호주의 항공사법 판례 분석

Siemens Ltd v Schenker International(Aust) Pty Ltd: High Court of Australia determines air waybill limitation clause extends beyond destination airport to road carriage.

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Ⅰ. Introduction

The High Court of Australia, in a landmark judgement handed down on 9 March 2004, *Siemens Ltd v Schenker International (Aust) Pty Ltd*,[1] held by a majority that the limitation clause in the air waybill for goods carried by air which were subsequently damaged while being carried by road outside Tullamarine International Airport, Melbourne, applied not only to the air carriage but to the subsequent removal of the cargo by road to a bonded warehouse beyond the airport destination.

Ⅱ. Facts of the case

In December 1996 Siemens Ltd (Siemens) purchased a large consignment of telecommunications equipment valued at over $A 1.6 million 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.

The equipment was purchased on an FCA (free to carrier) basis, so that, as between seller and purchaser, the property and risk passed at the "FCA point" Tegel Airport, Berlin. Transport of the equipment from Germany to Australia was organized by Schenker International Deutschland GmbH (Schenker Germany). The consignment was consolidated with cargo from other customers of Schenker Germany and forwarded on Singapore Airlines flights SQ7387 and SQ7294. to Tullamarine Airport in Melbourne.

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1) (2004) 205 ALR 232; 2004] HCA 11 9 March 2004 S158/2003. The Commonwealth Law Report (CLR) of this decision had not been published at the date of this commentary.

After arriving at Tullamrine on 13 December, the consignment was collected by an employee of 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 about four kilometres from Tullamarine's main gate. However, as a result of the negligence of the truck driver employed by Schenker Australia, part of the consignment fell off the truck (in transit from Tullamine but before arrival at the Schenker Australia bonded warehouse) and was damaged.

Ⅲ. Litigation

Siemens Australia subsequently brought an action in the Supreme Court of New South Wales[2] seeking damages, interest and costs from Schenker Australia and Schenker Germany (the Schenker companies). The Schenker companies did not dispute their liability for the accident but sought to limit their liability firstly, under the Warsaw Convention incorporated into Australian law under the Civil Aviation *(Carriers' Liability)* Act 1959(Cth) (the *Carriers' Liability Act*), alternatively by reference to the house air waybill issued by Schenker Germany for the consignment.[3]

In the Supreme Court of New South Wales Barrett J rejected the applicability of both the Warsaw Convention and the air waybill and found the Schenker companies jointly and severally liable to Siemens Australia in the amount of $1,688,059.50 including interest. The Schenker companies then appealed to the Supreme Court of Appeal (the Court of Appeal).[4]

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2) *Siemens Ltd v Schenker International (Aust) Pty Ltd* (2001) 162 FLR 469

3) Singapore Airlines issued a master waybill for the consignment andSchenker Germany issued a house air waybill for the same consignment. Only the Schenker Germany waybill was the focus of litigation and the subject of judicial decision. Both air waybills were in IATA standard form

The Court of Appeal of New South Wales found that, while agreeing that the Warsaw Convention did not apply, the terms of the waybill governed the rights and obligations of the parties in relation to the accident which included the limitation of liability in the waybill. The Court of Appeal set aside the orders of Barrett J and in their place entered judgement for Siemens Australia for the limited amount of $US 74,680. Siemens subsequently appealed to the High Court of Australia (the High Court).

The majority of the High Court (Callinan,Gummow,Heydon JJ) , finding for Schenkers, the respondents, stated that two primary issues from the appeal arose to be considered. Firstly, whether the Warsaw Convention, as incorporated into Australian law by the *Carriers' Liability Act*, applied to limit the liability of the Schenker companies. Secondly, whether the limitation of liability in the waybill issued by Schenker Germany for the consignment applied[5]. In dismissing the appeal by Siemens with costs and upholding the judgement of the Court of Appeal, the majority of the High Court ruled that the limitation in the Warsaw Convention did not apply but the limitation in the waybill did apply.

