

## **BREAKING CONVENTION: WHEN IS A CARRIER'S LIMIT OF LIABILITY UNDER THE WARSAW CONVENTION BROKEN? BEYOND *BERYL CLAIRE CLARKE & ORS V SILKAIR (SINGAPORE) PTE LTD*<sup>1</sup>**

### **Introduction**

1 The crash of SilkAir Flight MI 185 (“MI 185”) was a milestone in Singapore’s aviation and legal history. The tragic events of 19 December 1997 not only marked the first time that either SilkAir or its parent company, Singapore Airlines (“SIA”), had lost a plane in an in-flight disaster, but it also gave Singaporean courts their first opportunity to consider the issue of when the limits on a carrier’s liability, as contained in the Warsaw Convention, can be broken in the event of injury or death to a passenger. Hitherto, SilkAir and SIA’s clean safety record had ensured an almost total dearth of local jurisprudence on this matter.

### **The Warsaw Convention**

2 SilkAir’s General Conditions of Carriage for Passengers and Baggage<sup>2</sup> state very clearly that any contract of carriage by SilkAir is subject to the Warsaw Convention. The Warsaw Convention, also known

<sup>1</sup> [2002] 3 SLR 1 (CA), [2002] 3 SLR 100 (HC).

<sup>2</sup> Article 17 of SilkAir’s General Conditions of Carriage for Passengers and Baggage provides that:

Carriage hereunder is subject to the rules and limitations relating to liability established by the Convention unless such carriage is not international carriage to which the Convention applies. In international carriage as defined by the Warsaw Convention the liability of the Carrier for each passenger is limited to the sum of 125,000 French gold francs or its equivalent (US equivalent approximately \$10,000); and in international carriage as defined by the Warsaw Convention as amended at The Hague, 1955, the liability of the Carrier is limited to 250,000 French gold francs or its equivalent (US equivalent approximately \$20,000) ...SilkAir (Singapore) Private Limited agree that for a carriage which is subject to the Warsaw Convention or the Warsaw Convention as amended at The Hague and performed on a SilkAir Services, not being a journey to from or having an agreed stopping place in the United States of America, the limit of liability for death or bodily injury to a passenger shall be increased to US\$58,000 (or the appropriate currency equivalent) plus legal expenses or US\$75,000 (or the appropriate currency equivalent) inclusive of legal expenses in those countries where legal expenses are recoverable additionally.

as the “Convention for the Unification of Certain Rules Relating to International Carriage by Air” 1929,<sup>3</sup> was the first ever international agreement to deal with a carrier’s obligations, liabilities and immunities. The rules laid down in the Convention are “in effect, an international code declaring the rights and liabilities of the parties to contracts of international carriage by air”.<sup>4</sup>

3 The need to establish such an international code stemmed from the existence of different substantive rules on international carriage in different countries, each based on the peculiarities of their own legal systems. For instance, while the legal systems of some countries view any attempt to use exemption clauses to limit liability with hostility, the legal systems of others take a more benign approach. In an arena as diverse as international aviation, the presence of such a myriad collection of laws would give rise to serious problems of private international law.

4 Thus, one of the main objectives of the Warsaw Convention was to harmonise international aviation law (and avoid problems of private international law) by means of the adoption of a uniform international code to be applied by the courts of the countries adopting the Convention. As it was signed in 1929, a time when the civil aviation industry was still very much in its infancy,<sup>5</sup> another primary (and some say, the overriding) goal of the Convention was to ensure that the fledgling airlines of the time did not end up stillborn by falling victim to lawsuits with huge claims.<sup>6</sup>

<sup>3</sup> The Warsaw Convention was the product of two international conferences. In 1925, at its first meeting in Paris, the Conférence Internationale de Droit Privé Aérien (“CIPDA”) set up a specialist committee, the Comité International Technique d’Experts Juridiques Aériens (“CITEJA”) to look into the drafting of what would become the Warsaw Convention. The draft was presented at the second meeting of CIPDA in Warsaw in October 1929 and was signed by 23 countries on 12 October. It entered into force on 13 February 1933, 90 days after the deposit with the government of Poland of the fifth instrument of ratification. Singapore ratified the Warsaw Convention on 4 September 1971 and it has been given the force of law by the Carriage by Air Act (Cap. 32A).

<sup>4</sup> As per Greene LJ in *Grein v Imperial Airways Ltd* [1937] 1 KB 50 at 74.

<sup>5</sup> It must be remembered that Charles Lindberg’s successful solo flight across the Atlantic took place only 2 years before the signing of the Convention.

<sup>6</sup> The survival of airlines could be made the subject matter of an international convention signed by states, as nearly all airlines at that time (with the notable exception of the American airlines) were either state owned or heavily subsidised by the state. Thus, it was a matter of national interest to ensure that airlines did not become bankrupt.

5 The Warsaw Convention set about achieving the second objective in two ways. Firstly, the legal regime under the Convention was made an exclusive one. In other words, if a potential claim were to arise in the course of carriage of persons, luggage or goods performed by a carrier for reward,<sup>7</sup> the only means by which a potential claimant could seek redress would be to bring an action under the Convention. In other words, it would not be possible for a potential claimant to circumvent the provisions of the Convention, for example, by pleading his case under the common law of tort or contract.<sup>8</sup>

6 Secondly, in the event of accidents causing “death or wounding... or any other bodily injury” to a passenger, the Convention provides for the carrier’s liability to be limited.<sup>9</sup> The imposition of such a limit on liability would serve to defeat the fundamental purpose of a civil claim which is *restitutio in integrum* of the *status quo ante* and the exact rationale for this limitation of liability has been lost in the mists of time. However, Drion, in his excellent treatise on this matter,<sup>10</sup> has suggested a number of possibilities. These include:

- (1) an analogy with maritime law where the shipowner’s liability is also limited
- (2) the protection of a financially weak industry

<sup>7</sup> Article 1(1).

<sup>8</sup> Article 24 of the Warsaw Convention provides, *inter alia*, that cases covered by Article 17 (death or wounding or any other bodily injury suffered by a passenger) “can only be brought subject to the conditions and limits set out in this Convention” (“les cas prévus a l’article 17” in the prevailing French text). The exclusiveness of the regime under the Warsaw Convention has been upheld by the House of Lords in *Sidhu v British Airways* [1997] 1 All ER 193 and *Morris v KLM Royal Dutch Airlines* [2002] 2 WLR 578; the Supreme Court of the United States in *El Al Israel Airlines vs Tsui Yuan Tseng* (1999) 525 U.S. 155; the Supreme Court of Ontario (Canada) in *Naval-Torres v Northwest Airlines* (1998) 159 DLR. (4th) 67; the Federal Court of Australia in *South Pacific Air Motive Pty Ltd and Another v Magnus* (1998) 157 ALR. 443; the New Zealand Court of Appeal in *Emery Air Freight Corp v Nerine Nurseries Ltd* [1997] 3 NZLR 723 and the Singapore Court of Appeal in *Seagate Technology International v Changi International Airport Services Pte Ltd* [1997] 3 SLR 1.

<sup>9</sup> Article 17.

<sup>10</sup> Drion H, *Limitation of Liabilities in International Air Law* (Martinus Nijhoff, The Hague, 1954).

- (3) catastrophic risks should not be borne by the aviation industry alone
- (4) necessity for the carrier to obtain insurance
- (5) possibility for potential claimants to insure themselves
- (6) limitation of liability as a *quid pro quo* for a reversal of the burden of proof in lawsuits by the passengers against the carrier
- (7) avoidance of litigation by facilitating quick settlements
- (8) unification of law with regard to the amount of damages to be paid

7 While the matter is not free from controversy,<sup>11</sup> it is generally accepted that the rationale for the limitation on passengers' claims is to allow them to enjoy the benefit of a reversal of the burden of proof in lawsuits against the carrier.<sup>12</sup> Fault on the part of the carrier would be presumed and there would be no need for the plaintiffs to discharge the burden of proof. In return for this regime of strict liability in which they would be relieved of the almost impossible task of having to prove fault on the part of the carrier,<sup>13</sup> the plaintiff passengers had to accept a limit on the carrier's liability.

