## INTRODUCTION

At the time that commercial aviation became feasible – but not yet a reality – a body of maritime law had already progressed beyond infancy and into adulthood. The common law of shipping had been evolving for well over two hundred years. Even so, the first notable maritime convention governing the rights and liabilities of shippers and carriers was only signed in 1924, merely five years before its aviation equivalent. Prior to that, sea carriage of cargo was governed by domestic law of nations who, in themselves, were divided between landlocked states and those with coastlines. Generally speaking at that time, sea carriers were able to freely contract out of, liability or, at least, severely restrict it.

It is perhaps arguable that aviation jurists took note of the inconsistencies in the governing laws in the maritime field and saw the need for the creation of an aviation convention to govern carriage by air. In 1929, just two years after Charles Lindbergh made his daring crossing of the Atlantic Ocean, a large number of States signed the *Convention for Unification of Certain Rules Relating to International Carriage by Air* ("the Warsaw Convention").

The Warsaw Convention, although most likely influenced by the maritime Hague Rules of 1924, was farsighted and far-reaching for its time. As mentioned, commercial aviation was still in its infancy and the Convention faced the risk that it was too progressive to succeed. It could have ended up like the Moon Agreement in terms of usefulness. However, commercial carriage by air, unlike mining on the Moon, did develop and made the Warsaw Convention a practical legal instrument. The Convention was revolutionary for its time in that it, arguably, created a better balance of interests between the carrier and shipper than was common in the maritime

field. The fact that it remains one of the most widely adopted international Conventions of all time bears out this contention.

The purpose of this paper is to examine the differences between the governing international regimes for carriage of cargo by air and carriage of cargo by sea. Since the most of us will be more familiar with the latter, the paper is primarily written from an air law perspective in order to highlight the differences in approach between the two disciplines.

## HISTORY OF AVIATION CONVENTIONS

As mentioned, the Warsaw Convention was the first international treaty to be established to govern international carriage of passengers, baggage and cargo by air. (This paper will only focus on the carriage of cargo.) Although it includes peripheral stipulations, it is safe to say the Convention's greatest significance lies in its governing of three primary areas, namely, standardisation of documentation, establishment of a liability regime and in the laying down of rules for establishing jurisdiction for dealing with claims. These three areas will be discussed in more detail later in this paper.

Because of the immense importance of commercial aviation, the Warsaw Convention has attracted more than 150 ratifications, making it the most widely accepted unification of private international law. Nevertheless, the Warsaw Convention has attracted significant criticism over its 70 year history. Almost without exception, these attacks have been aimed at the level of liability limits for passenger injury or death and have led to the adoption of various Protocols - and one supplementary

convention - to amend the Warsaw Convention. In May this year an entirely new unification of rules was drafted following an ICAO plenary session held in Montreal.

It is notable that, while the drafters of these new instruments have taken the opportunity to clarify certain aspects of cargo carriage, they have not so much been concerned with increasing the liability limits or expanding the liability regime for cargo. Only two instruments, *Montreal Additional Protocol 4* (1975) ("MAP 4") and the new *Montreal ConventionI,* address cargo limits. Even then it is only to express the old limits in terms of the IMF's Special Drawing Rights. In doing so, care has been taken to maintain the value of the weight limits.

Four instruments currently govern carriage of cargo by air:

- The Warsaw Convention (1929) (In force)
- The Warsaw Convention as amended by the Hague Protocol (1955) (In force)
- The Guadalajara Convention (1961) (In force)
- Montreal Additional Protocol No. 4 (1975) (In force)

**Recent Developments**

On 28 May 1999, a new instrument, the "Montreal Convention", was opened for signature at an ICAO Diplomatic Conference in Montreal. The new Convention has potentially significant implications for those involved in the carriage of cargo by air, but it will only come into force shortly after it receives its 30th ratification.