Ⅳ. Richtungsverkehr --"Direct Traffic"

Before the majority of the High Court dealt with the two issues above it considered the contractual arrangements under which the consignment left Germany and arrived in Australia. The commercial relationship dating from the 19th century between Siemens Germany and Schenker Germany known as the "*Richtungsverkehr*" literally 'Direct Traffic," allowed Schenker Germany regularly act as a carrier of goods for Siemens Germany.

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

5) (2004) 205 ALR 232 at 250

The precise legal basis of this arrangement the High Court found to be uncertai n[6]. Neither Siemens or Schenker could indicate a single document setting out specific and current terms omunder which consignments made under the *Richtungsverkehr* were to be carried. However, correspondence on 17 January 1991 was relied on by both Siemens and Schenker, together with the monetary rate applied to the consignment, as evidencing the terms of the Richtungsverkehr currently agreed between them.

The High Court noted Barrett J's findings where he stated:

> "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 to the roles they played in that consignment and transportation. It must also be accepted that when.in accordance with prasctice, a house air waybill was issued in respect of a particular transportation, its terms supplemented those of the standing arrangement'[7]

The majority of the High Court accepted Barrett J's analysis of the contractual underpinnings of the *Richtungsverkehr*, holding that the terms of the standing arrangement included the statements in the correspondence of 17 January 1991.The majority of the high Court regarded the terms of the standing arrangement as necessary to construing the waybill that was issued for the consignment.

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6) (2004) 205 ALR at 251

7) *Siemens Ltd v Schenker International(Aust) Pty Ltd* (2001) 162 FLR 469 at 47

V. Warsaw Convention

Holding that the carriage of the consignment was "international carriage" for the purposes of Art. 1.1 of the Warsaw Convention the High Court regarded it necessary to consider whether the limitations on liability in the Warsaw Convention applied in the present case.

Art. 18.1 provides that:

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

"Carriage by air is defined by Art. 18.2 as :

> "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"

Where the damage took place during "carriage by air", under Art.22.2 the liability of the carrier is prima facie limited to 250 francs per kilogram of the cargo damaged, irrespective of the monetary value of the cargo. Where damage to part of the consignment affects the value of the undamaged remainder, the weight of that undamaged cargo may be taken into account.

Art 18.3 states clearly:

> "the period of carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome"

The High Court in dealing with the term "outside an aerodrome" followed the Court of Appeal in adopting the approach of the Supreme Court judge who held that the phrase should be interpreted to mean the physical boundary of

Tullamarine. It followed that the regime set up by the Warsaw Convention did not apply to limit the liability otherwise arising as a result of the damage sustained to the consignment.

VI. The waybill

The waybill relied on by the Schenker Companies was issued by Schenker Germany on 8 December 1996. The waybill was a standard form recommended by the International Federation of Freight Forwarders Associations (IFFFA). Clause 7 of the waybill provided that any limitation of liability applicable to the carrier applied to, and for the benefit of, the carrier's servants, agents and representatives. Although Schenker Australia was not identified as a party to the waybill, the Supreme Court judge accepted that Schenker Australia was acting as the agent of Schenker Germany during the accident to the consignment and was therefore able to take advantage of the terms of clause 7.The judge also accepted that a sub-bailment or sub-contract arose when Schenker Australia took possession of the cargo at Tullamarine[8]. Both these decisions were upheld by the Court of Appeal and not challenged before the High Court.

The waybill contained a standard reference to limitation under the Warsaw Convention already noted above. There followed a set of provisions entitled "CONDITIONS OF CONTRACT" which contained a clause 4 on which the Schenker Companies relied; it stated:

> "Except as 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.oo or the equivalent per kilogram of goods lost, damaged or delayed, unless a higher value is declared by the

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

shipper and a supplementary charge paid"

Construction of Clause 4

The main point of difference between Schenkers and Siemens was the extent to which clause 4 operated in respect of events occurring beyond the boundaries of the airport of destination nominated as the place of delivery, Tullamarine. Siemens Australia submitted that the waybill operated only in respect of "carriage by air" within the meaning of the Warsaw Convention. The High Court held that accepting Siemen's submission would mean that there was no applicable limitation clause on which the Schenker Companies could rely.

