must, by notice in writing in respect of a documentary movement application under subsection (2) ...
>
> (a) give the applicant permission to move the goods to which the application relates in accordance with the application either absolutely or subject to such conditions as are specified in the notice; or
>
> (b) refuse the application and set out in the notice the reasons for that refusal.
>
> (3A) A person to whom a permission has been given under subsection (3) must not, without reasonable excuse, move the goods to which the permission relates otherwise than in accordance with the permission."

Schenker Australia by an officer of Customs, pursuant to s 71E of the Customs Act, and relied upon in relation to the damaged consignment.

99 Accordingly, Schenker Australia was prohibited from delivering the consignment to Siemens Australia at any stage prior to the consignment's arrival at Schenker Australia's bonded warehouse and inspection there by Customs officers. In this context, a portion of cl 2.2 of the waybill is important. This states:

> "2.2 To the extent not in conflict with the foregoing, carriage hereunder and other services performed by each carrier are subject to:
>
> 2.2.1 applicable laws (including national laws implementing the [Warsaw] Convention), government regulations, orders and requirements".

The result is that, on the proper construction of the waybill, the damage sustained to the consignment in the course of complying with requirements necessary in order to effect delivery of that consignment fell within the terms of cl 4 of the waybill.

100 It should be noted that such a conclusion does not render the waybill inconsistent with the Warsaw Convention. As noted earlier, Art 18.3 of the Convention acknowledges that performance of a contract of carriage by air may involve "carriage" by land performed outside the geographic confines of the airport of destination. In those circumstances, the Convention rules relating to liability do not apply and, in their place, those of the waybill will be engaged until the point in time at which delivery may be effected to the consignee under the laws in force in the country of destination.

Authorities in other jurisdictions

101 The Schenker Companies sought to support their construction of the waybill by reference to several United States and United Kingdom decisions. Of most relevance in the present circumstances are two decisions of the United States Court of Appeals of the Ninth Circuit. The first is *Read-Rite Corporation v Burlington Air Express Ltd*[91]. In that case, a consignment of cargo to be transported by air from England to San Francisco was damaged en route to Heathrow Airport. An air waybill apparently in terms similar to the one presently under consideration was in force between the relevant parties. The

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91 186 F 3d 1190 (1999).

Court of Appeals accepted that, because the consignment had been damaged outside the perimeter of the airport of departure, the Warsaw Convention as it operates in the United States did not apply[92]. As a result, the limitation clause contained in the relevant air waybill applied, subject to compliance with "federal common law" restrictions on the enforceability of liability limitation provisions[93].

102 Leaving aside that latter consideration, the analysis in *Read-Rite* is consistent with, albeit not determinative of, the construction of the waybill adopted above. However, it should be noted that the waybill used by the parties in the present case provides on its reverse that when used as an air waybill issued by a freight forwarder in a capacity as contracting carrier for air transportation it is agreed that transportation to the airport of departure (as shown on the face of the waybill) does not constitute part of the contract of air carriage. That provision would strengthen the reasoning in *Read-Rite*.

103 *Read-Rite* was followed by a differently constituted Court of Appeals for the Ninth Circuit in *Albingia Versicherungs AG v Schenker International Inc*[94]. There, the Court was required to determine whether the primary judge had erred in concluding that federal common law[95] applied when determining the enforceability of a limitation clause contained in an air waybill issued by the Schenker company. In so doing, the Court proceeded on the basis that the theft of a consignment of electronic equipment owned by a Siemens company while at the Schenker San Francisco warehouse prior to the consignment's departure to Singapore fell within the terms of the limitation clause contained in the waybill[96]. The terms of that limitation clause did not differ in material respects from those presently under consideration.

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92 186 F 3d 1190 at 1194 (1999).

93 186 F 3d 1190 at 1198-1199 (1999). "Federal common law" is used here to identify one of those areas of law which survives the general application of State law in federal jurisdiction required by the decision of the United States Supreme Court in *Erie Railroad Co v Tompkins* 304 US 64 (1938). See Wright and Kane, *Law of Federal Courts*, 6th ed (2002) at 413-424.

94 344 F 3d 931 (2003).

95 The federal common law rule is (344 F 3d 931 at 939 (2003)) that "the limit on liability is valid and enforceable if the shipper has reasonable notice of it and a fair opportunity to purchase the means to avoid it".

96 344 F 3d 931 at 939-940 (2003).

Gummow J
Callinan J
Heydon J

Conclusion

104 The appeal should be dismissed with costs.

105 KIRBY J. This appeal concerns a limitation clause said to apply to contractual dealings between the parties. It presents a problem that would ordinarily be solved by reference to the intentions of the parties, ascertained objectively. The interest of the case arises from the way in which the contest is affected by the interaction of Australian law with the provisions of international law governing the liability of air carriers and the terms of a printed contract ("the air waybill") upon which the parties are taken to have agreed.

106 The ultimate issue to be decided is whether a clause in the agreement extends beyond "international carriage" of cargo by air so as to import into the broader dealings between the parties a restriction on liability calculated not by reference to the *value* of cargo lost but by reference to the cargo's *weight*.

The facts

107 *Loss by negligence*: On 15 December 1996 an employee of Schenker International (Australia) Pty Ltd ("Schenker Australia") negligently drove a vehicle in Melbourne in such a way as to dislodge one of two pallets carrying valuable telecommunications products ultimately destined for Siemens Ltd ("Siemens Australia"). The products on the dislodged pallet were destroyed. As a consequence, the products on the accompanying pallet were effectively rendered inoperative and irreparable[97]. As a result of the negligence, Siemens Australia sued for damages and was awarded approximately A$1.69 million including interest in respect of its loss[98].