States that ratify the Convention face an additional problem. According to Article 55 of the new Convention, once a State ratifies the Convention, it will prevail over the Warsaw Convention and its amendments to the effect that the ratifying State will have

no treaty relationship with States who have not ratified the new Convention but remain party to the Warsaw Convention or its amendments.

It is to be seen whether the new Convention receives widespread support but, in any event, it will take quite a number of years before receiving the required 30 ratifications.

## HISTORY OF MARITIME CONVENTIONS

As briefly mentioned above, there was a disparity in views between nations with access to the sea, (who naturally tend to be the main ship-owning States), and landlocked countries. Whereas the former generally have an interest in protecting sea carriers, the latter generally have an interest in protecting the users of ships, (i.e. cargo interests), against potentially unfair contractual terms such as limits or exclusions of liability. A bulk shipper has a relatively strong bargaining position whereas a shipper of low volume will generally have to accept whatever terms of carriage are put to him. In the 19th century, carriers took this strength of position for granted and traded on terms which generally exonerated them from all liability.

The USA led the way in bringing about reform with the enactment of the Harter Act 1893 which set out a statutory scheme of regulation of rights and liabilities between shippers and carriers which could not be contracted out of or amended less favourably by the bill of lading terms used by carriers.

Significant shipper countries, such as the UK, Canada, Australia and New Zealand adopted similar legislation. In order to counter these reforms, British shipowner interests convened a meeting of the Maritime Law Committee of the International

Law Association to formulate model rules for carriage of goods by sea. These were adopted at a plenary session of the Association at The Hague in 1921 before finally becoming the Hague Rules in August 1924. The Hague Rules were then not further revised until 1968.

However, like the Warsaw regime, these rules are not, and have not ever been, universally popular or accepted.

Two other maritime conventions will be examined briefly in this paper, namely, the *Limitation Conventions* of 1957 and 1976. Broadly, these Conventions deal with cases where negligent navigation and/or management of a ship leads to a collision or loss of life or cargo and provide that owners, can limit their liability based on the tonnage of the ship. In the event of an accident, a fund is created up to the limit of liability and injured parties are compensated, *pro rata*, from this fund. The 1976 Convention allows for the establishment of two separate funds, namely one for personal injury and one for cargo claims.

The aviation industry does not have an equivalent system to that offered by the *Limitation Conventions*. It is arguable that the value of claims arising from a catastrophic collision between ships will far exceed aircraft accidents and that a fixed limit of liability is also necessary in order to obtain adequate insurance. However, airlines still run a risk in not being able to limit their liability towards third parties but, for public policy reasons, that liability remains strict in most jurisdictions. A recent accident in China, where an aircraft crashed into a built up area of Shanghai, illustrates the potential for unlimited third party claims.

The United Nations, by means of its *Convention on the Carriage of Goods by Sea* signed at Hamburg in 1978 has also sought to reform the Hague / Hague Visby liability regime but so far it has not been adopted by any significant trading nations. Needless to say, the Australian government came close to adopting it on at least two occasions, before deciding to produce its own solution to some of the criticisms levied at the Hague / Hague Visby Rules. As you all know, the *Carriage of Goods by Sea Regulations 1998* came into force on 1 July 1998 although I believe that they have not yet had a significant impact upon the practice of carriage of goods claims.

**Documentary Provisions**

The form of documents used in air carriage is essentially based on maritime precedents. This is easily confirmed by a simple glance at a bill of lading and an air waybill. The format is almost identical.

Since adoption of the standard air waybill, its format has changed little and has now become cumbersome for the modern electronic age. Anecdotally it is said that airlines spend a larger portion of their operating expenses on paper ticketing and air waybills than they do on fuel. Ironically, it was the desire to ensure limited liability, intended to protect airlines from undue financial burden, which has proven to be an impediment to the road to electronic documentation.