The Supreme Court judge held that the waybill was confined to "carriage by air" and did not cover any "land element."[9] In relation to clause 4 clause 2.1 provided:

> "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 the Convention"

Clause 2.1 read with clause 4 was said to evidence an assumption that carriage "as a whole" would not fall within the Warsaw Convention's definition of "international carriage" On that basis the waybill, including clause 4, would only operate when the *entire* carriage (emphasis by the Court) performed under that waybill did not fall within the Convention. Since the Convention applied before the consignment was removed from the boundaries of Tullamarine, clause 4 could not be relied on by the Schenker companies. This was so even though, at the time the consignment was damaged, the operation of the Convention was at an end.

This construction of the waybill was disputed by the Schenker companies. They

9) *Siemens Ltd v Schenker International (Aust) Pty Ltd* (2001) 162 FLR at 480-1.

submitted that the waybill had to be read in conjunction with the terms of the *Richtungsverkehr*; in particular the requirement that the consignment would be transported from Tullamarine to the bonded warehouse of Schenker Australia. It followed that the waybill in this case continued to operate in its terms at least until delivery to the warehouse had taken place and so applied to the damage to the consignment which occurred en route.

The limitation of liability in clause 4 was only available in respect of "carriage" which is a term not defined in the waybill. However, the waybill included a definition of carrier"carrier" as any carrier which undertakes to carry goods under the waybill " or perform any other services incidental to *such air carriage*" (emphasis added). Siemens Australia relied on this emphasised phrase to support its argument that "carriage" within the meaning of clause 4 was limited to carriage by air.

However, the majority of the High Court listed three factors[10] that suggested a different construction:

1. Clause 4 operated only to carriage to which the Warsaw Convention did not apply. In providing in this way the airwaybill it was held contemplated a disjunction between carriage to which the Convention applied (international carriage by air) and carriage governed solely by the terms of the waybill. Therefore "carriage" in clause 4 had a different meaning from that contained in Art. 18 of the Convention.

2 The definition of carrier relied on by Siemens Australia referred to carriage of goods "hereunder", that is under the terms of the waybill. Importantly, the terms of the waybill provided for transport of goods other than carriage by air. Clause 11 of the waybill provided as follows:

" Notice of arrival of goods will be given promptly to the consignee or to the

10) *Siemens Ltd v Schenker International (Aust) Pty Ltd* (2004) 205 ALR 232 at 255.

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*(emphasis added. If the consignee declines to accept the goods or cannot be communicated with, disposition will be in accordance with instructions of the shipper"

In this case the terms of the *Richtungsverkehr* appeared to have included transport of the consignment to Schenker Australia's bonded warehouse.
This was suggested by the letter of 17 January 1991.It followed that delivery to Schenker Australia's bonded warehouse was contemplated by Siemens Germany and most importantly, Siemens Australia in its capacity as consignee.
3 The statutory regime in force at the time of the consignment's arrival at Tullamarine allowed no other conclusion but that above. Evidence to the Supreme Court judge indicated that Schenker Australia was permitted by an officer of the Australian Customs Service from April 1991 to transport consolidated cargo from Tullamarine to its warehouse for deconsolidation without being required to submit that cargo to customs inspections before its removal from the airport. This permission had been sought because Schenker Australia lacked facilities to deconsolidate cargo within the boundaries of Tullamarine after 1986 due to a change in the location of its bonded warehouse. All parties to the litigation had accepted that the permission subject to conditions under s71E of the *Customs Act* 1901 (Cth)[11] was given to Schenker Australia and relied on in relation to the damaged consignment.
Accordingly, Schenker Australia was prohibited from delivering the consignment to Siemens Australia at any stage before the consignment's arrival at Schenker Australia's bonded warehouse and inspection there by Customs officers.

