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Critique of *Siemens v. Schenker*: High Court of Australia Decision 9 March 2004

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I. INTRODUCTION

THE *SIEMENS V. SCHENKER*[1] case was the first in the world to have considered in any comprehensive manner the meaning and application of the limitation of liability clause (Clause 4) in the International Federation of Freight Fowarders Association's (FIATA) International Air Transport Association (IATA) standard form air waybill. The industry worldwide was waiting for an answer of substance from the High Court of Australia.

Instead, we were given only two opinions from each of the two dissenting judges (Acting Chief Justice (A.C.J.) McHugh and Justice Kirby) that provided us with any comprehensive and substantive analysis of the clause and its meaning.[2]

The majority opinion provided no more than four pages of substance dealing with Clause 4 and its meaning – an analysis that can only be described as severely brief, superficial and wrong.[3]

Kirby commented on the superficiality of the majority's analysis, stating: "A quick reading of the conditions of contract in the air waybill might lead to the conclusion reached by the Court of Appeal and now by a majority of this Court."[4]

The problem with Clause 4 of the bill is that the air transport industry worldwide (including lawyers and courts alike) has given the clause the "quick read" for so long that it has been accepted universally as correct, so that the bill continues to be

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[1] Siemens Ltd. v. Schenker Int'l Pty (Austl.) Ltd. (2004) 216 C.L.R. 418.

[2] *See id.* at 423-42, 454-72.

[3] *See id.* at 442-54.

[4] *Id.* at 459 (Kirby, J., dissenting).

used as the sole instrument of protection for carriers in circumstances where it really provides none at all.[5]

II. THE FACTS & ISSUES

Very briefly, the case involved the dropping of computer equipment from the back of a truck that was in transit approximately one kilometer outside Melbourne Airport, on its way to Schenker Australia's customs-bonded store, approximately four kilometers from the airport confines.[6] Negligence was admitted.[7]

The High Court held unanimously that the Amended Warsaw Convention did not apply to this incident, as its provisions did not extend to the road carriage beyond the airport boundary.[8] This meant that Schenker Germany could not rely on the limitation of liability provisions in the Convention to reduce its liability.[9] Therefore, Schenker Germany and its Australian representative, Schenker Australia, sought to rely on Clause 4 of Schenker Germany's house air waybill to limit their liability.[10]

The primary issues of the case, then, were:

1. Did the word "carriage" in the limitation of liability clause (Clause 4) mean "air carriage" as defined by the Warsaw Convention and Amended Warsaw Convention ("the Conventions"), thus restricting the limitation's application to the air carriage period and preventing its application to the road carriage outside the airport?[11]
2. Did the terms of the air waybill operate after delivery at the airport of destination, i.e., to the road carriage outside the airport?[12]

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[5] *See id.*

[6] *Id.* at 425 (McHugh, A.C.J., dissenting).

[7] *Id.*

[8] *Id.* at 442 (McHugh, A.C.J., dissenting); *id.* at 447 (Majority); *id.* at 458 (Kirby, J., dissenting).

[9] *See id.* at 458.

[10] *See id.*

[11] *Id.* at 423 (McHugh, A.C.J., dissenting).

[12] *Id.*

III. LEGAL ANALYSIS

A. THE MAJORITY'S INTERPRETATION OF "CARRIAGE" IN CLAUSE 4

> Except as otherwise provided in carrier's tariffs or conditions of carriage, *in carriage to which the Warsaw Convention does not apply carriers' liability shall not exceed USD 20.00* or the equivalent per kilogram of goods lost, damaged or delayed, unless a higher value is declared by the shipper and a supplementary charge paid.[13]

As the Warsaw Convention only applies to air carriage (i.e., aboard an aircraft or within airport confines or other landing place), a "quick read" of Clause 4 will result in the conclusion many have assumed for many years (including now the majority of the High Court of Australia), that the US $20-per-kilogram limitation applies because road carriage beyond the airport is carriage to which the Warsaw Convention does not apply.[14]

This is simple and seems at first glance reasonable. This was Schenkers' case and it has been applied for years. It is a simplistic approach, which was adopted by the majority.[15] The majority stated:

> cl. 4 itself operates only in respect of carriage to which the Warsaw Convention does not apply. In so providing, the waybill contemplates a disjunction between carriage to which the Warsaw Convention applies (international carriage by air) and carriage which is governed solely by the terms of the waybill. *It must follow that "carriage" in clause 4 has a meaning different from that contained in Art 18 of the Warsaw Convention.*[16]

This conclusion lacks any proper foundation.

