



## SIEMENS AND SCHENKER CASE ROLLS INTO HIGH COURT

### INTRODUCTION

Readers would be aware of the proceedings between Siemens Limited and two Schenker entities regarding the liability of the Schenker entities for damage to computer equipment owned by Siemens. The Siemens computer equipment had been inadequately secured to a Schenker vehicle and damaged as the vehicle travelled between Melbourne Airport and Schenker's Bonded Warehouse. At all relevant times, it had been agreed that the damage was caused due to the negligence of the Schenker employee in failing to properly secure the computer equipment to their vehicle.

### ISSUE AT STAKE

The crucial question for a variety of Courts has been whether Schenkers were entitled to the benefit of any limitation of liability provisions, whether pursuant to the Warsaw Convention, Australian legislation or the contracts as between Siemens and Schenker. These contracts included their general contract for the carriage of goods and the specific provisions of the House Airway Bill issued by Schenkers in the form consistent with other International Airway Bills.

### POSITION OF THE PARTIES

#### *Schenkers*

Schenkers were specifically relying on two possible provisions to limit their liability.

1. Article 22.2 of the Warsaw Convention and Hague Protocol (applicable in Australia pursuant to the *Civil Aviation (Carriers Liability) Act 1959*). This imposes a liability limit of 250 francs per kilogram for goods subject to "carriage by air" (designed to cover carriage on board an aircraft or within an "aerodrome").
2. Clause 4 of the House Airway Bill issued by Schenker in Germany which provided a limit of US\$20 per kilogram for damages to which the Warsaw Convention did not apply.

Although the House Airway Bill was issued by Schenker in Germany, Schenkers claimed that the benefit of the House Airway Bill benefited Schenker Australia which was not named in the House Airway Bill but caused the relevant damage. This contention was based on Schenker Australia being a "carrier" pursuant to the House Airway Bill based on an "overarching" general agreement between Schenker in Germany and Siemens which contemplated that Schenker in Germany would procure all relevant carriage.

#### *Siemens*

The position of Siemens in response to the limitation of liability provisions was as follows:

1. The Warsaw Convention did not apply as the damage to the goods occurred **outside** of air carriage or the specific geographic limit of the aerodrome (Melbourne

Airport). Siemens relied on many overseas cases that there should be a strict interpretation of “aerodrome” to its specific geographical limits as set out in the legislation establishing the Airport. On that basis, the damage occurred outside the aerodrome.

2. The limitation of liability provision of the House Airway Bill did not apply as the contract for carriage was not one to which the Warsaw Convention did not apply. The Convention applied but not in the relevant area where the damage occurred.

As a result, Siemens maintained that there was no provision to limit the liability of Schenkers.

### **DECISION AT FIRST INSTANCE**

At first instance in the New South Wales Supreme Court, Siemens were successful in recovering significant damages.

The Court formed the view that as the damage to the goods occurred outside the strict geographical confines of the Airport, the provisions of the Warsaw Convention did not apply.

The Court then decided that the limitation of liability provisions in the House Airway Bill did not apply given the way in which it was drafted. The Court held that those limitation of liability provisions would only apply if no part of the Warsaw Convention had applied to the carriage of goods. As the Warsaw Convention had applied to carriage of the goods, at least until leaving the confines of the Airport, then the limitation of liability provisions would not apply. On that basis, the Court awarded significant damages to Siemens.

There was then some interesting discussion regarding the calculation of damages (reduced by the scrap value of the damaged equipment), conversion of award amounts into Australian currency and calculation of interest.

### **SCHENKER’S APPEAL TO THE NEW SOUTH WALES COURT OF APPEAL**

In the judgment handed down on 11 June 2002, the New South Wales Court of Appeal overturned the decision at first instance. While the Court did agree that the Warsaw Convention did not apply, it also held that the relevant provision of the House Airway Bill did, in fact, have effect to cover the short trip from Melbourne Airport to its Bonded Warehouses. On that basis, the Court of Appeal significantly reduced the amount payable to Siemens for the damage to the equipment.

In making this conclusion, the Court of Appeal made three interesting findings:

1. The Court of Appeal agreed that the Warsaw Convention only applied while the goods were in the aircraft or within geographical confines of the Airport (as defined).
2. Schenker Australia was entitled to the benefit of the House Airway Bill issued by Schenker in Germany due to the general contract of carriage between Siemens and Schenker in Germany (“the Richtungverkehr”). The Court heard that the general contract converted all the House Airway Bills into “quadri-partite contracts” to which Schenker Australia was a party as conducting the carriage for Schenker in Australia. Presumably, the airlines transporting the equipment also benefited.
3. The House Airway Bill operated to limit the liability of Schenkers as it also applied to govern the liability of Schenkers from Melbourne Airport to its Bonded Warehouses. To find otherwise would mean that there were no duties on Schenker Australia once the goods arrived at the Airport. As the House Airway Bill covered duties for that transport, then so should the limitation of liability apply. The Court was also able to

rely upon cases decided in other jurisdictions which applied limitation of liability from Airway Bills to damage occurring beyond the limits of the Airport.