Article 8 of the Warsaw Convention and Article VI of Warsaw/Hague describe the mandatory information that needs to be shown on an air waybill (although the Warsaw/Hague regime has significantly reduced the amount of information required). Article 9 of Warsaw and amended article 9 of the Warsaw/Hague regime, however, stipulate that if certain information - and notably the notice that the Conventions

apply and may limit liability - is absent, the carrier will not be able to avail itself on the Convention limits of liability. Apart from the mandatory notice requirements, Articles 5 and 6 of the Warsaw Convention also prescribe the form and number of documents that need to be delivered for carriage. These have prevented airlines from finding simpler ways of preserving records of carriage.

But MAP 4 and the Montreal Convention strive to simplify documentary requirements. Article 5 of MAP 4, for instance, allows for other ways of preserving a record of the carriage as an alternative to delivering an air waybill. The consignor must, however, agree to such alternative methods. The carrier must also issue a receipt to the consignor, if so asked, that allows for the identification of the consignment and access to the information contained in the record preserved by such "other means." Moreover, MAP 4 makes the limits of liability unbreakable notwithstanding any defect in the contents of the record. Article 5 of the Montreal Convention goes further in that it requires certain information to be printed on the cargo receipt, namely the places of departure and destination, at least one of the agreed stopping places (if there is one) and the weight of the consignment. Obviously this information in critical to identify the applicable legal regime of the carriage contract and the limits of liability which apply.

Perhaps it is because the concept of paperless travel is too new, or because the practice of issuing air waybills has become entrenched, but airlines have been slow to move to consider alternatives to standard air waybills. They are, however, beginning to do so. So far, most of the focus is on electronic passenger ticketing, which obviously constitutes the bulk of an airline's "paperwork." Article 6 of MAP 4 and Article 7 of the Montreal Convention maintain the need for detailed information about

the issuing of air waybills, further indicating that the air waybill in its traditional form is likely to be around for some time to come.

Part of the problem of "waybill-less" cargo carriage is that airlines want to draw consignors' attention to their conditions of contract and that referring to a separate booklet, such as airlines' current Conditions of Carriage booklet, is not always accepted in certain jurisdictions. In the United Kingdom the fact that no warning is given about the limitation of liability may fall foul to the *Unfair Contract Terms Act*, for instance. Whether lengthy conditions of contract can be usefully displayed on a mere cargo receipt is doubtful.

By contrast, significant steps have been taken by the shipping and marine freight forwarding industries to implement electronic forms of data interchange and these have been embraced by several governments including the British and Australian whose Parliaments have enacted appropriate implementing legislation for the use of EDI.

**Carrier Defences**

The liability schemes in maritime conventions differ from those in aviation conventions. The Hague and Hague/Visby rules basically establish a duty of care upon the carrier to exercise due diligence before and at the beginning of the voyage and to ensure proper and careful loading, handling, stowage and carriage of goods. Thereafter, a list of defences is available to the carrier and, as been made clear in the recent *Bunga Seroja* litigation and the earlier *Gamlen Chemical v Shipping Group of India* case, an investigation of the proximate cause of the loss must be undertaken to see if a defence can be made out.

The liability regime under the Warsaw Convention is more onerous. It provides that the carrier is presumed liable on condition only that the claimant proves that the damage occurred during carriage by air. Under the Hague and Hague/Visby Rules, a claimant will have to prove that the ship was not seaworthy or properly manned or that the carrier did not handle, stow or carry the goods carefully or properly. In cases of unexplained losses at sea, this may be difficult.

On the other hand, it is relatively easy to prove that the goods were damaged during carriage by air since this period includes the time that the goods are in the custody or control of the air carrier or its agent. All the claimant has to show, is a clean air waybill at delivery of the goods to the carrier and that the goods arrived in damaged condition (or did not arrive at all). Goods are also considered to be under the carrier's control if they are in the custody of the carrier's agents.