<sup>11</sup> After an exhaustive review of the authorities (both common law and civil), Drion actually rejects all eight possibilities!

<sup>12</sup> In *In re Air Disaster at Lockerbie* (1991) 928 F 2d 1267, the United States Court of Appeals for the Second Circuit accepted this as the rationale for the limitation of liability. The juridical basis for a reversal of the burden of proof in exchange for a limitation on the defendant's liability can be traced to principles of French contract law governing contracts of domestic carriage. In such situations, French law implies a "*stipulation pour autrui*" which allows a plaintiff to bring an action in damages against the carrier without having to prove the carrier's negligence. However, the plaintiff's action is made subject to any limitation or exclusion clauses contained in the contract. German law on this point is similar. See also Milde M, *Warsaw Requiem or Unfinished Symphony* [1996-7] (Lloyd's Aviation Quarterly TAQ 1-86, Part 1, July 1996) pp 37 to 51, where it is argued that the limits of liability were put in place because the civil aviation industry was, in 1929, new and fraught with catastrophic risks. The limit of liability was understood to be a "subsidy" as well as special protection for this infant industry.

<sup>13</sup> Given the highly technical nature of the civil aviation industry, it would have been almost impossible for a lay plaintiff to prove fault on the part of the carrier in 1929 (or even today).

## Evolution of the Limits

8 Under Article 22 of the Warsaw Convention, the carrier's liability was limited to 125,000 francs<sup>14</sup> per passenger. This amount, which may have been a reasonable one in 1929, was quickly eroded by inflation and soon lost all relation to economic reality. The rapid rise in living standards over the years dictated that it had to be raised. And raised it was. Under the Hague Protocol in 1955,<sup>15</sup> the limit was dramatically doubled to 250,000 francs.

9 Unfortunately, further attempts to keep the limit of liability up to date met with only limited success. Of the original 150 parties to the Warsaw Convention,<sup>16</sup> almost all (134), ratified the Hague Protocol,<sup>17</sup> but only 77 ratified the 1961 Guadalajara Protocol.<sup>18</sup> There was an increasing divide between the developed nations (especially the United States) and the developing ones on whether and how much the limits of liability should be raised. Due to this and other differences,<sup>19</sup> the 1971 Guatemala City Protocol,<sup>20</sup> which tried to increase the limit of liability to 1,500,000 francs, did not even manage to secure the minimum number of ratifications necessary for it to come into force.<sup>21</sup>

<sup>14</sup> Article 22(4) makes clear that the franc referred to is the 1927 French Poincare gold franc consisting of 65 ½ milligrams gold of millesimal fineness 900. The gold franc was chosen as gold was a recognised yardstick of value (the hyper-inflation experienced by some post World War I countries were still fresh in the minds of the delegates). 125,000 francs would be worth approximately USD10,000 or SGD24,790.93 under the Carriage by Air (Singapore Currency Equivalents) Order.

<sup>15</sup> Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air done at The Hague on September 28, 1955. The Hague Protocol has also been given the force of law in Singapore by the Carriage by Air Act (Cap. 32A).

<sup>16</sup> The actual figure may vary due to the lack of clarity on the rules with regard to the succession of states.

<sup>17</sup> The United States is notable as being one of the original signatories of the Warsaw Convention which did not ratify the Hague Protocol.

<sup>18</sup> 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, signed at Guadalajara on 18 September 1961.

<sup>19</sup> Another difference arose from the insistence by the United States to include the court of the domicile or permanent residence of the claimant as one of the requirements in which an action for damages must be brought (Article 28).

<sup>20</sup> Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Protocol, done at The Hague on 28 September 1955, signed at Guatemala City on 8 March 1971.

<sup>21</sup> The Guatemala City Protocol required only 30 ratifications for it to come into force.

10 This lack of progress in increasing the limit of liability led the United States to the verge of a formal denunciation of the Warsaw Convention.<sup>22</sup> Only the signing of a last minute<sup>23</sup> agreement in which carriers flying to the United States agreed to increase the limit of liability to USD75,000 on flights to and from the United States<sup>24</sup> averted a unilateral withdrawal by the nation with the highest volume of international air traffic. While the agreement (which became known as CAB 18900<sup>25</sup>) ensured the survival of the Warsaw Convention, the end result was that a fragmented regime of international air law existed in which different limits of liability applied to different contracts of “international carriage”.

### Applicability of the Warsaw Convention

11 The Warsaw Convention applies to all contracts of “international carriage”.<sup>26</sup> Article 1(2) defines “international carriage” as:

“any carriage in which ... the place of departure and the place of destination ... are situated either within the territories of two High Contracting Parties<sup>27</sup> or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another State .....

12 The fact that some countries are High Contracting Parties to only the Warsaw Convention, while others are High Contracting Parties to both the Warsaw Convention and the Hague Protocol, gives rise to complications when determining which limit of liability applies to a particular contract of international carriage. Whether the 125,000 francs

<sup>22</sup> On 15 November 1965, then Secretary of State, Dean Rusk, sent a diplomatic note to the Government of Poland informing them of the decision of the United States Government to denounce the Warsaw Convention. Under Article 39(2), the denunciation would have become effective 6 months after the notification.

<sup>23</sup> This agreement arose out of an International Air Transport Association (IATA) initiative and was reached on 13 May 1966, just 2 days before the United States' notification of denunciation would have taken effect.

<sup>24</sup> Such an increase in the limit of liability was permitted as a “special contract” under Article 22(1).

<sup>25</sup> So called because the agreement was filed with the United States Civil Aeronautics Board (“CAB”). It was also known as the “Montreal Agreement 1966”.

<sup>26</sup> Article 1(1).

<sup>27</sup> The names of the countries which are High Contracting Parties to both the Warsaw Convention and Hague Protocol are set out in the Schedule to the Carriage by Air (Parties to Convention) Order.

limit under the original Warsaw Convention, the 250,000 francs limit under the Hague Protocol or the USD75,000 limit under CAB 18900 applies depends on the place of departure and destination that a particular passenger is flying between. This means that it is possible for two passengers sitting beside each other on the same flight to have their contracts of carriage governed by two different versions of the Warsaw Convention simply because they have a different “place of departure and ... place of destination”.

13 For example, on a flight from Jakarta to Singapore, a passenger with a one-way Jakarta – Singapore ticket or round trip Jakarta – Singapore – Jakarta ticket would have his contract of carriage subject to the 125,000 francs limit under the original Warsaw Convention. This is because Indonesia is a High Contracting Party to only the original Warsaw Convention. Similarly, a passenger with a one-way Jakarta – Bandar Seri Begawan ticket with a transit stop in Singapore would also be subject to the 125,000 francs limit as both Indonesia and Brunei are High Contracting Parties to the original Warsaw Convention. On the other hand, another passenger with a round trip Singapore – Jakarta – Singapore ticket on his way home to Singapore would be subject to the 250,000 francs limit under the Hague Protocol as Singapore is a High Contracting Party to the Hague Protocol. Finally, a passenger on his way from Jakarta to the United States via a transit stop in Singapore would be subject to the USD75,000 limit under CAB 1890

## **I Breaking the Limits – The Warsaw Convention**

14 The limits noted above, were made subject to one important exception. Article 25(1) provides that the carrier would not be able to rely on the limits if the damage had been caused by “his wilful misconduct or by such default on his part as ... is considered to be equivalent to wilful misconduct”.<sup>28</sup> Besides the carrier, the wilful misconduct can also be on