108 *Decision at trial*: The loss occurred outside the perimeter of the Melbourne Airport at Tullamarine in Victoria[99]. The negligence of Schenker Australia and, through it, of its principal, Schenker International Deutschland GmbH ("Schenker Germany"), was not disputed. On the face of things, therefore, Siemens Australia, which was awaiting the cargo from its parent company Siemens AG ("Siemens Germany"), was entitled under Australian law to recover its full loss from the Schenker companies. So, at the trial in the

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97 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 484 [55].

98 *Siemens Ltd v Schenker International (Australia) Pty Ltd (No 2)* [2001] NSWSC 742 at [8].

99 The loss was found to have occurred somewhere en route between the main gate of the Melbourne Airport at Tullamarine and a Schenker Australia warehouse located approximately 4 kilometres by road from the airport: *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 470 [1].

Supreme Court of New South Wales before the primary judge (Barrett J)[100], it did.

109 *Reversal on appeal*: The judgment at trial was reversed by the New South Wales Court of Appeal[101]. That Court upheld the appeal of the Schenker companies. It set aside the judgment for Siemens Australia and substituted a judgment in favour of that company in the sum of US$74,680. That judgment rested on a finding by the Court of Appeal that, in the circumstances of the loss, the Schenker companies were entitled to invoke a limitation clause appearing in an air waybill issued by Schenker Germany (as carrier) to Siemens Germany (as shipper) and to Siemens Australia (as consignee).

110 *The critical issue*: Now, by special leave, Siemens Australia appeals to this Court seeking restoration of the judgment recovered at trial. It submits that the limitation clause in the air waybill had no application to the liability of the Schenker companies at the time of the negligence, being limited by its terms to the liability of a "carrier", in the sense of an "international carrier" by air. The liability of the Schenker companies to Siemens Australia, outside the international air carriage, was, according to the latter, governed not by the air waybill but by the terms of normal contractual arrangements that related to road transport after delivery of the cargo to the Melbourne Airport, being the airport of destination of the "carriage" named in the air waybill. Siemens Australia argued that there was no agreed limitation of liability applicable to these wider contractual arrangements.

The agreement between the parties

111 *The parties' contractual arrangements*: Further facts relevant to the resolution of this appeal are set out in the reasons of the other members of this Court[102]. Those reasons contain an analysis of the broader contractual dealings between the Siemens companies and the Schenker companies, both in Germany and Australia. The air waybill concerned but one aspect of those arrangements.

112 Remarkably enough, the evidence at trial showed that Siemens Germany had dealt with Schenker Germany since the nineteenth century when the latter began providing transport services for Siemens' products. As might be expected,

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100 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469.

101 *Schenker International (Australia) Pty Ltd v Siemens Ltd* [2002] NSWCA 172. See reasons of McHugh ACJ at [5], [39]-[40], [48]-[49], [62]-[64].

102 Reasons of McHugh ACJ at [6]-[36]; reasons of Gummow, Callinan and Heydon JJ ("the joint reasons") at [72]-[87].

in a relationship extending over such a long time, the terms of the legally enforceable rights and obligations of the parties were not all spelt out with precision. They were described by reference to an arrangement encapsulated in the German language by the noun *Richtungsverkehr*[103].

113 Some objective evidence of the terms of the relationship between the companies emerged from exchanges of correspondence that occurred between the German companies in 1991 when the Siemens companies questioned Schenker Germany's charges. This caused Schenker Germany to spell out, in some detail, the full range of the services that it provided. Schenker Germany was at pains to emphasise that those services went far beyond the international carriage of cargo by air. They included various services before and after such carriage from places in Germany to places in Australia.

114 *A broader ambit of dealings*: Some of the foregoing correspondence is set out in the other reasons[104]. The primary judge accepted that the *Richtungsverkehr* commenced at the uplift of the Siemens products at various Siemens factories in Germany, and proceeded through the performance by the Schenker companies of their "variety of services" until the ultimate "hand-over of the goods from Schenker stores in Australia"[105]. By necessary inference, the terms of the contractual arrangements governing the rights of the Siemens companies and the duties of the Schenker companies extended beyond those apt to be governed by the law relating to the international carriage of cargo by *air* and contractual documents (such as an air waybill) drawn to govern the international *air* "carriage" aspect of the relationship.

115 It is important to understand this background of dealings between the parties in order to appreciate the conclusion reached by the primary judge concerning the contractual terms governing the parties once the international carriage of cargo by air was complete. He found that such "carriage" was concluded when the cargo left the perimeter of the aerodrome of Melbourne Airport. At the time the cargo was lost and damaged, it was on its way, beyond that airport, to a warehouse of Schenker Australia in pursuance of the wider *Richtungsverkehr* arrangements provided by the Schenker companies to their Siemens clients. According to Siemens Australia, the "carriage", in the sense of

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103 Literally "direct traffic" or more colloquially "directed traffic services".

104 Reasons of McHugh ACJ at [14]; joint reasons at [79].

105 Letter from Schenker Australia to Siemens Australia of 5 May 1994 quoted by the primary judge: *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 479-480 [35].

the international air carriage mentioned in the air waybill, was over. The limitation provision appearing in that document was inapplicable.

The Warsaw Convention on international air carriage

116 *The Convention and legislation*: Set out elsewhere[106] are relevant terms of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, as amended at The Hague in 1955[107]. The Convention so amended (which, in deference to the style adopted in the joint reasons, and at some sacrifice to accuracy, I shall call "the Warsaw Convention") is Sched 2 to the *Civil Aviation (Carriers' Liability) Act* 1959 (Cth) ("the Carriers' Liability Act"). By that Act, the Warsaw Convention, so defined, is given the force of law in Australia "in relation to any carriage by air to which the Convention applies"[108].