It is also clear from a first reading of the Warsaw Convention that the circumstances in which an air carrier can avoid liability are far less defined than that of the sea carrier. Under the Hague and Hague/Visby Rules, a sea carrier has certain obligations to fulfil with each obligation having its own separate defences. These defences are clearly stipulated and relate to defined scenarios such as fire, acts of war, strikes and lockouts.

By contrast, an air carrier has but two defences namely, that it and its servants/agents took all necessary measures to avoid the damage/loss/delay (Article 20) or that the damage was caused or contributed to by the negligence of the injured person (Article 21). It is an open question whether the "injured person" can also be a cargo owner who suffered financial injury. It is clear from Article 20 of the Warsaw Convention

that the wording is, if not ambiguous, open to interpretation. Courts have generally defined "all necessary measures" as meaning all *reasonable* measures, but even this qualification is not sufficient to prevent courts from using the benefit of hindsight to find a carrier liable. In practice, Article 20 is of little benefit to carriers, which is probably why airlines have unilaterally waived this defence both in the 1966 Montreal Agreement and in the 1995 IATA Intercarrier Agreement.

MAP 4 brought about a change in the type of defences open to an air carrier of cargo. The Protocol deletes Article 20 (except in cases of delay) and, instead, provides four new defences namely that the damage was caused by:

(a) an inherent defect, quality or vice of the cargo,

(b) defective packaging of the cargo performed by a person other than the carrier or its servants or agents,

(c) acts of war or armed conflict,

(d) acts of public authority carried out in connection with the entry, exit or transit of the cargo.

These defences have also been adopted in the new Montreal Convention.

If some of these defences sound familiar, it is because they are largely borrowed from the Hague and Hague/Visby Rules. It is ironic, however, that while air law is moving towards a fixed list of established defences, the Hamburg Rules take sea carriage in the opposite direction by requiring a carrier to prove that it or its servant or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

## LIMITS OF LIABILITY

Both maritime and aviation lawyers are familiar with the concept of limits of liability. In sea carriage, as mentioned earlier, the concept was well embedded by the time that the Hague Rules were signed in 1924. Perhaps aviation law copied the Hague Rules when it introduced Article 22 of the Warsaw Convention, but the traditional explanation is that the limitation of liability was a trade-off for air carriers accepting presumed liability at a time when the airline industry was at its fledgling stage of development.

The limits set out in Article 22 of the Warsaw Convention have become the primary focus of criticism of the Warsaw regime. Virtually all litigation in carriage by air centres on the limits of liability. It is interesting then that neither MAP 4 nor the new Montreal Convention significantly increase the cargo limits. Moreover, the two instruments make the limits unbreakable even in cases where the carrier acted recklessly and with knowledge that damage would probably result or with intent to cause damage.

MAP 4 is, however, no longer of much commercial or practical value due to small number of ratifications it has received so far. For the most part, international carriage by air is governed by Warsaw/Hague, which allows for the limits of liability to be broken in cases of recklessness and intent and is usually (but not always) tested subjectively. This is virtually identical to Art IV Rule 5(e) of the Hague/Visby Rules except that the latter also include unjustified deviation or deck carriage. It is also significant that the Hague/Hague Visby version requires recklessness by the carrier

itself – intention or recklessness by servants or agents is not enough (see The *European Enterprise* 1989).

For maritime claims, limits which were previously expressed in gold value, are now converted to Special Drawing Rights (SDRs) by virtue of the SDR Protocol 1979. This issue has also been addressed in aviation by four additional Protocols signed in Montreal in 1975. The fourth Protocol, MAP 4, converted the Warsaw cargo limit of 250 gold Francs (of the Warsaw Convention) or French Francs (of Warsaw/Hague) to 17 SDRs, a conversion that is copied in the new Montreal Convention. Nevertheless, due to MAP 4's insignificant following, most aviation liability claims still uses the 250 Francs of the Warsaw Convention. Many States have converted this amount into a local currency equivalent by way of legislation or Regulation. Airlines have also converted the limit into US$20 per kilogram pursuant to a declaration by the US CAB that fixed the last official price of gold at US$20 per kilogram. However, where a country's local equivalent is higher than US$20 per kilogram, airlines are prohibited from using the limit of liability stated in their Conditions of Contract since this is an attempt to set a lower limit, something that is prohibited by Article 23 of the Warsaw Convention.