<sup>28</sup> Article 25(1) was derived from one of the basic principles of civil law, which states that “no one can escape from the consequences of one’s *dol* or intentional fault”. The original French text of the Warsaw Convention refers to “*dol*” and “*une faute qui ... est considéré comme équivalente au dol*”. It is interesting to note that s 3(2) of the Singapore Carriage by Air Act provides that in the event of any inconsistency between the English translation and the authentic French text of the Warsaw Convention, the authentic French text would prevail. For a discussion of the difficulties judges face when interpreting texts of treaties or international Conventions in foreign languages, please refer to the decision of the House of Lords in *Fothergill v Monarch Airlines Ltd* [1981] AC 251.

the part of any servant or agent of the carrier who is acting “within the scope of his employment”.<sup>29</sup> In this regard, the courts have applied the ordinary case law meaning of the phrase. An act is done in the scope of employment if it is either:

- (1) a wrongful act authorised by the master or
- (2) a wrongful and unauthorised mode of doing some act authorised by the master.<sup>30</sup>

15 The term “wilful misconduct” has been defined in a number of English cases. The most well known is that found in *Horabin v British Overseas Airways Corp*<sup>31</sup> where Barry J, in his direction to the jury, defined wilful misconduct as;

“misconduct to which the will is a party, and it is wholly different in kind from mere negligence or carelessness, however gross that negligence or carelessness may be ...

In order to establish wilful misconduct, the plaintiff must satisfy you that the person who did the act knew at the time that he was doing something wrong and yet did it notwithstanding, or, alternatively, that he did it quite recklessly, not caring whether he was doing the right thing or the wrong thing, quite regardless of the effects of what he was doing on the safety of the aircraft and of the passengers for which and for whom he was responsible. That is something quite different from negligence or carelessness or error of judgment, or even incompetence, where the wrongful intention is absent. All these human failings - errors of judgment, carelessness, negligence or incompetence - may give rise to acts which in the judgment of ordinary reasonable people may amount to misconduct, but the element of wilfulness is there missing.”

16 Unfortunately, it was not possible for Barry J to apply the test that he had laid down as the matter was settled and the plaintiff withdrew his allegation of wilful misconduct. However, it is clear that any formulation as broad as Barry J’s would not be easy to apply. A more useful definition

<sup>29</sup> Article 25(2).

<sup>30</sup> *Thomas Cook Group v Air Malta Co* [1997] 2 Lloyd’s Rep 399 at 408.

<sup>31</sup> [1952] 2 All ER 1016, at 1019 to 1020.

of wilful misconduct is that found in *Thomas Cook Group v Air Malta Co*<sup>32</sup> where Cresswell J enunciated a more practical five stage test:

- (1) “The starting point when considering whether ... the acts or omissions of a person ... amounted to wilful misconduct is an enquiry about the conduct ordinarily to be expected in the particular circumstances.
- (2) The next step is to ask whether the acts or omissions of the defendant were so far outside the range of such conduct as to be properly regarded as "misconduct" ...
- (3) It is next necessary to consider whether the misconduct was wilful.
- (4) ... Wilful misconduct is far beyond negligence, even gross or culpable negligence.
- (5) ... A person wilfully misconducts himself if he knows ... that it is misconduct on his part in the circumstances to do or to fail or omit to do something and yet: (a) intentionally does or fails or omits to do it or (b) persists in the act, failure or omission regardless of the consequences or (c) acts with reckless carelessness, not caring what the results of his carelessness may be. (A person acts with reckless carelessness if, aware of a risk ... he deliberately goes ahead and takes the risk, when it is unreasonable in all the circumstances for him to do so.)
- (6) The final step is to consider whether the wilful misconduct ... caused the loss or damage...”

17 The defendants had contracted with the plaintiffs to carry a consignment of banknotes from London to Luqa Airport in Malta. Upon arrival of the aircraft in Malta, the defendants were supposed to hand over the banknotes to the plaintiffs’ agents. However, no one was present to collect the banknotes and the consignment was off-loaded at the airport. While awaiting customs clearance, there was an armed robbery and the entire consignment was stolen from a room within the import cargo warehouse.

<sup>32</sup> [1997] 2 Lloyd’s Rep 399.

18 Based on the six steps/propositions of law that he had set out, Creswell J found that the acts or omissions of Air Malta, (the defendants), were not so far outside the range of the conduct ordinarily to be expected in the particular circumstances as to be properly regarded as "misconduct". The defendants had done all they could and taken all steps necessary to reduce the risk of armed robbery. The defendants had ensured that valuable cargo consignments were kept in their custody for the minimum possible time. A policeman, a customs guard and an Air Malta official had escorted the valuable cargo from the aircraft to the customs examination room. No other airport in Europe provided police and customs escorts for valuable cargo. The parking area beside the import warehouse was a restricted customs area. There was a customs guard on duty at the barrier and customs and Air Malta personnel manned the duty to the import warehouse. Even if there had been misconduct on the part of the defendants, it could not be construed as wilful. Moreover, there was the difficult question of causation. Even if all possible security measures had been taken, it would not be possible to say that the robbery would have failed. It is not possible to eliminate the risk of armed robbery, it is only possible to reduce the risk. Even the best security systems are of little defence to an armed robbery. Successful armed robberies have still occurred where there have been the most sophisticated of strongrooms, with dedicated security staff guarding the valuables contained in them.

19 Given that one of the only ways<sup>33</sup> to circumvent the low limits of liability in the Warsaw Convention is to argue that the damage was caused by the carrier's "wilful misconduct" or "such default on his part as, . . . , is considered to be wilful misconduct", it is not surprising that countless plaintiffs have tried to prise open this small window of opportunity offered by Article 25. This trend is especially noticeable in the United States where, arguably, the limits are most out of line with economic reality.<sup>34</sup> In a number of American cases, plaintiffs have succeeded in showing that there had been "wilful misconduct" when the crew of the plane plotted a course below the minimum safety height above the highest obstacle, flew off-course or allowed terrorists to bring a bomb on board.

20 In *American Airlines vs Ulen*,<sup>35</sup> the plaintiff argued before the United States Court of Appeals, District of Columbia Circuit that the crew of a plane which flew below the minimum safety height above the highest

<sup>33</sup> The carrier would also not be able to limit his liability if there were defects in ticketing (Article 3(2)).

<sup>34</sup> "SilkAir Crash Legal Issues", *Sunday Times*, October 17, 1999 p 39.

<sup>35</sup> (1949) 186 F 2d 529.

obstacle was guilty of wilful misconduct. The plaintiff was on a flight from Washington National Airport to Mexico City when the plane crashed into the summit of Glade Mountain in Southwest Virginia. The plaintiff suffered serious injuries and was permanently disabled as a result of the crash. The defendants argued that if there was any liability on their part, such liability was limited by the relevant provisions of the Warsaw Convention.

21 At first instance, the trial judge held that the defendants were guilty of wilful misconduct and were not entitled to limit their liability under the Warsaw Convention. On appeal, the decision of the trial judge was affirmed by the United States Court of Appeals. Clark J (who delivered the decision of the Court) held that there was ample evidence upon which the jury could base its finding of “wilful misconduct”. The flight plan which was drawn up by the defendants clearly showed Glade Mountain (4,080 feet or 1,350 m in elevation) lying very close to the center of the airway over which the plane was to fly. The flight plan also showed clearly that a plane flying on that particular course would pass within 1 1/2 or at most 2 miles (2.5 to 3 km) from Glade Mountain. Under these circumstances, it would not be difficult to imagine what could happen and did happen. The fact that the captain had flown the same route in the same manner several times before only served as evidence of deliberateness and the full knowledge which rendered the defendants' actions all the more reprehensible. The last nail in the defendants' coffin was their astonishing admission that they did not know the official elevation of Glade Mountain. All this made it evident that there was wilful misconduct in the planning and execution of the flight.