117 Both to secure Australia's compliance with the terms of the Warsaw Convention and doubtless to ensure the unquestioned validity of the Carriers' Liability Act under the Constitution[109], the Carriers' Liability Act adheres closely to the terms of the Warsaw Convention. The Convention itself contains in Art 22(2)(a) a severe limitation on the "liability of the carrier" of cargo, as defined. It does so, save for an immaterial exception, in every case to which the Warsaw Convention applies. Had that article of the Warsaw Convention been applicable to the liability of the Schenker companies to Siemens Australia, the recovery of the latter would have been limited to the equivalent of 250 francs per kilogram. Presumably, the original idea behind such a limitation, calculated by reference to the weight of the cargo, was that weight, rather than value, was the prime determinant of the cost of the international carriage of cargo by *air* and thus of the financial return to the *air* carriers involved. Weight was thus made the determinant of the liability of *air* carriers with respect to the loss of the cargo that they carried by *air*.

118 *The Convention did not apply*: At trial, the Schenker companies invoked the limitation provision of the Warsaw Convention. That defence had to be considered first by the primary judge. This was because, as he pointed out, if the

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106 Reasons of McHugh ACJ at [18]-[23]; joint reasons at [81]-[83].

107 Done at Warsaw on 12 October 1929, amended at The Hague on 28 September 1955, 1963 *Australia Treaty Series* 18.

108 s 11(1).

109 Constitution, s 51(xxix). See *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 129-132, 172, 231-232, 262-264.

Convention limitation applied, it governed not only the amount of recovery but also specified the basis of the liability of the Schenker companies[110].

119 The primary judge concluded that the Warsaw Convention did not apply to the "carriage" at the time of the loss of the goods belonging to Siemens Australia[111]. He reached that view on the basis that the liability regime created by the Warsaw Convention had no application beyond the perimeter of the Melbourne Tullamarine "aerodrome"[112]. The Court of Appeal unanimously upheld this conclusion[113]. So now do the other members of this Court. On the supposed application of the Warsaw Convention the primary judge was clearly correct. In this respect I agree with the reasons of McHugh ACJ and with the joint reasons.

120 *Reliance on the contractual limitation*: Beaten down by unanimous conclusions against the argument based on the Warsaw Convention (which Meagher JA described as having been pressed on the Court of Appeal without "over much enthusiasm"[114]), the Schenker companies filed no notice of contention in this Court to assert the application of the Warsaw Convention. Instead, they concentrated their arguments on an alleged contractual limitation which they traced to cl 4 of the air waybill. In this way, that clause became the only potential source of the limitation in issue[115]. It follows that the ascertainment of its meaning and application presents the critical point of divergence between the primary judge and the Court of Appeal which this Court must resolve.

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110 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 472 [6].

111 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 477 [25].

112 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 477 [23] referring to the Warsaw Convention, Art 18.2.

113 *Schenker International (Australia) Pty Ltd v Siemens Ltd* [2002] NSWCA 172 at [4] per Meagher JA, [20] per Sheller JA, [40] per Stein JA.

114 *Schenker International (Australia) Pty Ltd v Siemens Ltd* [2002] NSWCA 172 at [4].

115 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 477-478 [26].

The limitation clause in the air waybill

121 *The terms of cl 4*: Although cl 4 of the applicable air waybill[116] is set out in the other reasons, I will repeat it because it is determinative. I will add a little emphasis:

> "Except as otherwise provided in *carrier's* tariffs or conditions of carriage, in *carriage* to which the Warsaw Convention does not apply *carriers'* liability shall not exceed USD 20.00 or the equivalent per kilogram of goods lost, damaged or delayed, unless a higher value is declared by the shipper and a supplementary charge paid."

122 It may be accepted that the air waybill became part of the contractual arrangements between Schenker Germany and the Siemens companies. It did so both by its terms and by the course of dealings between the two corporate groups. Siemens Australia did not deny this. The contest between the parties concerned the ambit of the air waybill and whether, like the Warsaw Convention itself, it was confined to the international carriage by air to which it refers and was thus limited in operation to the perimeter of the aerodrome[117]. The Schenker companies submitted that the air waybill extended more generally, so as to become part of the terms of the more extensive contractual dealings between the parties, namely the *Richtungsverkehr*. In short, the air waybill defined the rights and obligations of the Schenker companies in relation to the Siemens companies beyond the rights and obligations defined by the Warsaw Convention and therefore applied to the transport service being performed when the loss occurred.

123 *Arguments for incorporation*: A quick reading of the conditions of contract in the air waybill might lead to the conclusion reached by the Court of Appeal and now by a majority of this Court. On the face of the air waybill, the "carrier" is nominated as Schenker Germany and the address of the "first carrier" is given as Berlin-Tegel Airport. In the Conditions of Contract, cl 1 states that:

> "As used in this contract 'carrier' means all air carriers that carry or undertake to carry the goods hereunder or perform any other services incidental to such air carriage".

124 The delivery of goods beyond the aerodrome might be regarded, in the context of the *Richtungsverkehr*, as "services incidental to such air carriage". On

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116 The respective terms and operation of the Master Air Waybill and the House Air Waybill are explained in the reasons of McHugh ACJ at [25]-[36]. The latter is modelled on the former.

117 Air waybill, cll 1, 2.1.

this footing, the incorporation of the limitation provisions of cl 4 of the conditions of contract into the broader contractual arrangements between the parties appears relatively simple. Although the Warsaw Convention did not "apply" to the "carriage" in question, arguably, cl 4 was broad enough to expand the limitation upon carriers' liability. Schenker Germany was such a "carrier". Schenker Australia was, in this respect, its agent. Accordingly, so the argument ran, the protection which Schenker Australia failed to obtain under the Warsaw Convention was picked up by the incorporation, in the contractual conditions binding the parties, of the limitation expressed in cl 4 of the air waybill.

125 In support of the appeal to the contractual terms, the Schenker companies pointed to cl 11. Upon one view, that clause anticipates the extension of the conditions of contract contained in the air waybill to activities and places beyond the perimeter of the aerodrome:

> "Notice of arrival of goods will be given promptly to the consignee … On arrival of the goods at the place of destination, subject to the acceptance of other instructions from the shipper prior to arrival of the goods at the place of destination, delivery will be made to, or in accordance with the instructions of the consignee."