First, Clause 4 says nothing as to the meaning of "carriage" covered by the bill.[17] Yet, the majority's conclusion is derived from their description of a "disjunction," where they implicitly assume that the word "carriage" already has a wider meaning than air carriage.[18] In so doing, the majority is effectively giving meaning to the word "carriage" in order to arrive at a conclusion as to its meaning. This is an illogical approach.

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[13] *Id.* at 458 (Kirby, J., dissenting) (emphasis added).

[14] *See id.* at 459.

[15] *See id.* at 449 (majority opinion).

[16] *Id.* at 450 (emphasis added).

[17] *See id.* at 449.

[18] *See id.*

Second, there is no doubt that there is a disjunction between the meaning of carriage covered by the Warsaw Convention ("International Carriage" as defined by article 1 of the Convention) and other carriage under the bill.[19] However, it is not correct to conclude that this disjunction means that the other "carriage" has a different meaning to that covered by article 18 of the Warsaw Convention (i.e., air carriage).[20] This is because there is "carriage" to which the Warsaw Convention does not apply but which is "carriage by air" under article 18.[21] That is:

(a) domestic carriage by air, and

(b) carriage by air between states that are not both signatories to the Warsaw Convention.[22]

Both these carriages are air carriage as defined by article 18 of the Conventions, but they are not carriage to which the Warsaw Convention applies because they are not "International Carriage" as defined by article 1 of the Conventions.[23]

Therefore, it is clear that the presence of the disjunction is not to distinguish between carriage under article 18 and any other "carriage" under the bill, but to distinguish between air carriage that is covered by the Warsaw Convention and air carriage that is not (i.e., that which falls within the definition of "International Carriage" under the Warsaw Convention and that which does not).

This can only be properly understood by reviewing all the clauses of the bill, the history and purpose for which the bill was drafted, its relationship with the Warsaw Convention and the impact that these factors have on the meaning of the words and phrases in the bill when read as a whole. It is only through such a thorough analysis that the document can be read with any sense and consistency. This was an exercise that each of the dissenting judges addressed comprehensively, but which the brief majority judgment fails to tackle.

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[19] *See id.*

[20] *See id.* at 449.

[21] *See* Convention for the Unification of Certain Rules Relating to International Carriage by Air art. 18, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter Warsaw Convention].

[22] *See id.*

[23] *See id.* arts. 1, 18.

B. The Majority Judgment Did Not Consider the History and Purpose of the Bill Together with the Clauses of the Bill Which Use the Word "Carriage"

1. History & Purpose

The first IATA bill was drafted in 1931 shortly following the introduction of the Warsaw Convention in 1929.[24] IATA was aware that the Warsaw Convention did not apply to all air carriage.

As previously indicated, the Warsaw Convention only applies to "International Carriage," which by definition excludes (1) air carriage between states that were not both signatories to the Convention and (2) domestic air carriage.[25]

IATA, therefore, recognized that it was necessary to introduce a contractual document that mirrored the provisions of the Warsaw Convention to ensure that the same levels of responsibility and liability would apply to all air carriage (Warsaw and non-Warsaw), thereby ensuring uniformity and certainty.[26] The Convention also required that a bill be issued together with appropriate details, including notification that its liability provisions may apply, an indication of the places of departure and destination, etc.[27]

2. "Disjunction" and Purpose of Clause 4

With this background, it becomes clear that the "carriage" to which the Warsaw Convention does not apply in Clause 4 is really non-Warsaw air carriage – this is the real disjunction that the Majority fails to grasp, that between Warsaw air carriage and non-Warsaw air carriage.[28]

Clause 4's intended purpose is, without doubt, to apply the same limitation of liability to non-Warsaw air carriage as that

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[24] 1 Shawcross and Beaumont: Air Law, 1031-40 (4th ed. 1977) [hereinafter Shawcross].