The question arises why an attempt similar to that of the SDR Protocol was not made to convert the Warsaw limits into SDRs. Arguably, MAP 4 perhaps went too far by introducing an unbreakable limit of liability at a time when the limits were already seen as too low.

**What is a "Package"?**

A final issue to be examined when discussing limits of liability, is what weight should be taken into account when calculating the limits. Under the Hague/Visby Rules, liability is capped at either SDR666.67 per package or SDR2 per kilogram of gross weight of the lost or damaged goods, whichever is the higher. The question therefore arises what is to be considered a "package" for limitation purposes. Article 4 rule 5 (c) of the Hague Visby Rules largely resolves the problems encountered in the Hague Rules at least with regard to goods carried in a container or pallet.

There is still some doubt when the bill of lading acknowledges receipt of a container "said to contain" a specified number of packages. The better view appears to be that the number of packages stated on the bill is the number of "packages" for the purposes of Article 4 Rule 5 even though the carrier may not be certain as to the number of packages carried. The fact is that the number of packages are "enumerated in the bill of lading" and therefore should satisfy Article 4 Rule 5 (c) (see *PS Chellaram and Co. Ltd v China Ocean Shipping Co. (1989)*).

Where the unamended Hague Rules apply, it has been held that the Plaintiff can recover the limit amount from each of several defendants in the same proceedings (see *Carrington Slipways Pty Ltd v Patrick Operations Pty Ltd (1991)*) and *The Nichigoh Maru* – (unreported decision of the New South Wales Supreme Court 1991).

Furthermore, where the unamended Hague Rules apply, it has been held that a wrongful deviation by a carrier deprives it of the right to limit its liability under Article 4 Rule 5 (see *The Chanda 1989*).

A carrier's liability cannot be limited if the nature and value of goods are declared by a shipper before a shipment and inserted in a bill of lading. The declaration in the bill

of lading is prima facie evidence of the value of the goods but is not binding or conclusive on the carrier (see Article 4 Rule 5 (f) of the amended Hague Rules). However, in practice, a value is rarely declared because a carrier will, not surprisingly, charge a much higher freight rate.

In *PS Chellaram & Co. Limited v China Ocean Shipping Co.*,the Supreme Court of New South Wales adopted a "functional package" test for determining the meaning of the "package or unit" for the purposes of Article 4 Rule 5 and determined that it refers to "the unit in which the shipper packed the goods".

In US trades, the courts generally look to the "customary freight unit" to determine the package to be adopted for these purposes.

In aviation, the same question is still actively being debated. The Warsaw Convention simply states that the carrier's liability is limited to 250 Gold Francs per kilogram unless a higher amount is declared. However, with the practice of consolidating consignments, a grey area was created whereby limits of liability *may* be circumvented. Shippers can claim for the full weight of the consolidated cargo even in cases of partial loss. It is arguable that the Warsaw Convention contains wording that would preclude this from happening. Notably, the Convention aims to limit claims against air carriers to actual loss suffered. Article 18, for instance, states that "the carrier shall be liable for *damage sustained...*" Article 17, which deals with passenger injury and death, also contains similar wording which has been held to preclude non-compensatory damages such as punitive damages. To allow a claimant to recover on the full weight of the consignment even where he received part of that consignment would be tantamount to either unjust enrichment or making the carrier the insurer of the cargo. In fact, the Convention has a provision whereby the shipper

can declare the value of the goods and, at the payment of a premium, obtain "insurance" from the carrier up to that amount.