126 If this provision envisaged delivery outside the perimeter of the aerodrome (as was argued to be the case because of the location of the warehouse of Schenker Australia at some distance from the aerodrome in Melbourne), the obligation of "delivery" contemplated by the air waybill meant, so the Schenker companies submitted, delivery at least to the warehouse of Schenker Australia. This was what was happening when the negligence occurred that led to the loss for which Siemens Australia sued. It thus occurred during "carriage" within cl 4. It followed that the limitation contained within that clause applied.

127 *The contrary view*: Most questions involving the interpretation of disputed documents lend themselves to differing outcomes, at least by the time they reach a final court[118]. Because I agree with the primary judge, I must explain the considerations that have led me to differ from the Court of Appeal and from the majority in this Court.

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118 *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 77 ALJR 1515 at 1524 [42] per McHugh J; 200 ALR 157 at 168; *Maroney v The Queen* (2003) 78 ALJR 51 at 62 [61]; 202 ALR 405 at 420.

The meaning of cl 4 of the air waybill

128 *The context – an air waybill*: Lord Steyn has remarked, with only a little overstatement, that in the law "context is everything"[119]. The task before this Court is to ascertain and declare the contractual terms governing the parties at the time of the negligence of Schenker Australia. Despite their earlier exchange of correspondence, directed to exactly what the Schenker companies did for the Siemens companies, no express mention was made there of any limitation of liability with respect to the activities of the Schenker companies beyond the international air carriage of cargo. The only way that the limitation in cl 4 of the air waybill could be incorporated as a limitation of liability otherwise attaching to the services offered by the Schenker companies, before and after the "international carriage" of the cargo by air, was by the incorporation of cl 4. Did this occur? The context argues against such incorporation.

129 The limitation clause exists in a special agreement described as an *air* waybill. Ostensibly, it was concerned with *air* carriage and specifically "international carriage" *by air*. So much appears clear from the repeated references throughout the air waybill to the "Warsaw Convention". The concern, and only concern, of that Convention is with "international carriage"[120], relevantly of cargo, *by air*. On the face of things it would therefore be an odd place to find a condition, limiting the liability of the Schenker companies for their many other services *beyond* the international carriage of cargo by air, in a clause of a printed document addressed to a particular and limited aspect of the dealings between the parties.

130 Moreover, as Schenker Germany had been at pains to emphasise in the exchange of correspondence, the aspect of the relationship with the Siemens companies that involved carriage by air was but a small portion of the wider services that it offered. When given a chance to explain those services, Schenker Germany said nothing about the incorporation of a special condition limiting liability for those wider services. Ordinarily, in a business context, one would therefore infer that the normal rules of legal liability would attach to such wider services. This would leave the limitation of liability in cl 4 to apply only to the "international carriage" *by air*.

131 Closer analysis of the air waybill and of the contractual relations between the parties might possibly result in a contrary conclusion. However, there was nothing in the evidence at trial about the *Richtungsverkehr* that suggested an

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119 *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at 548 [28].

120 Air waybill, cl 2.1.

express agreement to a limitation of liability beyond the "international carriage" to which the air waybill was primarily addressed. To obtain such a result, therefore, the Schenker companies were forced to rely upon a view of the operation of the air waybill derived from the terms of a condition contained in a document whose general character and purpose would not necessarily alert a party to the wider ambit now postulated. These considerations lead me to approach the Schenker companies' arguments with considerable caution.

132 *Purpose of the air waybill*: Contested words must never be construed in isolation. They take their meaning from their context and purpose. The air waybill is not simply another written agreement between parties that happen to be involved, incidentally, in the "international carriage" of cargo by air. The existence of the air waybill is contemplated by several provisions of the Warsaw Convention. It is the standard agreement for the international carriage of cargo by air referred to in that Convention.

133 Section 3 of Ch II of the Warsaw Convention (Arts 5-16) is headed "Air Waybill". It contains detailed provisions governing the availability, contents and consequences of an air waybill for the purposes of the Convention. Each party to the carriage of cargo (carrier and consignor) has the right under the Convention to require the making and acceptance of such a document[121]. In the absence of an air waybill, or if, although provided, it does not contain certain information, a "carrier" is not entitled to avail itself of the provisions of the Warsaw Convention limiting its liability[122].

134 By the terms of the Convention, the air waybill is *prima facie* evidence of the conclusion of the contract, of the receipt of the cargo and of the stated conditions of carriage[123]. A clear objective of such provisions in the Warsaw Convention was to secure certainty and uniformity, relevantly in relation to the international carriage of cargo by air. As an incident of that purpose, an air waybill that conformed to the Convention could provide the specified limitation of liability to a carrier engaged in the "international carriage" of cargo[124].

135 In the years since its establishment, the International Air Transport Association ("IATA") has prepared standard form air waybills[125], drafted to give

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121 Warsaw Convention, Art 5.1.

122 Warsaw Convention, Art 9.

123 Warsaw Convention, Art 11.1.

124 Warsaw Convention, Art 22.

125 D'Arcy, Murray and Cleave, *Schmitthoff's Export Trade: The Law and Practice of International Trade*, 10th ed (2000) at 335-336 [17-020]; *Shawcross and*

(Footnote continues on next page)

effect to the objectives of the Warsaw Convention. Such air waybills have been designed to apply to all situations of carriage *by air*. These include cases where the Warsaw Convention applies (that is, international carriage by air between the territory of states parties to the Convention). But the IATA standard air waybill is also designed to apply to cases of air carriage where the Warsaw Convention is not engaged (for example, in the domestic carriage of cargo by air or in international carriage of cargo by air that is not between places within the territories of two states parties to the Convention)[126].