## **APPEAL TO THE HIGH COURT**

Given the significance of the issue regarding the operation of the provisions of the Warsaw Convention and the operation of the House Airway Bill, it came as no surprise that Siemens should lodge an appeal to the High Court and that the High Court would grant leave to appeal.

Arguments were heard by the High Court on 4 September 2003. In addition to the substantial written material put before the High Court, the majority of the oral arguments were made by the Senior Counsel for Siemens which was seeking to overturn the decision of the New South Wales Court of Appeal. Essentially, Senior Counsel for Siemens was endeavouring to reinstate the reasoning of the original trial judge in the New South Wales Supreme Court while Senior Counsel for Schenkers was endeavouring to convince the High Court that the reasoning of the New South Wales Court of Appeal had, in fact, been correct.

## **MATTERS REVEALED BY THE TRANSCRIPT OF THE HEARING**

The transcript of the hearing before the High Court disclosed a predictable amount of technical discussion as to the provisions of the Warsaw Convention and the contracts between Siemens and Schenker including the provisions of the House Airway Bill. It also introduced significant discussion regarding the application of Australian legislation and judgments in other cases similar to the current case in other Courts throughout the world, particularly in the United Kingdom and the United States of America.

However, the transcript does disclose some interesting interaction between the Senior Counsel for the parties to the case and the judges of the High Court. Normally, Senior Counsel are considered as being at the "top of the food chain" in the legal world. For a mere solicitor, it is a relief to see Senior Counsel being so openly questioned by members of the High Court. Some interesting aspects of the transcript are set out below.

### ***On any discussions regarding Insurance***

**"KIRBY J:** Did the evidence indicate at any stage that because of the limitations imposed by the Convention that consignors sending extremely valuable products by air had a practice of supplementing their entitlements under the Convention by insurance?

**MR GREENWOOD:** No.

**KIRBY J:** As usual, insurance trod like Hamlet's father through the play without revealing himself ---"

### ***On the application of Australian Statutes***

**"MR GREENWOOD:** Yes, as reflected by 2.1, which differentiates the two different regimes and the carriage then to which clause 4 does apply is the non Warsaw Convention carriage.

**KIRBY J:** It just seems to me that - we have to keep an eye on this, I think Justice Gummow raised at the beginning - if the statute of the Australian Parliament applies to the air carriage, then what the air waybill provides by way of private agreement is really not significant, is it? We have a higher duty to apply the law made by the

Parliament of Australia. And then the question becomes whether, by their private contract, the parties can supplement that legal obligation by their own private contractual arrangements.

**MR GREENWOOD:** Yes.

**GUMMOW J:** Now, is that common ground?

**MR GREENWOOD:** I have not thought the matter through, but at the moment that seems perfectly right to me, it must be right.

**KIRBY J:** Barristers hate statutes. We find it every day. They all love the common law, they love the common law of contracts and so on, but we are a Court of law in Australia and if the Act of the Australian Parliament applies, our duty is to apply the Act. That is our first step. Then, beyond that, we have to ask, "Can you and have you supplemented statutory obligations?"

### ***On introducing new arguments***

"... **MR MEAGHER:** What I want to do is to give your Honours some examples which illustrate difficulties which would arise if the appellant's construction is accepted.

**GUMMOW J:** Are these in your written outline?

**MR MEAGHER:** No, your Honour, I am sorry, they are not. I will be short.

**GUMMOW J:** Go ahead. Shock us."

## **CONCLUSION**

We now await with interest the decision of the High Court. I am loathe to predict the High Court's judgment. Let's face it, they are the High Court, after all! Still it is significant to note that the decision at first instance represented quite a novel approach to interpretation of the Convention and the House Airway Bill. All of the judges in the Court of Appeal commented that they could not follow or understand the decision at first instance. They were as critical (in a polite manner) as has been seen. The Court of Appeal was also able to rely on assistance from judgments in other jurisdictions which supported the approach of Schenkers. It seems that Siemens will have the bigger job to succeed.

However, notwithstanding the decision of the High Court, the various stages of the case have highlighted the need for proper clarity in contractual arrangements between parties so that if a party wishes to rely upon a limitation of liability provision it is very clear that the limitation of liability provision will apply to the relevant contracts to all stages of transport. It is also important to review their insurance arrangements. We await the decision of the High Court with interest for parties.

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