22 In *Ospina vs Trans World Airlines Inc.*,<sup>36</sup> the plaintiffs alleged wilful misconduct on the part of the defendant carriers who failed to prevent terrorists from setting off a bomb on board a flight to Athens, Greece. The plaintiffs succeeded in the district court but on appeal to the United States Court of Appeals for the Second Circuit, the decision of the District Judge was reversed. Meskill C J, who delivered the decision of the majority, held that the defendants had complied with all Federal Aviation

<sup>36</sup> (1992) 975 F 2d 35.

Administration (“FAA”) procedures and the laws of each country in which it operated. Even through there had been certain checks (which might have led to detection of the bomb) which had not been performed by the defendants, these checks (there were two) were not specifically required by the FAA and were not regularly employed by any airline at that time. The defendants’ failure in taking these measures in searching the cabin did not amount to wilful misconduct. If the defendants had searched the place where the bomb was hidden, the bomb would have been discovered. However, the test for wilful misconduct is not 20-20 hindsight. Moreover, none of the defendants’ other acts or omissions violated any specific FAA requirement and all of their actions complied with FAA safety procedures and regulations, as well as the laws of the countries in which the defendants operated.

23 Finally, in *Zicherman vs Korean Air Lines*<sup>37</sup> and *Dooley vs Korean Air Lines*,<sup>38</sup> two of the lawsuits arising out of the downing of Korean Airlines Flight KAL007, the United States Supreme Court held that there had been wilful misconduct when the crew of the ill-fated plane allowed it to stray off course on a flight from Anchorage, Alaska to Seoul, South Korea (the plane entered the air space of the former Soviet Union and was shot down by a military jet).

## II Breaking the Limits – The Hague Protocol

24 The Hague Protocol amended Article 25 by doing away with the concept of wilful misconduct.<sup>39</sup> Instead, the new Article 25 provides that:

“The limits of liability ... shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.”

<sup>37</sup> (1996) 516 US 217.

<sup>38</sup> (1998) 524 US 116.

<sup>39</sup> The amendment was prompted by differing decisions in the courts of the High Contracting Parties as to whether the term “wilful misconduct” imported an objective or subjective standard. Most of the decisions gave the term a subjective interpretation but the French courts appeared to favour an objective approach.

25 Thus, in order to establish liability under the new Article 25, the plaintiff had to prove

- (1) that the damage resulted from an act or omission;
- (2) that it was done with intent to cause damage; or
- (3) that it was done when the doer was aware that damage would probably result, but he did so regardless of that probability;
- (4) that the damage complained of is the kind of damage known to be the probable result.<sup>40</sup>

26 In interpreting Article 25, the court in *Goldman v Thai Airways International Ltd*<sup>41</sup> held that the test of “recklessness” was a subjective one and that the same approach should also be used in ascertaining the meaning of “knowledge”. In the words of Eveleigh LJ;

“When conduct is stigmatised as reckless, it is because it engenders the risk of undesirable consequences. When a person acts recklessly he acts in a manner which indicates a decision to run the risk or a mental attitude of indifference to its existence. This is the ordinary meaning of the word, as I understand it, ... . One cannot therefore decide whether or not an act or omission is done recklessly without considering the nature of the risk involved. However, the doing of the act or omission is not only qualified by the adverb “recklessly”, but also by the adverbial phrase “with knowledge that damage would probably result”. If the pilot did not know that damage would probably result from his omission, I cannot see that we are entitled to attribute to him knowledge which another pilot might have possessed or which he himself should have possessed. ... I cannot believe that lawyers who intended to convey the meaning of the well-known phrase “when he knew or ought to have known” would have adopted “with knowledge”.<sup>42</sup>

27 The word “probable” was also to be given its common meaning. Thus in the context of Article 25, “probable” simply meant that

<sup>40</sup> *Goldman v Thai Airways International Ltd* [1983] 3 All ER 693, 698.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Supra* note 40, at 699.

“something is likely to happen ... In other words, one anticipates damage from the act or omission”.<sup>43</sup>

28 In *Goldman*, the plaintiff who was on a flight from London to Bangkok, was thrown from his seat and hit his head against the ceiling of the cabin when the aircraft encountered clear air turbulence (“C.A.T.”). The plaintiff alleged that the injury that he had suffered resulted from an act or omission of the captain (a servant of the carrier) which was done recklessly and with knowledge that damage would probably result. The omission in question was the failure by the captain to order seat belts to be fastened before the aircraft encountered C.A.T. The plaintiffs argued that the captain had knowledge that damage would probably result from his omission as he had, prior to takeoff, been given a weather chart forecasting the areas of C.A.T. in the aircraft’s flight path. At first instance, the trial judge held that the captain had acted recklessly. Having been informed by the weather forecast that C.A.T. was expected, he wilfully disregarded the instructions in the flight operations manual when he knew that they were designed for the passengers’ safety. He knew that damage of some kind would probably result if the risk that he was taking (i.e. of encountering C.A.T.) materialised. To the trial judge, it was immaterial that the captain did not actually know that injury would probably result from his omission

29 The decision was reversed on appeal. According to Eveleigh LJ, a person acts recklessly when he acts in a manner indicating a decision to run a risk or a mental attitude of indifference to the existence of the risk. One therefore needs to consider the nature of the risk involved when deciding whether an act or omission is done recklessly. On the facts, the risk involved was the risk of injury to passengers who should have fastened their seat belts. Eveleigh LJ would have been prepared to say that the captain had acted “recklessly” because he had deliberately ignored instructions which he knew were for the safety of the passengers, thus demonstrating his decision to accept that risk. By omitting to order seat belts to be fastened, the captain had also decided that he was prepared to accept the risk of substituting his judgment for those responsible for the instructions contained in the flight operations manual. Such deliberate disregard of the rules must be considered as recklessness.

30 However, Article 25 qualifies the doing of the act or omission with the adverb “recklessly” as well as the adverbial phrase “with knowledge that damage would probably result”. If the captain did not

<sup>43</sup> *Supra* note 40, at 700.

know that damage would probably result from his omission, the Court is not entitled to attribute to him knowledge which another pilot might have possessed or which he himself should have possessed.<sup>44</sup> Here, the captain was not reckless in not switching on the “Fasten Seat Belt” sign. For the captain’s omission to amount to recklessness, it would be necessary to show that he knew that prudent flying required him to illuminate the seat belt sign before entering the C.A.T. area -- in other words, that it would be wrong to wait for “warning ripples”.<sup>45</sup> While the Flight Operations Manual did provide for this, Eveleigh LJ was not convinced that every pilot would understand it in that way. Two of the defendants’ expert witnesses had testified that they adopted some other approach to a C.A.T. forecast. The expert witnesses also testified that while it was good practice to belt up before entering an area where moderate C.A.T. was forecast, some careful pilots exercised their discretion and waited for tell-tale signs of light turbulence before lighting the “Fasten Seat Belts” sign.

31 Eveleigh LJ was therefore unable to find that the captain understood the Flight Operations Manual as requiring him to put on the “Fasten Seat Belt” sign before actually entering a C.A.T. area or even before the first indications of C.A.T. were felt. Moreover, there was no evidence to show that the captain knew that “damage would result” from his omission. While the captain may have known that a wine glass may slip from a tray and cut a passenger’s leg because there was no seat belt to protect him, that was different from saying that he knew that someone would be thrown from his seat because he was not told to fasten his seatbelt. Agreeing with Eveleigh LJ, O’Connor LJ held that that even if he were to agree with the trial judge that the captain’s omission to light the seat belt sign was reckless, he did not think that there was any evidence from which the judge could conclude that the captain had knowledge that damage would result from his omission. Article 25 was not to be construed by such considerations as wine glasses falling off trays. The damage had to be connected with the act or omission and there was no evidence that the captain knew that injury to passengers would probably

<sup>44</sup> At this point, Eveleigh LJ paused to note that there are difficulties when translating an original French text into English. While there is a natural inclination to follow the pattern of the original text, he could not believe that lawyers who intended to convey the meaning of the well-known phrase “when he knew or ought to have known” would have adopted “with knowledge.”