136 This understanding of the purpose of the standard air waybill helps to explain why the term relevant to "carriage" contemplates application to "other services"[127], not being "carriage" as defined in the Warsaw Convention. Principally, such "other services" were designed to cover air carriage (or any authorised substitute for air carriage), relevantly, of cargo. As befitted its integration with the Warsaw Convention, the air waybill was not, therefore, designed to govern transport or other arrangements not carried out *by air*. On the contrary, the IATA air waybill, such as that issued by Schenker Germany to the Siemens companies in the present case, was intended to provide uniformity of liability and conditions for all forms of carriage *by air*[128].

137 The air waybill was drafted to recognise the reality that, in a particular case, parts (or the entirety) of an international carriage of cargo by air might fall outside the Warsaw Convention[129]. As the primary judge pointed out, even the most cursory glance at the air waybill in question in this case indicates that its provisions and purposes were moulded to conform to the Warsaw Convention[130].

Beaumont: Air Law, 4th ed (2003), vol 1, div VII at [1162]. See also International Federation of Freight Forwarders Associations, *The Air Waybill Recommended by FIATA for Use by Freight Forwarders*, (1996), par 1.1.

126 *Samuel Montagu & Co Ltd v Swiss Air Transport Co Ltd* [1966] 2 QB 306 at 316 per Salmon LJ.

127 Air waybill, cl 1.

128 Goldhirsch, *The Warsaw Convention Annotated: A Legal Handbook*, (2000) at 569. See also *Shawcross and Beaumont: Air Law*, 4th ed (2003), vol 1, div VII at [319], [328]-[329], [1162].

129 By involving a domestic or internal (non-"international") carriage or by involving carriage between the territory of non-states parties to the Warsaw Convention or the territory of a non-state party and one of the "high contracting parties". See Warsaw Convention, Art 18.

130 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 480 [36]-[37].

138 By express provision of the Warsaw Convention "[t]he period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome"[131]. In such circumstances, it would be unsurprising to conclude that a standard form air waybill, designed to provide for *air* carriage of cargo, was limited in its purpose and application and generally inapt for operation to a wider range of services happening between the parties. In particular, the references to the Warsaw Convention in cll 1, 2.1 and 4 of the conditions of contract in the subject air waybill indicate that that air waybill is confined to air carriage except for the identified instances where land transportation occurs as a substitute for air carriage. Such substitution is contemplated by the reference in cl 8.1 of the air waybill to the exceptional use by the carrier of "other means of transportation". In the context, the only possible ground transportation to which the air waybill therefore applied was (1) ground transportation within the aerodrome which was *part* of the international carriage by air; and (2) ground transportation as a *substitute* for air carriage for part of the carriage otherwise to be performed by air[132].

139 *Analysis of air waybill's terms*: With these contextual considerations in mind, I now turn to the language of the subject air waybill. Close examination of it supports the Siemens companies' submission that the mention of "carriage" in cl 4 of the conditions applies only to carriage by air.

140 The starting point is to notice that cl 1 draws a distinction between those who perform the relevant tasks of carrying ("air carriers") and those who may also provide "other services". The clause states (with emphasis):

> "As used in this contract 'carrier' means all *air* carriers that carry or undertake to carry the goods hereunder or perform any other services *incidental to such air carriage*".

141 The critical word is "such". The "carriage" with which the air waybill is concerned is, and is only, "air carriage". Unsurprisingly, the language of the conditions gives effect to this meaning. "Carriage" in this document ordinarily means "air carriage".

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131 Warsaw Convention, Art 18.3.

132 Warsaw Convention, Art 18. For passenger, baggage and cargo transportation involving short journeys it is not uncommon for air carriers in certain places to substitute ground transportation, particularly to avoid delays in adverse weather conditions or following missed connections. The context of cl 8.1 of the air waybill supports this construction, being concerned with the use of alternative carriers, alternative routing and other means of transportation.

142 In cl 2.1 a definition of "carriage" is given. The purpose is made clear by the opening words, "[c]arriage hereunder". By this phrase, the drafter indicates that, whenever "carriage" is used in the air waybill, it is to take the meaning indicated in cl 2.1. Very clear language would be required to expand, or alter, this express definition. Further, the words used are only really apt to apply to air carriage. The distinction in cl 2.1 between carriage subject to the Warsaw Convention and otherwise is not between air carriage and carriage by truck, car, ship, barge, horse, camel or donkey. It is between "international carriage" by air as defined by the Warsaw Convention and other "carriage" by air which, by the terms of the Convention, is outside its application.

143 Carriage within the airport ("aerodrome") whether on board the aircraft or during loading or unloading, presenting or removing, is treated as part of "international carriage" within the Convention. In order to provide a clear rule governing the ambit of the application of the Convention, the perimeter of the aerodrome is fixed as the criterion. Of its very nature, as invariably in Australia, this will normally be a defined and secure place. As the Convention applies only to carriage by air to, from and within that space, it is unsurprising that the air waybill, designed to give effect to the Convention, is similarly so confined.

144 Whilst it is true that the Convention contemplates that provision might be included in an air waybill for conditions of carriage by modes other than carriage by air[133], any such condition must be incidental, and subject, to those regarding the "carriage by air". This alone is governed by the provisions of the Convention and then only in the case of "international carriage" as there defined[134].

145 The statement in cl 2.1 of the air waybill that "[c]arriage hereunder" is subject to the Warsaw Convention is obviously a reflection of Art 8(q) of the original Warsaw Convention. That sub-article specifies that the air waybill must contain a statement that the "carriage" is subject to the rules relating to liability established by the Convention. In such a context, the word "carriage" in the air waybill could only mean air carriage by reason of Art 31[135]. It follows that cl 2.1 in the air waybill, by its reference to "carriage", refers, and refers only, to air

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133 Warsaw Convention, Art 31.2. The permission is subject to observance of provisions of the Warsaw Convention as regards the carriage by air.