Notwithstanding these arguments, the Hague Protocol inserted Article 22(2)(b) in order to try and close the loophole. In many respects this attempt failed. Article 22(2)(b) states that

> "*In the case of loss, damage or delay of part of registered baggage or cargo, or any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited* ***shall be only the total weight of the package or packages concerned.*** *Nevertheless, when the loss, damage or delay of a part of the registered baggage or cargo, or any object contained therein affects the value of other packages covered by the same air waybill, the total weight of such package or packages shall be taken into consideration in determining the limit of liability.*"

However, the insertion of this wording created a new controversy focused on the question of what is a package. Depending on the nature of the claim, interests may argue that the package is the smallest unit indicated on the air waybill or that it is any one of a number of identifiable units within the consignment. The former argument obviously draws heavily on maritime carriage and was notably used in a Dutch case of *Seaboard World Airlines v Nieuwe Rotterdam.* The argument, however, appears flawed when viewed against the compensatory aim of the Warsaw Convention and the case has been criticised by authorities on air law such as the authors of Shawcross and Beaumont's *Air Law.* It is submitted that a better solution was presented by Lord Denning in the English Court of Appeal case of *Bland v British Airways.* In that case, certain items were lost from a checked-in suitcase (the principles for checked baggage and cargo are identical). The carrier sought to reconstruct the weight of the lost items by using similar items. The Plaintiff's objected but Lord Denning held that, while the

carrier has the burden to prove the weight of the lost goods, it was allowed to use any means available to prove the weight. In carriage by air, where the use of containers and heavily packaged items are not as established as in shipping, this interpretation of Article 22(2)(b) appears to be more practical.

Further, the issue of the weight to be taken into account is not clear cut. Arguments abound. But the better view seems to be that expressed in *Data Card Corporation v Air Express International (1983)* and *Hartford Fire Insurance Co. v TWA*. This view is that only the weight of the goods lost or damaged should be taken into account and not either the weight of the entire consignment or the weight of the package or carton from which the goods were lost. The argument often arises in the case of missing mobile phones or other similar goods which are of high value and of low weight.

The last part of Article 22(2)(b) warrants brief mention. Even where opposing parties agree to the meaning of a "package", the question often arises whether the partial loss or damage affected the value of the entire consignment. One can envisage a situation where an importer or a number of identical items, such as stuffed toys for instance, loses a business contract for failure to deliver the full amount of the ordered goods. Does this mean that the loss of a number of items from the consignment affected the value of the entire shipment? The answer appears to be "no." What is usually understood to "affect the value of the entire consignment" is where the other parts of the consignment are unable to function or have no value without the damaged or lost part. A good example would be where a mainframe computer is shipped along with its components such as the software, cables, etc. Should the mainframe computer become lost or damaged, the residual items will arguably have no value (apart from salvage) by themselves.

**Jurisdiction**

One of the most important provisions in the Warsaw Convention is Article 28 which deals with jurisdiction and the question of where proceedings can be brought. It is interesting to note that the Hague and Hague/Visby Rules are silent in this regard. In carriage under the Hague and Hague/Visby Rules, the laws of the State from where the goods were shipped, will generally apply. However, the Hamburg Rules adopt a jurisdiction clause which provides for more fora than the Warsaw Convention's Article 28.

In the context of passenger claims the Montreal Convention has recently implemented a so called "fifth jurisdiction" to allow claims to proceed in the place of principal residence of an injured party subject to certain caveats. This change was brought about largely due to pressure from the United States to the obvious advantage of its citizens.

Whatever the reason for its inclusion, Article 28 allows for only four jurisdictions where claims may be brought. They are the place where the carrier is domiciled, where it has its principal place of business, where it has a place of business through which the contract of carriage (the air waybill) was made, and the place of destination. The Plaintiff has to choose a forum from the four. The new Montreal Convention has introduced a fifth jurisdiction, namely that of the domicile of the passenger, but this forum only applies in cases of passenger injury or death and not to cargo.