<sup>45</sup> When a plane enters a zone of clear air turbulence, it usually first encounters a series of minor shocks that serve as a warning. This allows the pilot time to caution his passengers to remain seated and have their seat belts fastened.

result from this omission. The trial judge was incorrect in thinking that any sort of damage was enough.

32 Eveleigh LJ's rigorous approach to Article 25 was followed in *Nugent and Killick v Michael Goss Aviation*,<sup>46</sup> Dyson J (sitting in the Court of Appeal) held that it would be sufficient to concentrate on three different types of "knowledge". The first type of "knowledge" was "actual conscious knowledge" i.e. actual knowledge in the mind of the pilot at the instance the act or omission occurs. The second type of knowledge or "background knowledge" is knowledge which would be present to the mind of a person if he had thought about it. Finally, there is "imputed knowledge" or knowledge which a person ought to have but does not in fact have.

33 As the test of knowledge under Article 25 is a subjective one,<sup>47</sup> Dyson J rejected the notion of "imputed knowledge" and held that some form of actual knowledge would be required. He then went on to consider which of the two remaining types of knowledge ("actual conscious knowledge" or "background knowledge") would suffice for the purposes of Article 25. His conclusion was that only actual conscious knowledge would suffice as this state of mind is one that is clear and simple to understand. To include "background knowledge" within Article 25 would introduce uncertainty and difficulties of classification as there would be "argument as to where on the gradient between actual conscious knowledge and imputed knowledge a particular case comes." For example, a person who is trying to remember a fact may find that it is just below the surface of his mind or deeply buried in its recesses. It may be just below the surface of his mind by reason of his currently being distracted or tired or because he had forgotten it temporarily. It could also have been that he learnt the fact some time ago and since it was buried more deeply, he could not bring it to mind without some outside assistance. At the other extreme, he could have so completely forgotten a fact that it cannot sensibly be said that he had actual knowledge of it at all (although he may well have imputed knowledge of it).

34 If "knowledge" were to mean more than actual conscious knowledge, this would give rise to argument as to where on the gradient between actual conscious knowledge and imputed knowledge a particular

<sup>46</sup> [2000] 2 Lloyd's Rep 222, pp 231 to 233.

<sup>47</sup> *Supra* note 40.

case comes. Dyson J did not believe that it was the intention of the Convention to make it necessary for such subtle and difficult questions to be answered in order to determine whether a claimant could rely on Article 25. There was nothing in the language of Article 25 or the *travaux préparatoires* of the Hague Protocol to indicate that Article 25 was intended to include some but not all the categories of knowledge not present to the mind at the time of the act or omission. For example, there would be no reason to exclude knowledge that had been temporarily forgotten. A person who failed to apply his mind to a fact because he had temporarily forgotten it, has no more and no less actual knowledge of that fact at the time of his act or omission than a person who failed to apply his mind to it because he had been temporarily distracted. Given the difficulty in distinguishing between the different types of background knowledge, Dyson J concluded that "knowledge" in Article 25 should not mean anything other than actual conscious knowledge.

35 On the facts, Dyson J rejected the plaintiffs' claims that the damage had resulted from an act or omission of the defendant who had acted recklessly and with knowledge that damage would probably result. The plaintiffs were in a helicopter piloted by the defendant on a journey from Bolton to London<sup>48</sup> when it crashed. The plaintiffs alleged that the defendant had acted recklessly because he had failed to keep his flying skills up to date; failed to acquaint himself with the navigational aids with which the helicopter was equipped; failed to plan the flight properly and had flown when he was tired. As to knowledge of probable damage, the plaintiffs alleged that the probability of damage was "within his knowledge" in that, even if it was not present in the mind of the defendant at the material time, "if he had addressed his mind to the matter he would have appreciated, by reason of his knowledge and skill as an experienced pilot, that death or serious injury was probable". However, Dyson J held that it was not possible to infer from the evidence put forward by the plaintiffs that the defendant had actual knowledge that damage would result from his conduct. Moreover, as background or imputed knowledge was insufficient for the purposes of Article 25, it would not have been enough for the plaintiffs to show that the defendant should have known by

<sup>48</sup> The Hague Protocol was brought into force in the United Kingdom by the Carriage by Air Act, 1961. Section 10 of the Act provided that by an Order in Council, the provisions of the Hague Protocol could be made to apply to carriage by air not governed by the Convention (eg carriage by air wholly within the United Kingdom). In 1967, the Carriage by Air Act (Application of Provisions) Order was made. The Order had the effect of applying (with certain immaterial exceptions) the provisions of the Hague Protocol to carriage by air wholly within the United Kingdom.

reason of his training and experience that damage would probably have resulted from his act.

36 The rationale for the rigorous<sup>49</sup> nature of the test in the amended Article 25 of the Hague Protocol was explained by the Australian Court of Appeal in *SS Pharmaceutical Co v Qantas Airways*:<sup>50</sup>

“... Art 25 ... suggests a rigorous standard in order to qualify for full recovery from the air carrier. One of two criteria established is intentional damage. That will be rare indeed, particularly in flight, where the lives of many crew and passengers are inevitably at stake. That extreme exception gives a clue, without more, to the high stringency involved also in the alternative ground of exception ... So too does the context. For this is an exception from a compensation regime which is obviously meant to be one of general application ... a study of the minutes of the Working Group which developed that Protocol shows conclusively that its purpose was to limit even more rigorously the circumstances of escape from the general regime of limited entitlement, when compared to the already strict regime which had obtained under the Warsaw Convention itself.”

37 In *SS Pharmaceutical Co v Qantas Airways*, cargo that was being transhipped, was damaged when the defendants left it in the open, exposed to heavy rain. Each of the cartons that contained the cargo was marked with a stencilled umbrella symbol to denote that the goods therein would be damaged if exposed to water. The weather forecast for the day in question had been of rain and the cargo was left in the open for some eight hours during which it was exposed to torrential rain and wind. In an exchange of correspondence between the parties, the defendants' cargo handling supervisor admitted to “deplorably bad handling” and that it was not the first time that a shipment of cargo had been similarly damaged.

<sup>49</sup> An indication of the rigorousness of the test can be seen in *Gurtner v Beaton* [1993] 2 Lloyd's Rep 369, where the English Court of Appeal held that the defendant pilot was able to rely on Article 25 even though he had flown straight into a hillside. The Court of Appeal held that there was no basis for a finding that the pilot knew that damage would probably result from flying too low as he had (at the time of the crash) mistakenly thought that he was flying over low ground.

<sup>50</sup> [1991] 1 Lloyd's Rep 288, 302.

38 At the trial, the defendants chose not to call any evidence to explain their conduct, not even the “leading hand tarmac” who was in charge of handling the cargo. At first instance, Rogers J found that the defendants knew of the likelihood of damage having regard to the especially vulnerable cargo and the forecast of rain. His decision was affirmed by a majority of the Court of Appeal. The Court of Appeal held that the court was entitled, in the absence of any witness from the defendants to explain why the cartons were left in the open when there were clear signs on the cartons indicating that they must not be exposed to rain and the forecast for that day was rain, to infer that the person in charge was reckless and knew that damage would result and that he plainly could not care.

### **The Position in Singapore : *Beryl Claire Clarke & Ors v SilkAir (Singapore) Pte Ltd***

39 The *locus classicus* in Singapore would of course be the decision of the Court of Appeal in *Beryl Claire Clarke & Ors v SilkAir (Singapore) Pte Ltd*. Prior to *Beryl Claire Clarke*, local cases on the Warsaw Convention/Hague Protocol had dealt only with claims for loss or damage to cargo carried by the carrier and not physical injury or death. In *Singapore Airlines Ltd and Malaysian Airlines System Bhd v Fujitsu Microelectronics (Malaysia) Sdn Bhd*,<sup>51</sup> the first appellant, the carrier, Singapore Airlines, shipped seven parcels containing flash memory integrated circuit dies from Tokyo to Kuala Lumpur via Singapore. When the consignment arrived in Kuala Lumpur, it was placed in the custody of the second appellant, the carrier’s servants or agents, Malaysian Airlines System Bhd (“MAS”) at their Cargo Centre. However, only six of the seven packages were ever delivered to the consignee.

