



Trade & Transport – Client Alert

March 2004

Siemens Ltd v Schenker International (Australia) Pty Ltd & Anor

Decision of High Court of Australia 9 March 2004

On 9 March 2004, the High Court of Australia handed down a landmark decision for both freightforwarders and airlines worldwide. For the first time, a court of final appeal in a common law country has interpreted the meaning and application of the limitation of liability clause in the IATA and FIATA recommended standard forms of air waybill, confirming that contracting carriers and their subcontractors can limit their liability in respect of carriage occurring pursuant to the air waybill but outside the perimeter of an airport.

Blake Dawson Waldron acted for Schenker International Deutschland GmbH and Schenker International (Australia) Pty Ltd in successfully defending the claim by Siemens Ltd.

Facts

In December 1996, Siemens Ltd (**Siemens Australia**) purchased a consignment of telecommunications equipment from its German parent company (**Siemens Germany**). Schenker International Deutschland GmbH (**Schenker Germany**) contracted to carry the equipment from Berlin to Melbourne. Schenker Germany issued a FIATA recommended form of neutral air waybill (the **Schenker air waybill**) for the carriage.

The equipment, a consolidated shipment, was to be deconsolidated and delivered at the bonded warehouse of Schenker International (Australia) Pty Ltd (**Schenker Australia**), outside the perimeter of Melbourne airport.

However, as the equipment was being transported by truck by Schenker Australia, the subcontractor of Schenker Germany, from Melbourne airport to its bonded warehouse, one of the two pallets containing the equipment fell off the truck and was damaged. The negligence of Schenker Australia was admitted.

Contractual arrangements

The amended Warsaw Convention applied to the carriage between Berlin – Tegel and Melbourne, the period during which the equipment was in the charge of Schenker Germany within Melbourne airport.

As the accident occurred outside the perimeter of Melbourne airport, the amended Warsaw Convention did not apply and both Schenker Germany and Schenker Australia were unable to rely upon the limitation of liability provisions in that Convention.

However, Clause 4 of the Schenker air waybill provided:

“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 USD20.00 or the equivalent per kilogram of goods ... damaged ...”

In addition to, and beyond the terms of the Schenker air waybill, there was a contractual arrangement among the Siemens and Schenker companies known as the Richtungsverkehr or “Direct Traffic” (the **Direct Traffic agreement**). The terms of the Direct Traffic agreement commenced at uplift of goods from various

factories of Siemens Germany and continued through the performance by the Schenker companies of a variety of services until the hand-over of the goods at warehouses of Schenker Australia in Australia.

The Direct Traffic agreement contained no limitation of liability provision.

Legal proceedings at first instance and on initial appeal

Siemens Australia commenced proceedings against both Schenker Germany and Schenker Australia in the Supreme Court of New South Wales suing for the full value of the equipment, being approximately AUD1,700,000. The Schenker companies argued that, in accordance with Clause 4 of the Schenker air waybill, their liability was limited to USD20.00 per kilogram, being a total sum of approximately AUD140,000.

“Carriage” is not defined in the Schenker air waybill. At issue was the question whether or not the word “carriage” referred only to air carriage, or whether it extended to the road carriage from Melbourne airport to the bonded warehouse of Schenker Australia, thereby, allowing Schenker Germany and Schenker Australia to rely upon Clause 4 to limit their liability.

Siemens Australia argued that Schenker Germany and Schenker Australia could not rely on Clause 4 as that Clause only applied to the air carriage between the airports of Berlin – Tegel and Melbourne.

It was further argued by Siemens Australia that, because the Schenker air waybill named Melbourne as the airport of destination, the “carriage” described by the Schenker air waybill had concluded at Melbourne airport, and from the time that the equipment was beyond the perimeter of that airport, the Direct Traffic agreement solely applied.

Schenker Germany and Schenker Australia argued that Clause 4 must be read in the context of the Schenker air waybill as a whole, and the Direct Traffic agreement. Further they argued that other clauses of the Schenker air waybill (particularly Clause 11) and the Direct Traffic agreement contemplated the application of the terms of the Schenker air waybill beyond the perimeter of the airport of destination.

Further, Australian customs laws did not permit delivery to Siemens Australia at any place before Schenker Australia’s bonded warehouse. Therefore, the damage to the equipment was occasioned during carriage being performed to comply with legal requirements necessary in order to effect delivery of the equipment, that carriage being within the terms of Clause 4.