**LIABILITY OF SERVANTS AND AGENTS**

In the context of marine claims, the courts have for years grappled with the problem arising from the fact that as a general rule a stranger to a contract cannot take advantage of the provisions of that contract even where it is clear from the contract that some provisions in it were intended to benefit him. Usually the scenario arises in the context of stevedore claims and the question asked is whether the benefit of protections contained within the bill of lading can be extended to them, as agents or servants of the carrier. Lord Denning foresaw this possibility in his dissenting judgment in *Midland Silicones Ltd v Scruttons Ltd (1961)* and has strong support in Australia in the insurance context (see *Trident General Insurance Co. Ltd v McNiece Bros. Pty Ltd (1988)*).

The Australian Courts have also follow this approach as something of an exception to the privity of contract principle and this can be seen, for example, in *The Erymedon (1975)* and *Carrington Slipways Pty Limited* v *Pacific Austral Pty Ltd (1991).*

Much has been written and debated about so called "circular indemnity clauses" and Himalaya provisions. Distilled to its essential elements, a circular indemnity clause is such that A agrees with B that he will make no claim against X (someone other than the contractual "carrier") for any liability whatsoever and if, contrary to this agreement, such action is taken, then A agrees to indemnify the carrier against the consequences of his action. Whether such clauses are valid remains a moot point but it would appear that they will be upheld (see for example *BHP v Hapag-Lloyd (1980)* and *Sidney Cooke Limited v Hapag-Lloyd (1980)*). Moreover, Himalaya provisions have long been upheld.

In the aviation context, the issue usually arises in the context of claims against carriers and their ground handling agents. The Singapore courts have been particularly active in considering this issue. In *Seagate Technology International v Changi International Airport Services Pte Ltd (1997)*, the Singapore Court of Appeal applied a literal interpretation of the Warsaw Convention refusing to accept that the word "carrier", where it appears in the Warsaw Convention, automatically includes its agents as well. The principal question at stake is whether a consignor of cargo who sues a carrier's agent for loss is required to plead Article 18 of the Convention or whether he can plead his case at common law. It was argued, successfully, that Articles 17, 18 and 19 create liability on a carrier but not on its agents since those provisions do not specifically refer to the servants or agents of the carrier. The decision extends the liability exposure of carrier's agents and indirectly a carrier's own liability under ground handling arrangements.

A further decision of the Court of Appeal of Singapore on 27 August 1999 looked at a similar problem from a slightly different perspective. The case this time was between *Yusen Air & Sea Service (S) Pte Ltd* and *Changi International Airport Services Pte Ltd.* The case reached the Court of Appeal because the appellants claim against CIAS, founded in negligence and bailment for the loss of a consignment of integrated circuits, had failed. A clause in the carrier's master air waybill was phrased in terms similar to that of a Himalaya clause found in most bills of lading. It sought to extend the limitation of liability to persons other than the carrier. It was decided that CIAS had impliedly authorised the carrier (KLM) to contract on the basis including the Himalaya provision and that this was true in the light of commercial practice.

Whilst following the earlier *Seagate* Court of Appeal decision, the Court found that the carrier's agent, although susceptible to other causes of action apart from under the Warsaw Convention, was entitled to the limits of liability under the Convention and that, alternatively, it could rely as an agent of the carrier on contractual conditions appearing in the carrier's air waybill.

## CONCLUSION

A comparison of marine and aviation liability regimes is almost inevitable as development of the two has been intertwined for many years. The point of interest is in the diversity of solutions to similar problems and the way in which, in recent years, the two industries have, at times, moved in the same direction to resolve common problems, whilst at others they have swapped positions and gone off at tangents. To some extent, the very nature of the two industries, and the difference in time scale of typical journeys, dictates that different solution to will always have to be found to some problems. However, where there is room for common ground, for example in the context of deciding whether limits on liability should be imposed or not, it remains to be seen whether the marine industry and the marine insurance sector, come under the same pressures that have been faced by airlines and their insurers in recent years.