40 The respondents’ claim for the missing parcel was based, *inter alia*, on breach of the contract of carriage and/or a breach of duty as carrier under the Hague Protocol. At the trial, the appellants did not dispute that they should compensate the respondents for the loss. The only issue was whether they were entitled to limit their liability under Article 22(2)(a)<sup>52</sup> of

<sup>51</sup> [2001] 1 SLR 241.

<sup>52</sup> Article 22(2)(a) provides that:

In the carriage of registered baggage and of cargo, the liability of the carrier is limited to a sum of 250 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

[continued next page]

the Hague Protocol. The learned trial judge, Lim Teong Qwee JC held that while there was no evidence to show that the carrier's servants or agents had intended to cause the loss, they were reckless and they knew that their act/omission would probably cause the loss.

41 On appeal, the Court of Appeal reversed the decision of the trial judge. Applying the strict approach laid down in *SS Pharmaceutical Co v Qantas Airways*, the Court emphasised that since:

“a reasonable limit is set to the operator's liability in return for giving the claimant a right to secure compensation without the burden of proof of negligence, the Convention should limit very narrowly indeed, that is to those where there is an element of criminal intent, the cases where liability is unlimited.”

42 This reasoning is especially valid under the Hague Protocol, as the carrier's limit of liability has been doubled from that in the Warsaw Convention. While the Court of Appeal agreed that there was no intention on the part of the carrier's servants or agents to cause the loss, they disagreed that the evidence showed that there was any recklessness on their part or that they knew that their act/omission would probably cause the loss. The loss arose because the carrier's servants or agents did not know what had happened to the missing parcel. The warehouse that they operated was plagued with recurring problems. The warehousing was congested and poorly managed. It suffered from bad housekeeping and inadequate security measures. As a result, the warehouse was fertile ground for loss and damage to cargo. However, this did not mean that the carrier's servants or agents were reckless or that they knew that the seventh package would probably be lost. Thus, the carrier was entitled to rely on the limits of liability contained in Article 22 of the Hague Protocol.

43 In *Beryl Claire Clarke*, the plaintiffs were the personal representatives of passengers who perished on board Silkair Flight MI 185 when it crashed into the Musi River in Sumatra on 19 December 1997. On that fateful day, Flight MI 185 took off from Jakarta at 15:37 local time, bound for Singapore. Upon attaining its cruising altitude of 35,000ft (10,000m), it proceeded without incident to Palembang. The last voice transmission, a routine one from the crew, came at 16:10 to Jakarta Air

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 that sum is greater than the passenger's or consignor's actual interest in delivery at destination.

Traffic Control (“ATC”). The last radar recording from Jakarta ATC showed that the aircraft was at 35,000ft at 16:12:09. The last data recording, at 16:12:41, showed the aircraft to be at 19,500ft. The aircraft crashed into the Musi River at about 16:13. The crash occurred in daylight and in good weather. All 97 passengers, five cabin crew, pilot Captain Tsu Way Ming and First Officer Duncan Ward perished. The defendants, SilkAir (Singapore) Pte Ltd, were able to settle compensation claims with the personal representatives and dependants of all but six of the passengers who proceeded to sue.<sup>53</sup>

44 The Indonesian National Transportation Safety Committee (“NTSC”) carried out a thorough investigation into the cause of the crash. In its Final Report dated 14 December 2000 (“the NTSC report”), it concluded that the cause was unascertainable due to a lack of evidence. Only 73% of the wreckage was ever recovered and not all of it could be used for investigative purposes. The parts of the aircraft that were recovered included the cockpit voice recorder (“CVR”), the flight data recorder (“FDR”), the horizontal stabiliser, the throttle box and some oxygen generators. The data from the FDR was analysed by the manufacturers of the radar, Hughes Raytheon and corrected. There was further correction of the data by Boeing and the NTSB.

45 A separate investigation came to a different conclusion. The United States’ Accredited Representative, the National Transportation Safety Board (“NTSB”), disagreed with the NTSC’s conclusion. In a letter to the NTSC dated 11 December 2000, the NTSB suggested that:

- (1) The accident was not caused by mechanical failure.
- (2) It was likely that the accident was caused by intentional pilot action. This probably included sustained manual nose-down flight control inputs (more likely made by Capt Tsu than by F/O Ward), intentional disconnection of the CVR and a decision not to attempt recovery of the aircraft from its dive.

46 The Criminal Investigation Department (“CID”) in Singapore also conducted an inquiry into the career history and personal circumstances of the crew of the plane. In its report, ‘Investigation into Police Report Lodged by the Singapore-Accredited Representative to the NTSC on 25

<sup>53</sup> Some or all of the plaintiffs also sued the manufacturers of the aircraft (Boeing) and the manufacturers of the aircraft parts in the United States. The plaintiffs’ counsel denied this at trial but did not clarify the matter on appeal.

August 1999' (dated 14 December 2000), it stated that it had found no evidence of suicidal tendencies or of motives to crash the aircraft.<sup>54</sup>

47 In an attempt to break the limits imposed by the Warsaw Convention/Hague Protocol, the plaintiffs alleged wilful misconduct and recklessness on the part of the defendants. The plaintiffs' case was centered on the "manual input" from the cockpit setting the horizontal stabiliser of the aircraft to a nose-down trim that caused the plane to crash. The allegations of wilful misconduct and recklessness also included the fact that SilkAir allowed the captain of the plane to fly even though he had committed prior breaches of proper safety procedures and international safety standards and had a record of failure to observe or comply with proper safety procedures.<sup>55</sup>

48 The trial judge held that the actions on the part of SilkAir did not amount to "wilful misconduct" under the Warsaw Convention. Neither did they act "recklessly and with knowledge that damage would probably result" and thus the limits under the Hague Protocol were also not broken. The decision of the trial judge was affirmed on appeal.

49 First, the Court of Appeal held that the plaintiffs had failed to show that there was "wilful misconduct" under the Warsaw Convention. Applying the five step test laid down in *Thomas Cook*, the Court of Appeal held that it was not possible to answer the first two questions as to what conduct was expected in the circumstances and whether the pilots' conduct fell outside the expected range. As there were very limited facts available as to what the circumstances actually were, it was only possible for expert witnesses to discuss the possible "causes" of the crash and at the end of the day, it was still anyone's guess as to what the actual "cause" was.

<sup>54</sup> A recent newspaper article ("New data shows rudder may be the cause", *The New Paper* 19 May 2003, p 4) has reported that new data has been recovered from the Flight Data Recorder pointing to mechanical failure as the cause of the crash. While this new evidence will have no bearing on the legal proceedings in Singapore which are already *res judicata*, it may have a major impact on the lawsuits which have been filed against the aircraft and aircraft part manufacturers in the United States.

<sup>55</sup> Initially the plaintiffs also asserted that the aircraft was unsafe and defective and that by operating the aircraft, SilkAir had acted recklessly and with knowledge that damage would probably result. The plaintiffs also asserted that SilkAir had failed to maintain the aircraft in order to ensure its airworthiness. These allegations were later withdrawn.