In this context part of clause 2.2 of the waybill provided:

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11) See s8 of the *Customs and Excise Legislation Amendment Act* 1992(Cth).

" 2.2 To the extent not in conflict with the foregoing, carriage hereunder and the services performed by each carrier are subject to:

2.1 applicable laws (including national laws implementing the [Warsaw] Convention), government regulations, orders and requirements"

On the proper construction of the waybill the result was that damage to the consignment in the course of complying with the requirements necessary to carry out delivery of the consignment fell within terms of clause 4 of the waybill.

The majority of the High Court did not regard such a conclusion as rendering the waybill inconsistent with the Warsaw Convention. 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.[12]

Authorities in other jurisdictions

In support of their construction of the waybill the Schenker companies sought support from a number of United States and United Kingdom decisions. The majority in the High Court noted two as most relevant to the circumstances of the case as decisions of the United States Court of Appeals of the Ninth Circuit; *Read-Rite Corp v Burlinglton Air Express Ltd*[13] and *Albingia Versicherungs AG v Schenker International Inc.*

In the *Read-Rite* 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 in terms similar to the one under consideration was in force between the relevant parties. The Court of Appeals accepted that, because the consignment had been damaged outside the perimeter of the airport of departure, the Warsaw

12) (2004) 205 ALR 232 at 257-6.

13) 186 F 3d 1190 (1999)

Convention as it operated in the United States did not apply. 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.

The analysis in *Read Rite* was held to be consistent with, but not determinative of, the construction of the air waybill adopted above. It was noted that the waybill used by the Siemens and Schenker provided on its reverse side that when used as an air waybill issued by a freight forwarder in a capacity as a contracting carrier for air transportation .It was agreed that transportation to the airport of departure (as shown on face of the waybill did not constitute part of the contract of carriage. This provision, it was held, strengthened the reasoning in *Read Rite*.

Read Rite was followed by a differently constituted Court of Appeals for the Ninth Circuit in *Albingia Versicherungs AG v Schenker International Inc*[14].

The court was required to determine whether the primary judge was in error in concluding that federal common law applied when determining the enforceability of a limitation clause in an air waybill issued by the Schenker company. 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 Franciso warehouse before the consignment's departure to Singapore fell within the terms of the limitation clause contained in the waybill. Those terms were not materially different from those in the waybill in the case at issue before the High Court.

Ⅶ. The dissenting judgements

Two strong dissenting judgements were given by McHugh and Kirby JJ .

14) 344 F 3d 931 (2003) at 939-40.

Both agreed that the limitation provision in Art. 18 of the Warsaw Convention did not apply, However, both held that the limitation provision in the air waybill did not apply either. McHugh ACJ was of the opinion that the carriage of the consignment was not " carriage to which the Warsaw Convention does not apply" The fact that the Convention's liability provisions did not apply to the loss in question was beside the point. Kirby J ruled that clause 4 of the air waybill was concerned only with air carriage. Clause 4 did not extend to impose a contractual limitation of liability on Schenker for loss caused by the negligence of Schenker International Australia's driver outside the airport. Examination of these dissenting judgements will mainly deal with the status and effect of the waybill.

McHugh ACJ

In the opinion of McHugh ACJ the primary judge, Barrett J, had correctly construed clauses 2.1 and 4 of the waybill (see above).A combined reading of these clauses indicated, in the view of McHugh ACJ, that the liability regimes in the Convention and the air waybill operated exclusively of each other. If the Convention did not apply clause 4 provided the relevant liability regime.
Which liability regime applied was determined by reference to whether or not the carriage in question was "international carriage".[15]

McHugh ACJ agreed with Siemen's contention, held by the primary judge Barrett J, that clause 4 had no application to carriage by air where it is governed by the Convention and that the circumstances on which clause 4 operated were not determined on a failure to limit liability under the provisions of the Convention. Accordingly, as in this case, as the Convention did not apply, clause 4 was inapplicable.