[25] Warsaw Convention, *supra* note 21, art. 1.

[26] Shawcross, *supra* note 24 (reciting each clause of the IATA bill and noting which provisions of the Conventions each clause reflects); *Siemens*, 216 C.L.R. at 461-63, 465 (Kirby, J., dissenting) (stating how the provisions of IATA bill mirror the provisions of the Warsaw Convention).

[27] Warsaw Convention, *supra* note 21, art. 8 as provided in cl. 2.1 of the IATA bill; *Siemens*, 216 C.L.R. at 461-63 (providing an interesting analysis on the purpose of the IATA bill).

[28] *See Siemens*, 216 C.L.R. at 450.

provided to Warsaw air carriage (clearly reflected by the US $20 being the equivalent amount under the original Convention).[29]

This intention becomes abundantly clear when reviewing the clauses that actually use the word "carriage" and the inclusion in those clauses of the phrase "other services."

3. The Meaning of "Carriage" as Used in the Clauses of the Bill

The majority's conclusion that "carriage" can include non-air carriage requires the same word to have different meanings in the same document.[30] That is inconsistent with the structure of the document and, in particular, the following provisions:

> Clause 1 defines carrier as "all air carriers that carry or undertake to carry the goods hereunder or perform any other services incidental to such air carriage."[31] The reference to "*such* air carriage" relates the phrase "air carriage" back to "carry or undertake to carry," which indicates that "carry . . . hereunder" is carrying by air.[32] Also, it is noted that the act of carrying is differentiated from the "other services" performed incidental to such air carriage.[33]

Clause 2.1 is the clause that effectively defines "carriage hereunder."[34] It states: "Carriage hereunder is subject to the rules relating to liability established by the Warsaw Convention unless such carriage is not "international carriage" as defined by that Convention."[35]

Whilst the majority judgment recognizes that "carriage" under the bill is relevantly carriage of the goods hereunder (i.e., pursuant to the terms of the waybill), it fails to go to Clause 2.1, which effectively defines "carriage hereunder."[36] It instead goes to Clause 11, which makes no mention of carriage but deals with the concept of delivery.[37]

Kirby, on the other hand, correctly recognized the importance of Clause 2.1 in defining "carriage" under the bill:

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[29] *See id.* at 465 (Kirby, J., dissenting).

[30] *Id.* at 450 (majority opinion).

[31] IATA Resolution 600B (II) Air Waybill – Conditions of Contract, cl. 1.

[32] *Id.* at cl. 2.

[33] *Siemens*, 216 C.L.R. at 437 (McHugh, A.C.J., dissenting); *id.* at 463 (Kirby, J., dissenting).

[34] IATA Resolution 600B (II) Air Waybill – Conditons of Contract, cl. 2.

[35] *Id.*

[36] *Siemens*, 216 C.L.R. at 450.

[37] *Id.*

> In cl 2.1 a definition of "carriage" is given. The purpose is made clear by the opening words, "[c]arriage hereunder." By this phrase, the drafter indicates that, whenever "carriage" is used in the air waybill, it is to take the meaning indicated in cl 2.1. Very clear language would be required to expand, or alter, this express definition. Further, the words used are only really apt to apply to air carriage. The distinction in cl 2.1 between carriage subject to the Warsaw Convention and otherwise is not between air carriage and carriage by truck, car, ship, barge, horse, camel or donkey. It is between "international carriage" by air as defined by the Warsaw Convention and other "carriage" by air which, by the terms of the Convention, is outside its application.[38]