50 The third and the fifth questions (whether the misconduct, assuming that there was misconduct, was wilful) could only be partly answered, as it was impossible for the Court to ascertain whether the pilots would subjectively have known whether their acts or omissions amounted to misconduct. The plaintiffs were also unable to show that the pilots intentionally did or omitted to do an act to cause the plane to crash. First, the corrected radar data and tests did not establish that the trajectory of the aircraft was very steep. Secondly, the condition of the horizontal stabiliser did not lead to the conclusion that the aircraft had been manually programmed to dive as steeply as it could. Thirdly, the plaintiffs could not show that the Cockpit Voice Recorder and Flight Data Recorder had been intentionally disconnected. Thus, it was impossible for the Court to judge whether the pilots had persisted with their action or omission, regardless of the consequences or had acted with reckless carelessness. There was no evidence to show what was the situation faced by the pilots and hence it would be impossible to appreciate the decision that they had to make and the risks appurtenant to each choice.

51 The fourth question to be answered was whether there was negligence that went so far beyond grossness and culpability that it amounted to wilful misconduct. This would be most pertinent if the pilots had attempted to recover control of the plane after it went into a dive. Unfortunately, it was again not possible to ascertain what actually happened. It could have been that the pilots did not even attempt to recover the plane from its dive or it could have been that they did so attempt but failed because they were reckless. Another possibility was that it could have been that they did so attempt but failed because they were negligent or careless. However, even if such negligence or carelessness were present, it would not necessarily make the pilots guilty of wilful misconduct.

52 It was also impossible to answer the seemingly simple sixth question as to whether the pilots' acts or omissions caused the crash. First, it was not possible to ascertain what the cockpit inputs were and secondly, it would be impossible to know whether there was something which the pilots should have done but omitted to do as it was also not possible to know what were the circumstances prevailing at the time of the crash.

53 In deciding whether there was recklessness under the Hague Protocol, the Court encountered the same problems as it did with trying to decide whether there was "wilful misconduct" under the Warsaw Convention. The large gaps in information rendered insoluble the question of whether the pilots intended to cause the crash or were reckless and knew that damage would result. None of the four elements in *Goldman*

could be proven. The plaintiffs were unable to show that the crash resulted from an action or omission in the cockpit. Secondly, the evidence did not support a conclusion that the pilots intended to cause the crash. Neither could recklessness with knowledge of damage be shown. As Eveleigh LJ said in *Goldman*;

“One cannot ... decide whether or not an act or omission is done recklessly without considering the nature of the risk involved.”<sup>56</sup>

54 Unlike *Goldman*, where the court knew what the risk was (the risk of injury should the passengers not be told to fasten their seatbelts during turbulence), this was not the case here. It was not possible for the Court to ascertain whether the pilots had actual conscious knowledge of the risks as the risks were unknown.

55 As for the third element in the *Goldman* test, the Court of Appeal held that it was clear that such a consequence would have been envisaged by a pilot who either intended to cause a crash or who took the risk that his acts or omissions would cause the aircraft to leave its normal flight envelope. However, there was no evidence here that the pilot or first officer intended to crash the plane or to take that risk and that they had envisaged that consequence.

56 Thus, the plaintiffs failed in their claim to have the limits of liability set aside. Those whose contracts of carriage were governed by the Warsaw Convention were limited in their claim to damages of USD10,000 and those whose contracts of carriage were governed by the Hague Protocol were limited to USD20,000.

### **Beyond *Beryl Claire Clarke***

57 While the plaintiffs may have failed in their efforts to set aside the limits of liability, the importance of the decision in *Beryl Claire Clarke* cannot be underestimated. It may be quite some time before the local courts get another opportunity to analyse the provisions of the Warsaw Convention and Hague Protocol again. Indeed such an opportunity may never arise, not only because it is hoped that there would never be another crash involving SilkAir or SIA but because of recent developments which have affected the Warsaw Convention and Hague Protocol.

58 After the 1971 Guatamala City Protocol failed to come into force, efforts continued to be made in an attempt to patch up the fragmented

<sup>56</sup> *Supra* note 40, at 699.

regime of the Warsaw Convention.<sup>57</sup> At a major conference in Montreal in 1975, the International Civil Aviation Organisation (“ICAO”) agreed on the adoption of four additional protocols to amend the Warsaw Convention and the Hague Protocol. Among the amendments contained in these four additional protocols was the introduction of the concept of Special Drawing Rights (“SDR”).<sup>58</sup> The effect of Montreal Additional Protocol No. 1<sup>59</sup> was to substitute the SDR for the gold franc in the Warsaw Convention while Additional Protocols No. 2<sup>60</sup> and 3<sup>61</sup> did likewise for the Hague Protocol and Guatemala City Protocols respectively. The conference also adopted Montreal Protocol No. 4,<sup>62</sup> which dealt with issues arising from the carriage of cargo and introduced a system of strict liability for their damage or loss. Despite strenuous efforts by ICAO to bring Additional Protocol No. 3 into force (thereby raising the limits for death or injury to that contained in the Guatemala City Protocol),<sup>63</sup> it was Montreal Protocol No. 4 and Additional Protocols No. 1 and 2 that came into force.<sup>64</sup> There appeared to be a great deal of

<sup>57</sup> Drion has compared the patchwork state of the Warsaw Convention with the *leitmotiv* of an unfinished symphony.

<sup>58</sup> With the collapse of the Bretton Woods System in 1973, it became meaningless to express the limits of liability in terms of the gold franc. Gold was no longer a stable yardstick of value as it was traded like any other commodity and priced according to supply and demand. It was agreed at the Montreal Conference to substitute the SDR for the gold franc as the former had become widely used internationally by then. The SDR is now defined as a basket of currencies. Currently, that basket consists of the Euro, the Japanese Yen, the Pound Sterling and the US Dollar.

<sup>59</sup> Additional Protocol No. 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929.

<sup>60</sup> Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol done at The Hague on 28 September 1955.

<sup>61</sup> Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocols done at The Hague on 28 September 1955 and at Guatemala City on 8 March 1971.

<sup>62</sup> Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol done at The Hague on 28 September 1955.

<sup>63</sup> These efforts included the drafting of Montreal Additional Protocol No. 3 as a protocol-to-protocol-to-protocol thereby creating a new, separate and distinct instrument with its own rule for entry into force (ratification by 30 states). In other words, even though Montreal Additional Protocol No. 3 incorporates the provisions of the 1971 Guatemala City Protocol, it actually creates a new instrument with its own legal existence and is independent of the entry into force of the Guatemala City Protocol.

<sup>64</sup> Montreal Additional Protocols No 1 and 2 entered into force on 15 February 1996 and Montreal Protocol No 4 entered into force on 14 June 1998.

reluctance on the part of nations as a whole to raise the limits of liability with regard to death or injury.

59 Fortunately, this inertia did not extend to the airlines of some developed nations, which decided to unilaterally increase their limit of liability to 100,000 SDR in the event of a death or injury to their passengers.<sup>65</sup> These included the airlines of Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Portugal, Spain and the United Kingdom. This raising of the limit was a totally voluntary action on the part of the airlines. It was not until the mid-1980s that the first law was passed in Italy, to force airlines to increase their limit of liability. This Italian measure arose as a result of a 1985 decision of the Italian Constitutional Court<sup>66</sup> which held that the limits of liability in the Hague Protocol were unconstitutional. Article 2 of the Italian Constitution guarantees the “inviolable rights of man” and in their decision, the Constitutional Court held that these included the right to compensation especially in the event of death or personal injury. The mere existence of a limit on compensation would not render it unconstitutional as such a limitation could be upheld if it represented a true compromise between the interests of the competing parties (in the aviation industry, this would be the carriers and the passengers).

60 The Constitutional Court held that the Hague limits were no longer justified by the need to give special protection to the aviation industry in light of improved safety and lowered insurance costs. Subsequently, the Italian legislature passed a law<sup>67</sup> that restored the concept of a limit on liability but at the much higher level of 100,000 SDR. The Italian measure was followed in quick succession by Japanese carriers which adopted a two-tier system of liability in November 1992.<sup>68</sup>

<sup>65</sup> 100,000 SDR was chosen because this was the limit in the 1971 Guatemala Protocol as amended by Montreal Additional Protocol No. 3. 100,000 SDR is currently equivalent to approximately USD135,000.