McHugh ACJ did not regard the cases relied on to uphold the reasoning of the Court of Appeal as supporting the Schenker Companies.[16]

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15) (2004) 205 ALR 232 at 242-3.

The *Read -Rite*[17] case his Honour noted as being concerned with United States' federal common law, not the construction of an air waybill. The United States Court of Appeals in *Read-Rite* did not consider clauses similar to clauses 2.1 and 4 in the waybill

In *Samuel Montagu & Co Ltd v Swiss Air Transport* [18]the issue was whether the limitation of liability in the IATA waybill complied with the requirements of Art. 8q of the Warsaw Convention. Lord Denning stated in that case that these requirements were "if the statement says that the carriage is subject to the rules *so far as the same are applicable* to the carriage." Lord Denning was referring to the fact that the carriage under the 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" (all emphases in the original). *Samuel Montagu* was not, in McHugh ACJ's view, an authority for the Court of Appeal to find that clause 2.1 was consistent with part of the carriage to be performed under the waybill being subject to the rules relating to liability established by the Convention.

The two other cases on which the Court of Appeal relied were also distinguished by Mchugh ACJ.

In *Aerofloral Inc v Rodricargo Express Corporation*,[19] cargo was lost at a warehouse 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 waybill in the present case. 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

16) (200) 205 ALR 232 at 246-7.

17) 186 F 3d 1190 (9th Cir 1999).

18) [1966] 2 QB 306;[1966] 1 All ER 814.

19) 756 So 2d 234 (Fl App 3 Dist 2000).

"incidental to such carriage" as contemplated by the definition of "carrier" in the air waybill. They sent the case back to the trial court to consider whether the warehousing fell within the word "carriage." Green J, dissenting, said it was not disputed that the cargo was not "in carriage" at the time it was lost[20]. Accordingly, the limitation provision did not apply.
On remission to the trial court, the trial judge held that the cargo was not in carriage at the time because the carton had been opened by United States Customs for inspection and was no longer ready for transport. This decision was subsequently affirmed on appeal.

In *Quantum Corporation Ltd v Plane Trucking Ltd* [21]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 which the Convention on the Contract for International Carriage of Goods by Road applied. The relevant air waybill expressly provided that the transportation of cargo from Paris to Dublin was to be by road. In the case before the High Court, McHugh ACJ noted that the air waybill simply referred 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 in that case did not consider whether the limitation provision in the air waybill would have applied.

McHugh ACJ regarded as correct the contention of Siemens in the present case that nothing in the evidence suggested that the parties intended the provisions in the air waybill to apply beyond the nominated airport of destination, Tullamarine.[22] The waybill in clause 11 provided that:

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20) At 236.

21) [2001] 2 Lloyd's Rep133.Reversed on appeal on another point in *Quantum Corp Inc v Plane Trucking Ltd* [2002] 1 WLR 2678;[2003] All ER 873.

22) 714 F Supp 81 (SDNY 1989).

" on arrival of the goods at the place of destination, subject to the acceptance of other instructions from the shipper prior to the 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 Mchugh ACJ observed did not identify "the place of destination" but clearly was the " Airport of Destination" stated on the front of the air waybill. His Honour regarded the word "to" in the phrase "delivery will be made to" as indicating the issue was *how* and *to whom* delivery was to be made at the place of destination, not *where* delivery was to to be made (emphasis added).Clause 11 was to be regarded as giving effect to the practical provisions of Arts 12 and 13 of the Convention. These refer to delivery of cargo to "the place of destination". This indicated that clause 11 also contemplated delivery to the place of destination indicated on the face of the air waybill, as he termed it, Melbourne Airport.[23]

McHugh ACJ also noted that the instructions concerning delivery to the bonded warehouse were given under the *Richtungssverkehr* 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, His Honour regarded that clear words would surely have been used in the air waybill. This occurred in *Jaycees Patou Inc v Pier Air International* [24] in which an 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 airwaybill was therefore evidence of the entire contract for transportation. In the present case both Siemens and Schenker 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"
on the face of the master air waybill, might have been sufficient. As this was not done the air waybill had to be construed according to its terms. The limitation provision in clause 4 did not apply to the damage which occurred outside the

23) At 248.