Kirby and McHugh further recognized that Clause 2.1 is a rehash of article 8q of the Warsaw Convention, where the word "carriage" can only mean air carriage because article 31 of the Convention states that its provisions only apply to carriage by air.[39] Treating "carriage hereunder" as anything other than air carriage would render road transport subject to the rules of liability under the Convention, contrary to article 31.[40] The IATA bill was intended to reflect the provisions of the Conventions, not contradict them.[41] The fact that Clause 2.1 does not refer to "other services" also confirms that it is intended to be restricted to carriage by air, as distinct from other services incidental to such air carriage, such as road carriage, for the purpose of loading, transshipment or delivery.[42]

Clause 2.2 provides that (to the extent not in conflict with the rules relating to liability established by the Conventions) carriage hereunder (under the air waybill) and other services performed by each air carrier are subject to applicable laws and provisions of the waybill (Clauses 2.2.1 and 2.2.2).[43] "Carriage," again, is differentiated from *other* services performed by each air

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[38] *See id.* at 464 (Kirby, J., dissenting). This is the same disjunction referred to in Clause 4 which the majority noticed but got wrong. *Id.* at 432-34 (McHugh, A.C.J., dissenting) (recognizing that Clause 2.1 and 4 have the same holistic language and when read together indicate that the liability regimes under the Warsaw Convention and the bill operate exclusively of each other so that when the carriage (by air) is "International Carriage" the provisions relating to liability under the Warsaw Convention apply (Clause 2.1) and when not, Clause 4 does).

[39] *Id.* at 437 (McHugh, A.C.J., dissenting); *id.* at 464 (Kirby, J. dissenting).

[40] *See id.* at 464 (Kirby, J., dissenting).

[41] *Id.* at 437 (McHugh, A.C.J., dissenting); *id.* at 464-65 (Kirby, J., dissenting).

[42] *See id.* at 465 (Kirby, J., dissenting).

[43] IATA Resolution 600B (II) Air Waybill – Conditions of Contract, cl.2.2, 2.2.1, 2.2.2.

carriage.[44] Consistently, the phrase "carriage hereunder" must have the same meaning as in clauses 1 and 2.1.[45]

Clause 7 refers to when an aircraft is used by a carrier for carriage.[46] An aircraft is not used for any carriage but air carriage.[47]

Clause 8.1 uses the term "other means of transportation" to refer to non-air carriage.[48] This supports the proposition that where "carriage" is used it means air carriage and that "carriage hereunder" is air carriage under the air waybill.[49]

4. Other Services Incidental to the Carriage

Most importantly, however, is the fact that both clauses 1 and 2.2 speak clearly of "carriage" and "other services," whilst Clause 4 does not.[50]

Both McHugh and Kirby agreed that the differentiation between carriage (by air) and other services (incidental to such carriage) reflects the terms of articles 18.2 and 18.3 of the Conventions, which deal with "carriage by air," distinguishing it from land elements for the purpose of loading, delivery, or transshipment in the performance of a contract for carriage by air.[51]

The bill recognizes, like the Conventions in articles 1, 18, and 31, that a contract for air carriage may include these land elements. However, like the Conventions, they are not "carriage" but rather incidental to it. This is why both McHugh and Kirby noted that even if one argued that the bill could apply to the

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[44] *Siemens*, 216 C.L.R. at 465 (Kirby, J., dissenting).

[45] *Id.* at 437 (McHugh, A.C.J., dissenting); *id.* at 465 (Kirby, J., dissenting).

[46] IATA Resolution 600B (II) Air Waybill – Conditions of Contract, cl. 7.

[47] Siemens, 216 C.L.R. at 437 (McHugh, A.C.J., dissenting).

[48] *Id.* cl.8.1.

[49] *See Siemens*, 216 C.L.R. at 435-37 (McHugh, A.C.J., dissenting).

[50] *See id.* at 437 (McHugh, A.C.J., dissenting); *id.* at 463 (Kirby, J., dissenting).