134 Warsaw Convention, Art 1.2.

135 Warsaw Convention, Art 31.1 provides: "In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1."

carriage. If it were intended to refer to other forms of carriage by the many alternatives that are possible, or to other activities in the vast range of potential interaction between a carrier and its customers, a different, clearer and supplementary condition would have been included in the air waybill. Its purpose is to provide a mirror image of the terms of the Warsaw Convention. The air waybill in issue in this appeal does this.

146 Still further support for this confined use of the notion of "carriage" is given by the distinction drawn in cll 1 and 2.2 of the air waybill between "carriage" and "other services". Movement of the goods by road beyond the perimeter of the aerodrome could be such an "other service". But in so far as the conditions of the contract in the air waybill referred to the notion of "carriage", it was addressed to carriage *by air*.

147 Once this definition of "carriage" is adopted, the meaning of that word, appearing in the limitation clause (cl 4), becomes clear. Its purpose is to address "carriage" to which the Warsaw Convention does not apply, that is, air carriage outside the category of "international carriage", as defined, which enlivens the Warsaw Convention[136]. Confirmation that this is the intended scope of cl 4 of the air waybill is provided by internal evidence within the clause. It provides a limitation of liability ("shall not exceed USD 20.00 or the equivalent per kilogram of goods lost, damaged or delayed") approximately equivalent to the limitation provided by the Convention (Art 22.2(a)).

148 It would be understandable for the air waybill to provide by contract such a limitation of liability upon analogous activities of air transport which fell outside the Convention regime because the "carriage" in question, although by air, was not covered (being domestic air carriage or international air carriage between the territory of states that were not parties to the Warsaw Convention or between one state that was and another that was not a party to the Convention). For the imposition of liability with respect to the myriad transport and other activities beyond the perimeter of the aerodrome, one would expect a more variable and discerning criterion of liability. Such a criterion would take into account the duration, distance, circumstances and mode of the transport and other services involved.

149 These considerations reinforce the conclusion, derived from the language of cl 4 in the air waybill, that it is concerned, and concerned only, with air carriage. The primary judge was correct to so conclude. He was therefore right to hold that cl 4 did not, by its terms, extend to impose a contractual limitation of

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136 Warsaw Convention, Art 1.2.

liability on Siemens Australia for loss caused by the negligence of Schenker Australia's truck driver outside the aerodrome[137].

150 This conclusion makes it unnecessary to consider whether, had cl 4 applied to the contractual relationship between Schenker Germany and the Siemens companies, Schenker Australia was entitled to its benefits, directly or by derivative means[138]. The Court of Appeal erred in disturbing the primary judge's conclusion.

151 *Conclusion – limitation inapplicable*: Nothing in the language of cl 4 of the conditions of contract in the air waybill, understood in its context and having regard to its purposes, casts doubt upon this conclusion. The "Airport of Destination" identified on the face of the document was the airport at Melbourne: a designation that confirms the limitation of the subject "carriage" to that contemplated by the Warsaw Convention by reference to the air carriage.

152 Pursuant to cl 11 of the air waybill, delivery might well be beyond the boundary of the airport ("aerodrome"). In the case of Schenker Australia, its warehousing arrangements virtually required this as a matter of fact. But such facts, peculiar to this case, say nothing about the scope of the limitation on liability provided in cl 4. It was confined to "carriage" as defined. For the reasons given, that activity, in this context, was limited to air carriage. In its terms, the clause thus had no application to carriage of goods by truck outside the aerodrome. To such carriage, in default of a specific and additional limitation or exception clause, the ordinary law of liability for negligence applied.

Consistent application of international standard terms

153 *The rule of international comity*: Is the foregoing interpretation of the ambit of cl 4 inconsistent with any consideration of similar provisions in air waybills by courts of other countries? In the interests of international comity[139] and the consistent interpretation of documents having a source in an international

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137 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 481 [41].

138 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 481 [41] referring to *Life Savers (Australasia) Ltd v Frigmobile Pty Ltd* [1983] 1 NSWLR 431.

139 See Brownlie, *Principles of Public International Law*, 6th ed (2003) at 28.

treaty, it is appropriate to take any contrary opinions into account so as to promote a generally consistent approach to common transborder problems[140].

154 The approach of comity is the settled attitude of this Court in such instances[141]; and so of other Australian courts[142]. The primary judge was correct to tackle the two issues before him in this way[143]. The Court of Appeal did likewise[144]. It represents a sensible adaptation of the common law in the construction of disputed language appearing in international treaties and domestic legislation giving them effect and in instruments drafted for related purposes. The approach adopted is similar to that applying to legal divergences within a federation[145].

155 International case law certainly lent support to the conclusion, now reached at each level in the disposition of this case by Australian courts, concerning the inapplicability of the limitation of liability provided in the Warsaw Convention to the negligence of the carrier occurring in road transport

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140 Sturley, "International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation", (1987) 27 *Virginia Journal of International Law* 729 at 731-746. See also Mankiewicz, "Conflicting Interpretations of the Warsaw Air Transport Treaty", (1970) 18 *American Journal of Comparative Law* 177 at 183.

141 *Shipping Corporation of India Ltd v Gamlen Chemical Co A/Asia Pty Ltd* (1980) 147 CLR 142 at 159; *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640 at 675, 687-688; *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad* (1998) 196 CLR 161 at 176 [38], 186 [71], 213 [137]; cf *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 240, 294.

142 *SS Pharmaceutical Co Ltd v Qantas Airways Ltd* [1991] 1 Lloyd's Rep 288 at 294 (NSWCA); *Emery Air Freight Corporation v Merck Sharpe & Dohme (Australia) Pty Ltd* (1999) 47 NSWLR 696 at 704-707 [49]-[65].

143 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2001) 162 FLR 469 at 474-477 [16]-[22].

144 *Schenker International (Australia) Pty Ltd v Siemens Ltd* [2002] NSWCA 172 at [9], [35], [37]-[38].