24) 714 F Supp 81 (SDNY 1989)

limits of Tullamarine and the appeal by Siemens should be allowed.[25]

Kirby J

Kirby J agreed with the reasons of McHugh ACJ and the majority of the High Court that the liability regime of the Warsaw Convention had no application beyond the perimeter of Tullamarine airport[26]
His Honour noted that the primary judge accepted that the *Richtungsverkehr* commenced at the uplift of the Siemens products at various factories in Germany,and proceeded through performance under the terms of the *Richtungsverkehr* by the Schenker companies of their "variety of services" until the final handover of he goods from Schenker stores in Australia."
By inference these terms extended beyond international carriage of cargo by *air* and contractual documents (such as the air waybill) drawn to govern the international air "carriage" aspect of the relationship[27]

Kirby J regarded the clause 4 of the air waybill as the only potential source of limitation in issue and noted that the Schenker companies submitted that the air waybill extended more generally, so as to become part of the more extensive contractual dealings between Schenker and Siemens, namely the *Richtungsverkrhr*. [28]
In disagreeing with the majority of the High Court his Honour observed, echoing Lord Steyn's remark in another case, in law "context is everything"[29]. Despite the earlier exchange of correspondence between the parties no express mention was made of any limitation of liability beyond the international air carriage. His Honour held that the limitation of clause 4 of the waybill was not incorporated

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25) At 249.

26) At 261

27) (2004) 205 ALR 232 at 260

28) At 262.

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

in the contract for Schenker's services before and after the "international carriage" of the cargo by air.

Kirby J found that the waybill was concerned specifically with international carriage by air. In his Honour's view, it would therefore be an odd place to find a condition limiting Schenker's liability for their many other services *beyond* the international carriage of cargo by air (emphasis added), in the clause of printed document addressed to a particular and limited aspect of the dealings between the parties. Since Schenker had said nothing about the incorporation of a special condition limiting liability for those wider services. In his Honour's view this left the limitation of liability in clause 4 applying only to the "international carriage" *by air* (emphasis added). Additionally, there was nothing in evidence a trial concerning the*Richtungsverkehr* that suggested an express agreement to a limitation of liability beyond the "international carriage" to which the air waybill was primarily addressed.[30]

His Honour noted that under the Warsaw 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. These provisions embodied the clear objectives of the Convention to secure certainty and uniformity, relevantly in relation to the international carriage of cargo by air; accordingly an airwaybill conforming to the Convention could specifically limit the liability of a carrier engaged in "international carriage" of cargo. The International Air Transport Authority (IATA) in drafting standard air waybills to apply to all situations of carriage by air also has drafted them to apply to cases where the Convention does not apply (for example, in the domestic carriage of cargo by air or in international carriage by air that is not between places within the territories of two states parties to the Convention)[31]

The air waybill, on the above basis of understanding, 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

30) (2004) 205 ALR 232 at 264.

31) At 265.