[51] *Id.* at 463 (Kirby, J., dissenting); *id.* at 436-37 (McHugh, A.C.J., dissenting). McHugh made one slight error when he states that Siemens contended that services incidental to air carriage would include tasks such as loading and unloading the cargo at the airport, loading the cargo into and unloading the cargo from the aircraft and moving the cargo by truck around the aerodrome. *Id.* at 436 (McHugh, A.C.J., dissenting). This was in fact the incorrect conclusion reached by Barrett J. in the Court at First Instance. *Id.* at 437. Siemens actually contended, as McHugh correctly held, that incidental services were confined to land elements such as loading, unloading, and transshipment, as reflected by articles 18.2 and 18.3 of the Amended Convention. *See id.* The services referred to by Barrett J. in the Court at First Instance clearly fall within "air carriage." *Id.* at 437.

bonded store, the road carriage was at best an "other service" incidental to the carriage under the bill.

Since Clause 4 does not apply to "other services," but is restricted in application to "carriage" by air, the dissenting judges correctly held that the Schenker companies could not rely on Clause 4 to limit their liability to the road carriage outside the airport confines.[52]

C. Majority's Confused Analysis of the Second Issue

1. *The Majority Failed to Distinguish Between the Operation of the Bill and the Operation of the Wider Agreement, Richtungsverkehr*

The majority's error in its interpretation of the word "carriage" under the bill, as noted above, resulted from its confused interpretation of Clause 11 of the bill. Clause 11, relevantly, was quoted by the majority, but its meaning not explained by them:

> Notice of arrival of goods will be given promptly to the consignee or to the person indicated on the face hereof as the person to be notified. *On arrival of the goods at the place of destination, subject to the acceptance of other instructions from the shipper prior to arrival of the goods at the place of destination, delivery will be made to, or in accordance with the instructions of the consignee.* If the consignee declines to accept the goods or cannot be communicated with, disposition will be in accordance with instructions of the shipper.[53]

Schenker argued that delivery pursuant to the bill was to be made to Siemens at the customs bonded store because this is what the parties agreed pursuant to their wider agreement, the Richtungsverkehr ("direct traffic agreement"), and that is what customs regulations mandated.[54] Siemens did not dispute this. Siemens embraced this.[55]

Importantly, however, Siemens argued that whilst the Richtungsverkehr and customs regulations contemplated delivery at the bonded store, the terms of the air waybill did not refer to any such place of destination but rather Melbourne Airport.[56] The bill worked within the wider agreement.

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[52] *See id.* at 437, 442 (McHugh, A.C.J., dissenting); *id.* at 465, 471 (Kirby, J., dissenting).

[53] *Id.* at 450 (majority opinion).

[54] *Id.* at 441 (McHugh, A.C.J., dissenting).

[55] *Id.*

[56] *Id.*

To the extent that any domestic laws (such as customs regulations) apply, they do so within the parameters of the contract at hand: in the case of the bill, between the place of departure and the place of destination stated on the bill.[57] The extent that they apply outside the bill (i.e., beyond the place of destination) is dependent on the existence of a wider agreement. In this case, there was a wider agreement that contemplated de-consolidation and delivery of the goods to Siemens at the bonded store, thus bringing the customs regulations into effect.[58] The off-airport de-consolidation, customs clearance and delivery services worked hand-in-hand with the customs regulations to require the goods' immediate removal to these locations so that these services could be performed as agreed.[59]

It is illogical to suggest, as the majority did, that Clause 2.2.1 of the bill, which incorporates by reference applicable laws, would apply and incorporate domestic laws to services that are provided beyond the place of destination of the bill.[60]

Clause 11 and the concept of delivery at the airport can be interpreted sensibly without any extension of the terms to the bonded store (i.e., delivery to a road carrier, Schenker Australia, at the airport pursuant to the instructions of the consignee to effect the terms of the wider agreement).[61]

McHugh and Kirby carefully distinguished between the operation and ambit of the wider agreement and that of the bill.[62] The bill could only operate within the purview of its terms. The bill never dealt with a place of destination other than that which appeared on the face of the bill (Melbourne Airport), and Siemens' submissions in relation to the meaning of Clause 11 were consistent with this analysis.[63]

McHugh followed Siemens' submissions, which carefully dissected the meaning of Clause11, and stated:

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[57] *See id.* at 442 (holding that the customs mandate did not operate within the ambit of the air waybill).