145 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492.

beyond the aerodrome. Courts in the United States of America[146], England[147] and New Zealand[148] have adopted a similar interpretation of the ambit of that Convention. Like the Australian courts, they have pointed to the language of the Convention and to the advantage which a clear rule, defined by reference to the ascertainable perimeters of the aerodrome place, introduces into the respective rights and liabilities of carrier, consignor and consignee under the Convention.

156 By analogy, a similar approach would apply to cases concerned not with the Convention, as such, but with a "combined carriage" performed "partly by air and partly by any other mode of carriage" where it is suggested that the air waybill applicable to the air carriage segment of the journey provides conditions also applicable to the conduct of an "other mode of carriage"[149]. It is therefore appropriate to consider cases in which it is said that overseas courts have decided like questions.

157 *Distinguishable international case law*: In the Court of Appeal reference was made to three categories of case in an endeavour to support the proposition that the present air waybill, unlike the Convention, operated by contractual extension beyond the perimeter of the aerodrome of destination to restrict the consignee's rights of recovery for loss occurring there.

158 The first category of case involved a reference to the reasons of Lord Denning MR in *Samuel Montagu & Co Ltd v Swiss Air Transport Co Ltd*[150]. His Lordship was there dealing with a clause in an air waybill expressed in language similar to cl 2.1 in the present matter. He remarked that the clause was "just another way of saying that the carriage is subject to the rules so far as the same are applicable"[151]. However, the issue in *Samuel Montagu* was whether the

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146 *Victoria Sales Corporation v Emery Air Freight Inc* 917 F 2d 705 at 707 (1990); *General Electric Company v Harper Robinson & Co* 818 F Supp 31 (1993); *Read-Rite Corporation v Burlington Air Express Ltd* 186 F 3d 1190 at 1194 (1999); *HIH Marine Insurance Services Inc v Gateway Freight Services* 116 Cal Rptr 2d 893 at 897 (2002); *Albingia Versicherungs AG v Schenker International Inc* 344 F 3d 931 at 939-940 (2003).

147 *Rolls Royce Plc v Heavylift-Volga DNEPR Ltd* [2000] 1 Lloyd's Rep 653 at 658-659 [31]-[32].

148 *International Cargo Express Ltd v U-Jin Enterprises Inc* [1997] 2 NZLR 712 at 720.

149 Warsaw Convention, Art 31.

150 [1966] 2 QB 306.

151 *Samuel Montagu & Co Ltd v Swiss Air Transport Co Ltd* [1966] 2 QB 306 at 314.

language of the clause sufficiently complied with Art 8(q) of the original Warsaw Convention requiring that the air waybill contain a statement that the carriage is subject to the Convention's rules relating to liability. The observation made the point that some only of the Convention's provisions would apply to international carriage since the Convention also dealt with liability in respect of passengers and baggage, in addition to cargo.

159 There is nothing inconsistent between the reasoning in *Samuel Montagu* and the opinion which I favour in the present case. Indeed, that case highlights the unacceptability of extending the words "[c]arriage hereunder" in cl 2.1 of the conditions in the air waybill to all modes of carriage. Clause 2.1 *prima facie* renders "carriage" subject to the rules relating to liability established by the Warsaw Convention. It would contradict Art 31 of the Convention if the "[c]arriage hereunder" were to apply at large to all modes of transport, however performed and wherever occurring. This is because Art 31 states expressly that the provisions of the Convention apply only to carriage by air and then only if such carriage by air is "international carriage" within the terms of Art 1. It is only when "[c]arriage hereunder" means "air carriage" that cl 2.1 in the conditions in the air waybill correctly reflects the provisions as to liability established by the Convention.

160 Secondly, the Court of Appeal drew upon what Sheller JA[152] took to be the reasoning of the English Court of Appeal in *Quantum Corporation Inc v Plane Trucking Ltd*[153]. That case concerned the operation of the Convention on the Contract for the International Carriage of Goods by Road ("the Road Convention"). However, the factual circumstances were quite different from those of the present case. There, the road segment of the journey was part of the transportation of the cargo to the place of destination nominated in the air waybill. Accordingly, the English Court of Appeal did not consider whether the limitation in cl 4 applied. By force of English law, the Court was required to give effect to the Road Convention[154]. The holding in the case was addressed to the application to the facts of Art 1 of the Road Convention. I do not accept that the air waybill remained the contract for "carriage that governed the road transportation from the airport to Schenker Australia's under bond warehouse"[155].

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152 *Schenker International (Australia) Pty Ltd v Siemens Ltd* [2002] NSWCA 172 at [30]-[35].

153 [2002] 1 WLR 2678; [2003] 1 All ER 873.

154 *Carriage of Goods by Road Act* 1965 (UK).

155 *Schenker International (Australia) Pty Ltd v Siemens Ltd* [2002] NSWCA 172 at [36] per Sheller JA.

I see nothing in the very different circumstances considered in the *Quantum Corporation* case that suggests, or warrants, a contrary conclusion.

161 That leaves the third category comprising two United States cases: *Aerofloral Inc v Rodricargo Express Corporation*[156] and *Read-Rite Corporation v Burlington Air Express Ltd*[157]. The decision in *Aerofloral* turned on whether the relevant cargo was any longer "in carriage" when it was lost. The Warsaw Convention, as applicable in the United States, had no application because, as here, the goods had been removed from the Miami International Airport to a warehouse located nearby, but outside the airport perimeter[158]. The majority in the District Court of Appeal of Florida held that warehousing the goods was a service "incidental to such carriage" and fell within the definition of the term "carrier" in the limitation clause of the air waybill. The Court remanded the matter and directed the trial judge to address whether warehousing was also encompassed in the term "carriage". This preliminary view of the limitation clause does not dissuade me from the interpretation of the air waybill that I favour.