At first instance the Supreme Court (Barrett J) found in favour of Siemens Australia. His Honour referred to Clause 2.1 of the Schenker air waybill which 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 that Convention.”

In reading that Clause 21 and Clause 4 together, His Honour found that Clause 4 would only apply if the amended Warsaw Convention had never applied to the carriage as a whole. Therefore, as the amended Warsaw Convention had applied to the air carriage between Berlin – Tegel and Melbourne, the limitation of liability provided by Clause 4 was not available to Schenker Germany and Schenker Australia. The Schenker air waybill was confined to “air carriage” and did not intend to cover any land element. Clause 4 would only operate in circumstances where the entire carriage performed pursuant to the air waybill did not fall within the Convention.

On initial appeal to the New South Wales Court of Appeal (Meagher, Sheller and Stein JJ), that judgment was reversed unanimously. Their Honours held that the terms of the Schenker air waybill governed the rights and obligations of the parties with respect to the claim, and including the limitation of liability contained in Clause 4 of the air waybill.

Final appeal to High Court of Australia

The High Court (McHugh ACJ, and Kirby, Gummow, Callinan and Heydon JJ) dismissed the appeal by a majority (Gummow, Callinan and Heydon JJ), McHugh ACJ and Kirby JJ dissenting.

Majority judgment

In a joint judgment, the majority view was that, on a proper construction of the Schenker air waybill, the damage occasioned to the equipment in the course of compliance with requirements necessary to effect its delivery, fell within the terms of Clause 4. The Schenker air waybill continued to operate on its terms at least until the delivery of the equipment to the bonded warehouse had taken place.

That majority found that “carriage” within the meaning of Clause 4 was not limited to carriage by air on the bases that:

- As the Schenker air waybill contemplates a disjunction between carriage to which the amended Convention applies and carriage which is governed solely by the terms of that air waybill itself, therefore “carriage” in Clause 4

has a meaning different from that contained in the definition of carriage by air in Article 18 of the amended Convention.

- Delivery of the equipment to Schenker Australia's bonded warehouse was contemplated by all parties to the Direct Traffic agreement and the terms of the Schenker air waybill (Clause 11) provided for the carriage of the equipment other than by carriage by air.
- Schenker Australia was prohibited by the applicable provisions of the Customs Act 1901 (Cth) from delivering the equipment at any stage prior to its arrival at Schenker Australia's bonded warehouse.

Dissenting judgments

Judgment of McHugh ACJ

In his Honour's opinion, a combined reading of Clauses 2.1 and 4 indicated that the liability regimes in the amended Warsaw Convention and the Schenker air waybill operated exclusively of each other. If the amended Warsaw Convention did not apply, Clause 4 provided the relevant liability regime.

Further, his Honour found that the word "carriage" in Clause 4 is confined to "air carriage". He reasoned that "carriage hereunder" in Clause 2.1 is subject to the liability provisions of the amended Warsaw Convention. However, if "carriage hereunder" means any carriage, including road transport, then Clause 2.1 would render such carriage (including road carriage) subject to the rules relating to liability established by that Convention. This would contradict Article 31 of the amended Warsaw Convention, which provides that the Convention only applies to air carriage. Further, as the Schenker air waybill is intended to supplement and not contradict the Convention regime, then "carriage hereunder" must refer only to "air carriage".

Judgment of Kirby J

His Honour found that the context in which the Schenker air waybill was issued necessarily required that the word "carriage" be limited to air carriage. Further, in his Honour's opinion, the Schenker form air waybill was designed to apply to all situations where there was carriage by air, whether or not the Warsaw Convention applies.

His Honour also referred to the ambiguity raised by the terms of the Schenker air waybill and to the settled law which states that, when interpreting a clause in a contract in the case of ambiguity, such ambiguity must be resolved against the parties attempting to rely upon that clause, in this case those parties being Schenker Germany and Schenker Australia. Therefore Clause 4 did not apply.

Conclusion

This landmark decision will provide comfort to freightforwarders and airlines worldwide. It confirms that contracting carriers and their subcontractors can rely on the limitation of liability clause in the IATA and FIATA recommended standard forms of air waybill during carriage which occurs pursuant to the air waybill, but outside of the geographical limits provided by amended Warsaw Convention.

However, the decision does highlight the need for:

- freightforwarders to review their own conditions of contract;
- a review of the conditions of contract of the IATA and FIATA standard form air waybills; and
- consideration for the introduction of a combined transport or door-to-door air waybill.

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