[58] *Id.*

[59] *See id.*

[60] *See id.*

[61] *See id.* at 441.

[62] *See id.* at 460-66 (Kirby, J., dissenting); *id.* at 439-42 (McHugh, A.C.J., dissenting).

[63] *See* Warsaw Convention, *supra* note 21, art. 8 (mandating that the places of departure and destination be marked on the air waybill). The only relevant spaces for these places in the FIATA/IATA air waybills are boxes referring to airports of departure and destination on the face of the bills; the airports must be these places. *See Siemens*, 216 C.L.R. at 441-42 (McHugh, A.C.J. . dissenting).

> Clause 11 does not identify "the place of destination." It is clearly the "Airport of Destination" given on the front of the air waybill. The word "to" in the phrase "delivery will be made to" indicates that the issue is *how* and *to whom* delivery is to be made at the place of destination, not *where* the delivery is to be made. Clause 11 gives effect in practical terms to the provision of Arts 12 and 13 of the Amended Convention.[64]

2. *The Majority Failed to Grasp the Concept of "Delivery"*

Clause 11 assumes that the goods have already arrived at the place of destination, i.e., Melbourne Airport.[65] It deals with the concept of delivery as the disposition of the goods to a person at that place, not delivery as a concept of transport to an additional place beyond the place of destination.[66] It is not possible to have two places of destination under the bill.

The majority judgment not only fails to distinguish between the operation of the bill and the operation of the wider agreement between the parties, but it also fails to correctly distinguish between "delivery" as a concept of disposition of goods (as it is used in Clause 11 and the Warsaw Convention) and "delivery " as a concept of transport. This is evidenced by its conclusion, after quoting Clause 11 without explanation as to its meaning: "It follows that delivery to the Schenker Australia bonded warehouse was contemplated by Siemens Germany, the Schenker companies and, most importantly, Siemens Australia in its capacity as consignee."[67] The reference to "delivery to the . . . warehouse" indicates that the Majority has not understood the concept of delivery under Clause 11.

As already stated, Clause 11 (like articles 12 and 13 of the Warsaw Convention) does not talk of delivery *to* another place, because the clause begins with the premise that the goods have already arrived at the place of destination.[68] It talks, as McHugh correctly recognizes, of delivery being the disposition of goods to a person – the consignee or some other party at the con-

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[64] *Id.* at 441 (emphasis added). Clause 11 gives effect in practical terms to the legal provisions in articles 12 and 13 of the Convention. SHAWCROSS, *supra* note 24, at 1031-40. Clause 11 determines the rights of the consignor and consignee as against the carrier in relation to delivery (i.e. disposition) of the goods to a person, not carriage to another place.

[65] *See Siemens*, 216 C.L.R. at 441 (McHugh, A.C.J., dissenting).

[66] *See id.* at 441 (McHugh, A.C.J., dissenting).

[67] *See id.* at 450-51 (majority opinion).

[68] *See id.* at 441 (McHugh, A.C.J., dissenting).

signee's instruction, i.e., in this case, the road carrier, Schenker Australia, who was to take the goods from Melbourne airport to the customs bonded store, consistent with the terms of the wider agreement and customs regulations.[69]

D. The Majority Intertwined and Confused the Two Main Issues of the Case

The most glaring error, however, was that the majority, after conflating the operation of the wider agreement with the operation of the bill and confusing the meaning of "delivery," then mistakenly relied on the "Clause 11 and customs regulations" analysis to determine the meaning of "carriage" under the bill.[70]