162 The applicability of the equivalent of cl 4 was not argued in *Read-Rite*. As the other members of this Court point out[159], *Read-Rite* was substantively concerned (as was a later case[160]) with the requirements in the United States of federal common law. Under that law, a contractual limitation of liability is valid and enforceable if the shipper has reasonable notice of it and a fair opportunity to purchase the means to avoid it. The existence of those questions, the terms of that body of applicable law and the circumstances concerning the purchase of separate insurance[161] sharply distinguish the considerations before the United States courts from those before this Court.

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156 756 So 2d 234 (2000). See *Schenker International (Australia) Pty Ltd v Siemens Ltd* [2002] NSWCA 172 at [37].

157 186 F 3d 1190 (1999).

158 *Aerofloral Inc v Rodricargo Express Corporation* 756 So 2d 234 at 235 (2000).

159 Reasons of McHugh ACJ at [59]; joint reasons at [101].

160 *Albingia Versicherungs AG v Schenker International Inc* 344 F 3d 931 (2003).

161 Held as evidencing "obvious recognition of the waybill limitation" and therefore determinative of the applicability of the limitation clause in the air waybill in *Albingia Versicherungs AG v Schenker International Inc* 344 F 3d 931 at 939-940 (2003), following *Read-Rite Corporation v Burlington Air Express Ltd* 186 F 3d 1190 at 1198-1199 (1999).

163 In *Read-Rite* the United States Court of Appeals for the Ninth Circuit ultimately had before it a challenge to a summary judgment granted at first instance in favour of the carrier. The question posed on appeal was whether, under the federal common law, the carrier had successfully limited its liability by contractual provisions in its air waybills. The Court affirmed the trial judge's conclusion. In doing so, the Court applied established federal law. That holds that the loss or damage to goods by interstate common carriers by air is governed by federal common law[162]. The Court also had regard to federal legislation on the subject[163]. The true basis for the decision was a finding that there was no miscarriage of the primary judge's discretion to enter summary judgment[164]. The Court did not address, as this Court has, the different question of the applicability and meaning of the limitation clause appearing in the standard air waybill. The case is therefore quite different from the present.

164 *Conclusion – no settled rule*: It follows that none of the case law propounded by the Schenker companies suggests, still less requires, a conclusion different to that which the application of Australian law to the contractual arrangements of the parties would otherwise demand[165].

Resolution of ambiguity in the ambit of the limitation

165 *Failure to propound a clear limitation*: There is one final consideration. The issue concerning the applicability of the limitation provision in cl 4 of the parties' air waybill to the contractual relationships of Siemens Australia with the Schenker companies was one for evidence, inference and judgment as well as analysis of the language of the air waybill. In the event of ambiguity concerning the ambit of cl 4, and whether it applied beyond the "international carriage" of cargo by air for which it was designed, such ambiguity should be resolved by reference to the conduct of the parties propounding the clause. These are the Schenker companies which, as "carrier", had the full opportunity in their correspondence with Siemens Germany, or otherwise, to spell out any relevant conditions of their dealings, including any limitation of liability upon which they relied in respect of the *Richtungsverkehr*. This they failed to do[166].

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162 *Deiro v American Airlines Inc* 816 F 2d 1360 at 1365 (1987). See also *Boston & Maine Railroad v Piper* 246 US 439 at 444 (1918).

163 *Read-Rite Corporation v Burlington Air Express Ltd* 186 F 3d 1190 at 1196 (1999).

164 *Read-Rite Corporation v Burlington Air Express Ltd* 186 F 3d 1190 at 1199 (1999).

165 See also reasons of McHugh ACJ at [44].

166 Contrast the clear terms of the air waybill considered in *Jaycees Patou Inc v Pier Air International Ltd* 714 F Supp 81 (1989) referred to in the reasons of McHugh ACJ at [68].

166 Nor did the Schenker companies spell out the wider contractual limitation of liability in the air waybill for which they now argue. On the face of that document, the inference was readily available that the contractual provision of cl 4 applied in the same way as the Warsaw Convention has been held to apply. Each applied only to "carriage". In the context, that meant carriage *by air*. The Warsaw Convention attached to "international carriage" by air as defined. Clause 4 of the conditions in the air waybill attached to air carriage outside the scope of such "international carriage". In neither case did the air waybill expand cl 4 clearly to cover all the unspecified contractual dealings of the parties beyond the perimeter of the aerodrome.

167 *Obligation to diminish rights clearly*: If, then, there is ambiguity in the printed document which the Schenker companies rely upon, the propounded clause should be construed in favour of Siemens Australia[167]. This rule of construction[168] is one that may be invoked effectively as a last resort. But it remains available. In Australia, those who wish to reduce the entitlements of others to prosecute their legal rights to recover damages for conceded negligence must do so clearly[169]. The Schenker companies did not. Instead, they relied on a standard form air waybill and tried to stretch its operation beyond the aerodrome fixed by the Warsaw Convention, claiming that this was what the parties "agreed". That attempt fails.

Orders

168 The judgment of the primary judge should be restored. To give effect to that conclusion the appeal to this Court should be allowed with costs. The judgment of the Court of Appeal of the Supreme Court of New South Wales

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167 cf *Johnson v American Home Assurance Co* (1998) 192 CLR 266 at 274 [19.4].

168 See discussion of the strict and *contra proferentem* rule of construction in the context of limitation of liability provisions appearing in standard form contracts in Seddon and Ellinghaus, *Cheshire & Fifoot's Law of Contract*, 8th Aust ed (2002) at 460-461 [10.74]. See also *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at 602 [74.4] citing and applying *Johnson v American Home Assurance Co* (1998) 192 CLR 266 at 274-275 [19].

169 This standard is also reflected in United States federal common law, as applied in *Aerofloral*, *Read-Rite* and *Albingia*. It requires that, to be valid and enforceable, limitation of liability clauses must be distinctly declared and deliberately accepted: *The Majestic* 166 US 375 at 384-386 (1897); *Deiro v American Airlines Inc* 816 F 2d 1360 at 1363-1365 (1987).

should be set aside. In place thereof, it should be ordered that the appeal to that Court be dismissed with costs.