Air [32] (emphasis added).Art 18.3 of the Convention provides that " the period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome." His Honour held that in such circumstances, it would be unsurprising to conclude that a standard form air waybill, designed to provide for *air* cargo (emphasis added), was limited in its purpose and application and generally inapt for operation to a wider services happening between the parties. In particular, the references to the Convention in clauses 1,2.1 and 4 of the conditions of contract in the air waybill indicated that the waybill was confined to air carriage except in identified instances where land transportation occurred as a substitute for air carriage.[33]

In dealing with the definition of "carriage" in clause 2.1 of the air waybill His Honour regarded the opening words "carriage hereunder" as indicating that "carriage" within the waybill was to take the meaning in clause 2.1 and that very clear language would be required to expand, or alter, this express definition. Further, the words used were only apt to apply to air carriage.
The statement in clause 2.1 that "carriage hereunder" was subject to the Convention Kirby J regarded as reflecting Art. 8q of the Convention which specified 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. It followed that Clause 2.1 in the waybill in referring to "carriage" referred only to air carriage.[34]

The above considerations reinforced his Honour's conclusion, derived from the language of clause 4 in the waybill, that it was concerned only with air carriage. Therefore, the primary judge was correct in concluding that clause 4 of the waybill did not, by its terms, extend to impose a contractual limitation of

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32) At 265

33) At 266

34) At 267

liability on siemens Australia for loss caused by the negligence of Schenker Australia's truck driver our side Tullamarine[35].

Ⅷ. Conclusion

The majority of the High Court in *Seimens Ltd v Schenker International (Aust) Pty Ltd* determined that the terms of, and limitation of liability provision in, the air waybill provided for transportation of goods other than by air. This decision may be seen in the context of the Schenker companies and Siemens long standing contractual relationship under the *Richtungsverkerhr* and the interpretation made by the majority of clause 4 of the Schenker air waybill. Instructions to Schenker regarding the delivery to the bonded warehouse McHugh ACJ noted were given under the *Richtungsverkehr* not the air waybill. If parties wished to extend the terms of the waybill (which would be any under standard IATA terms) to delivery to the warehouse clear words would need to be used. His Honour regarded a stamp such "bond delivery approved" as sufficient to do this[36]. This option may commend itself as a practical measure to avoid any difficulty in jurisdictions outside Australia that would arise from following the *Siemens* decision of the High Court of Australia.

It seems appropriate in this regard to note Kirby J's concerns that the interpretation of clause 4 in the Schenker waybill should be consistent with similar provisions in waybills by courts of other countries. His Honour stated that it was in the interests of international comity and the consistent interpretation of documents having a source in an international treaty to take any

35) At 268.Kirby J's strong dissenting judgement also dealt in detail with international cases cited before the High Court and New South Wales Court of Appeal, distinguishing them as not applying to the case at issue; see (2004) 205 ALR 232 269-272

36) (2004) 205 ALR 232 at 249 citing *Jaycees Patou In v Pier Air International Ltd* 714 F Supp 81 (SDNY 1999)

contrary opinions into account so as to promote a generally consistent approach to common trans border problems.[37]

37) His Honour referred to Brownlie, *Principles of Public International Law*, 6th ed , Oxford University Press,2003 at p28,Sturley "International Uniform Laws in International Courts: The Influence of Domestic Law in Conflicts of Interpretation", (1987) 27 *Virginia Journal of International Law*729 at 731-46. On the inapplicability of the limitation provision in the Warsaw Convention to negligence of the carrier occurring in road transport beyond the airport His Honour cited the following international cases; *Victoria Sales Corp v Emery Air Freight Inc* 917 F 2d 705 (1990) at 707; *General Electric Co v Harper Robinson & Co* 818 F Supp 31 (1993); *Read Rite Corp v Burlington Air Express Ltd* 186 F 3d 1190(1999); *HIH Marine Insurance Services Inc v Gateway Freight Services* 116 Cal Rptr 2d 893 (2002) at 897; *Albingia Versicherungs AG v Schenker International Inc* 344 F 3d 931(2003) at 939-40; *Rolls Royce Plc v Heavylift-Volga DNEPR Ltd* [2001] Lloyd's Rep 653 at 658-8; *International Cargo Express Ltd v U-Jin Enterprises Inc* [1997] 2 NZLR 712 at 720.