<sup>66</sup> *Coccia v Turkish Airlines* [1985] Dir Mar 751 (Constitutional Court, 2 May 1985).

<sup>67</sup> Law No. 274 of 7 July 1988. It was made applicable not only to Italian carriers but to all carriers operating to, from or via Italy.

<sup>68</sup> The relevant portion of the Conditions of Carriage as adopted by Japan Airlines (“JAL”) are: (4)(a) JAL agrees in accordance with Article 22 (1) of the Convention that, as to all international carriage performed by JAL as defined in the Convention:

(i) JAL shall not apply the applicable limit of liability based on Article 22 (1) of the Convention in defence of any claim

[continued next page]

61 Under the first tier of liability, the carriers would accept strict liability up to a limit of 100,000 SDR. Beyond 100,000 SDR, there would be no limit on liability but this would be made subject to a “reversed burden of proof” in which the carrier would be allowed to avail itself of the defence that it took “all necessary measures”. This “Japanese initiative”, as it came to be known, is a major historic innovation, indicating the willingness and ability of the aviation industry to accept liability without any monetary limit.<sup>69</sup>

62 The principles of the Japanese initiative were adopted by IATA at its 1995 General Meeting in Kuala Lumpur and they are now known as the Intercarrier Agreement on Passenger Liability (“IIA”).<sup>70</sup> The IIA came into force in February 1997 and to date, it has been signed by almost all major carriers, including SIA.<sup>71</sup> Unfortunately, the Japanese initiative and the IIA, both being unilateral actions by airlines, suffer from one major shortcoming. While Article 22 of the Warsaw Convention allows the limits of liability to be increased by a “special contract”,<sup>72</sup> the substantive provisions of the Convention cannot be amended as this would violate Article 32.<sup>73</sup> Given the rejection of earlier efforts to amend the Warsaw Convention piecemeal, a superior alternative would be to search for an entirely new international convention to replace the Warsaw Convention.

arising out of death of or, wounding or other bodily injury to, a passenger within the meaning of Article 17 of the Convention. Except as provided in (ii) below, JAL will not waive any defence to such claim which is available under Article 20 (1) of the Convention or any other applicable laws

(ii) JAL will not, with respect to any claim arising out of death of, or wounding or other bodily injury to, a passenger within the meaning of Article 17 of the Convention, avail itself of any defence under Article 20 (1) of the Convention up to the sum of 100,000 S.D.R. exclusive of the costs of the claim including attorney's fees which the court finds reasonable

- (b) Nothing herein shall be deemed to affect the right of JAL with regard to any claim brought by, on behalf of, or in respect of any person who has wilfully caused damage which resulted in death of, or wounding or other bodily injury to, a passenger.

The full text of the Conditions of Carriage is available on the JAL website ([www.jal.com](http://www.jal.com)).

<sup>69</sup> Abe Koichi, “*The Warsaw Convention and the Waiver of the Limitations of Liability by the Airlines of Japan*” (1992) Vol 12 Lloyd’s Aviation Law 12.

<sup>70</sup> The full text of the agreement can be found at [www.iata.org/legal](http://www.iata.org/legal). The Measures to Implement the Intercarrier Agreement on Passenger Liability (“MIA”) were also adopted at the same meeting.

<sup>71</sup> According to information available on [www.iata.org](http://www.iata.org).

<sup>72</sup> For example, CAB 18900.

<sup>73</sup> Article 32 provides that any clause or special agreement by which the parties purport to infringe the rules laid down in the Convention shall be null and void.

And there would be no better way to conduct the search than under the aegis of the ICAO.

63 In November 1995, the ICAO Council commenced preparations for a draft of the new convention. It convened a Working Group to prepare a draft report. Essentially, the approach taken by the Working Group was to follow the two-tier system of liability under the IIA. Carriers were to be strictly liable, in the first instance, for damages up to 100,000 SDR. The carrier was also to be liable for damages in excess of this figure, unless it could prove that the damage was not due to its negligence or was due solely to the negligence of a third party. This draft which was adopted at the ICAO Diplomatic Conference, convened on 28 May 1999 in Montreal, became known as the Montreal Convention.

64 Thus, unity of law was achieved once again, with the signing of the Montreal Convention<sup>74</sup> in 1999. The salient feature of the Montreal Convention is the elimination of the old limits on liability. It has become increasingly difficult in recent years to justify the limits of liability contained in the Warsaw Convention. In 1999, seventy years after the signing of the Warsaw Convention, the airline industry had grown from strength to strength and survived numerous shocks to its system.<sup>75</sup> Most of the airlines in the world had long been privatised and comprehensive risk insurance covering all types of damage is readily available at competitive rates. Drion was years ahead of his time when he said that it was not possible to find any convincing rationale for the aviation industry to be accorded special treatment and protected via limitations on the carrier's liability. Moreover, the Warsaw Convention represents an unhappy union of civil and common law concepts. Many difficulties have arisen over the interpretation of terms and expressions in the Warsaw Convention as these are civil law concepts which have no equivalent in the common law.<sup>76</sup> The time is ripe for the Warsaw Convention to be replaced by an entirely new

<sup>74</sup> Convention for the Unification of Certain Rules for International Carriage by Air done at Montreal on 28 May 1999.

<sup>75</sup> While the global airline industry is currently experiencing a period of weakness after the September 11 attacks and the current war in Iraq, it is expected to grow strongly after this period of consolidation is over.

<sup>76</sup> Besides "wilful misconduct", these terms and phrases include words like "accident", "bodily injury" and the issue of whether punitive damages can be claimed under the Warsaw Convention. There is also the problem of the Warsaw Convention being

*[continued next page]*

authentic only in French while the Hague Protocol and the Guadalajara Supplementary Convention are authentic in English, French and Spanish. Besides these three languages, the Guatemala City Protocol is also authentic in Russian!

instrument. Judging from the warm reception which greeted the Montreal Convention when it was opened for signature in 1999,<sup>77</sup> it looks like the Convention is set to repeat the success that the Warsaw Convention once enjoyed in 1929.

65 To date, more than 25 countries have already ratified the Montreal Convention. It is only a matter of time before the deposit of ratification by the 30<sup>th</sup> country and the Convention comes into force.<sup>78</sup> It is clear that the days of the Warsaw Convention are numbered and that it is only a matter of time before it is consigned to the history books. However, despite the initial upbeat response that it received, ratifications of the Montreal Convention did not flood in but instead, only trickled in at the rate of one or two a year. This means that it may take another year or two before the Montreal Convention comes into force. It must also be kept in mind that, as at the time of writing, Singapore has not even signed, much less ratified the Montreal Convention.

66 In the meantime, many of the major carriers of the world have already put the liability system contained in the Montreal Convention into place by signing the IIA. While more than 120 carriers have signed the IIA, there is still a significant minority which have not.<sup>79</sup> These include a number of airlines operating out of Singapore and other regional destinations like Silkair, Bangkok Airways and AirAsia. Therefore, until such time when the Montreal Convention comes into force, the Warsaw Convention will continue to govern contracts of international carriage by airlines such as SilkAir and *Beryl Claire Clarke* will remain the leading local decision on what amounts to “wilful misconduct” and “recklessness” under the Warsaw Convention and Hague Protocol respectively.

JACK TEO CHENG CHUAH\*

<sup>77</sup> Some 50 countries, including the United States signed the Convention on 28 May 1999 when it was opened for signature.

<sup>78</sup> The Montreal Convention will come into force 60 days after the deposit of the instrument of ratification by the 30<sup>th</sup> country.

<sup>79</sup> It is important to bear in mind that the IIA is an inter-carrier agreement, not an international Convention and the decision to sign is made by the individual companies and not a government. Thus commercial considerations may have dictated the decision on the part of the carrier not to sign the IIA.

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