In other words, the majority's judgment applied Schenkers' "Clause 11 and customs regulations" arguments, which related to whether the bill's terms extended beyond the airport (the second issue of the case) to determine the meaning of the word "carriage" (the first issue of the case).[71] This is despite the fact that neither Clause 11 nor the customs regulations make any mention of, or deal with, the word "carriage" as it is used in the bill.[72]

When determining the meaning of "carriage" under the bill, the Majority stated: "Importantly, the terms of the waybill provided for the transportation of goods other than through carriage by air. This is made clear by cl 11 which provides as follows . . .;" and then the majority quotes Clause 11 with no explanation as to its meaning.[73] Clearly, the majority is incorrectly interpreting the meaning of "delivery" in Clause 11 as a concept of transport rather than disposition of goods. This is likely the cause of its error, particularly since the clause makes absolutely no reference to the word "carriage."[74]

Kirby and McHugh were not so confused and noted that, even if one accepted that Clause 11 and the customs regulations extended the operation of the bill to the bonded store, the transport from the airport to this point was not "carriage" as referred to in the bill.[75] If transport to the bonded store was contem-

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69 *See id.*

70 *See id.* at 450-51 (majority).

71 *See id.*

72 *See id.*

73 *See id.* at 450.

74 *See id.*

75 *See id.* at 441 (McHugh, A.C.J., dissenting); *id.* at 465 (Kirby, J., dissenting).

plated by the bill, it would at best be a service incidental to the "carriage" under the bill for the purpose of delivery.[76] As such, it was not covered by the Clause 4 limitation that applied to "carriage" only.[77]

Kirby and McHugh came to this conclusion because they had already explored the other clauses of the bill that refer to the word "carriage."[78] They had properly and comprehensively considered these in light of the bill's history, purpose and its relationship with the Warsaw Convention to accurately determine the meaning of "carriage."[79] The majority made no mention of these considerations.[80] They are, in fact, the most important submissions of the case.

E. The Majority Referred to No Relevant International Authority

Whilst the comprehensive judgments of both McHugh and Kirby relied on international authority, including numerous leading international texts dealing with the IATA air waybill and its relationship with the Warsaw Convention, the majority referred to none.[81]

Whilst McHugh and Kirby went to great lengths in explaining why the foreign cases on which Schenker attempted to rely were inapplicable, the majority did not deal with these cases at all, nor explain why the cases on which Siemens relied were inapplicable.[82]

The majority referred briefly (without substantive explanation) to two U.S. cases that simply applied Clause 4 in circumstances of losses outside airport confines, but that neither dealt with the meaning of Clause 4 nor the word "carriage" as used in Clause 4.[83]

IV. CONCLUSION

Both dissenting judges, McHugh and Kirby, who found in favour of Siemens, were prepared to analyse both Siemens' and

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[76] *See id.*

[77] *See id.* at 438 (McHugh, A.C.J., dissenting); *id.* at 466 (Kirby, J., dissenting).

[78] *See id.* at 435-38 (McHugh, A.C.J., dissenting); *id.* at 463-65 (Kirby, J., dissenting).

[79] *See id.*

[80] *See id.* at 442-54 (majority opinion).

[81] *See generally id.* at 418-72.

[82] *See generally id.*

[83] *See id.* at 453-54 (majority opinion).

Schenkers' submissions and comment on the merits, or lack thereof, of both.

Remarkably, however, the majority judgment:

- failed to deal with the bulk of Siemens' submissions,
- failed to consider Clause 4 in context with all the other clauses of the bill that used the word "carriage" and
- failed to consider the purpose for which the bill was drafted.

It is not an overstatement to say that the majority's judgment ignores basic interpretational principles of contract law.

Quoting Lord Steyn, Kirby remarked that in the law "context is everything."[84] He stresses that "contested words must never be construed in isolation. They take their meaning from their context and their purpose."[85] It is these basic interpretational principals that should be applied in the legal analysis of any contractual document. However, it is clear that the majority's judgment failed enormously in this application.

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[84] *Id.* at 460 (Kirby, J., dissenting).

[85] *Id.*