LEGISLATION COMMENTS

THE CARRIAGE BY AIR ACT 1988[1]

I. The International Background

CARRIAGE by air, whether of passengers or cargo, poses a number of problems which would seem best resolved through international conventions. Different countries applying their differing laws perceive liability for damage and injury differently, have different conflict of laws rules, assume jurisdiction on differing bases. Without a uniform system of law to be applied, the possibilities of differing results obtaining depending on where a suit is brought, of suits being brought in a multiplicity of jurisdictions and hence of forum shopping are immense.

The 1929 Warsaw Convention was the first international convention spelling out uniform rules on matters of tickets, air waybills and baggage checks, specifying which courts were to have jurisdiction and establishing substantive rules concerning rights and duties of carrier, passengers, consignors and consignees. It was successfully concluded at a time when carriage by air was in its infancy and when there was a widely held sentiment that the industry required protection and encouragement. It was thought that to require a carrier to carry passengers and cargo safely to the place of destination was inordinate, given that flying was, it seemed, an inherently dangerous and uncertain exercise. Accordingly, the principles of liability agreed upon were (1) that the carrier could not be asked to do more than take all necessary measures to avoid damage or injury and (2) that the carrier should have the benefit of a ceiling on liability which was then fixed at 125,000 gold francs unless guilty of *dol* (wilful misconduct).

Twenty-six years later, conditions of air carriage had changed radically from those prevailing in the 1920's. Commercial flying had developed into a staple service, backed by a mature and sophisticated insurance coverage industry. On the other hand, the limits to liability set in 1929 seemed ludicrously low and in the light of technological developments and the safety record, exceeding pro-carrier. The problem of the liability limits and others relating to documentation became the subject of a Diplomatic Conference in 1955 and the result was the important Hague Protocol

[1] Cap 32A, 1985 (Rev. Ed.)

which did not in fact come into force until 1963.[2] The most important change effected by the Hague Protocol was undoubtedly the doubling of the Warsaw limits of liability.

In 1958 the jet engine was invented and its subsequent commercial exploitation proceeded with celerity. In the 1970's wide-bodied jet planes made their appearance. The impact of such technological advances and rising standards of living worldwide on air carriage may be seen by comparing the total amount of passenger — kilometres flown in scheduled traffic all over the world in 1929 which was 212 million with the corresponding figure for 1984 which was 1,086 billion.[3] These fundamental changes in air carriage were recognized in a Diplomatic Conference held in Guatemala in 1971. The result was the Guatemala Protocol of 1971.

The Guatemala Protocol represented a turning point. It marked a fundamental change in philosophy concerning the principle of liability. The principle of fault was abandoned in favour of absolute liability with unbreakable limits fixed at 1.5 million gold francs. Another important feature which was added, essentially in accommodation to US demands, allowed for a national system of compensation supplementing the unbreakable limits. But it might be noted that although the monetary unit used in fixing the liability limits was *the poincare* franc, defined as having a specific gold content,[4] the sale of gold to private buyers at fixed prices had ceased three years earlier in 1968. A problem, perhaps not clearly anticipated in 1971, soon emerged when two levels of gold prices developed, one on the free market and the other in official transactions between central banks. The consequential uncertainty as to the price at which the *poincare* franc was to be valued necessitated yet another Diplomatic Conference held in Montreal. The resulting Montreal Protocols of 1975 attempted to remove any uncertainty by fixing the limits at Special Drawing Rights (SDR) 8300 in the Warsaw Convention, SDR 16,600 in the Hague Protocol and SDR 100,000 in the Guatemala City Protocol. Such then has been the history of international efforts towards a unified and uniform system of air carriage law.

II. The Relationship between UK Law and Singapore Law

At the municipal level, the UK government, which was a signatory to the Warsaw Convention, has been a signatory to each successive Protocol. Following ratification of the Warsaw Convention, the Carriage by Air Act 1932[5] was enacted. In 1961, the 1932 Act was replaced by the Carriage by Air Act 1961,[6] giving effect to the provisions of the Hague Protocol, 1955. More recently, the Carriage by Air and Road Act 1979[7] has been

2 The Conference would have discussed changes badly needed by shippers of cargo had it not been that opposition by the US necessitated primary focus on the limits of liability.

3 UN Statistical Year Book, 8: 1956 and 40: 1986. The statistics do not include the USSR and the People's Republic of China.

4 *i.e.* 65-½ mg gold of millesimal fineness 900.

5 22 & 23 Geo. 5, c. 36.

6 9 & 10 Eliz. 2, c. 27.

7 27 & 28 Eliz. 2, c. 28.

enacted so as to give effect to the Montreal Protocols Nos. 3 and 4 and this Act will come into force as soon as the Protocols are ratified.

In tracing the position in Singapore, one has to bear in mind the total absence of any national airline until the formation of the MSA. Three years after the 1969 secession of Singapore from Malaysia and the assumption of sovereign independence thereupon, we see the formation of SIA in October 1972 and its rapid growth into a present major airline, operating an impressively huge fleet.[8] But if the absence of a national airline for a long time might seem to obviate any pressing need for legislation on carriage by air, this would be more than offset by the need to improve and develop air-links so as to enhance Singapore's strategic position in Asia.

We find that from 1935 onwards, there would at least be one governing piece of legislation, namely, the UK Carriage by Air Act 1932; because it was extended to the then colony of Singapore by order in council.[9] From 1961 onwards, it is possible that the 1961 UK Act would also apply by virtue of s. 5 of the Civil Law Act.[10] Charles Lim argues that this possibility cannot be ruled out because the purpose of the 1961 Act is different from the purpose of the 1932 Act.[11] We have to be a little more precise. Between 1961 and 1979 when amendments were made to the Civil Law Act, the test would be whether the subject matter was already governed by local written law. Since the order in council was not then repealed, it would appear to be local written law precluding the application of the 1961 Act. After 1979, the question to ask must be formulated in terms of purpose; *i.e.* whether the purpose of the UK Act is already fulfilled by local legislation. It is not clear of course how broadly or narrowly we are to regard the purpose of a statute for purposes of s. 5 but it seems more arguable that the purpose Of the extant order in council is similar to the purpose of the 1961 Act, namely to deal comprehensively with matters concerning international air carriage. There are difficulties therefore in seeing how the 1961 Act can operate alongside the 1932 Act, especially when in the UK the 1961 Act in fact repealed the 1932 Act. If the 1932 Act had not been extended to Singapore so as to become part of Singapore's domestic written law, then the position would have been unequivocally identical to the UK's. But since the 1932 Act was so extended, s.5 is *ipsofacto* rendered inoperative where carriage by air is concerned. In the alternative, Charles Lim suggests that the order in council expired in 1971 upon Singapore's accession to the 1929 Warsaw Convention. This also seems hard to accept because it is well-known that accession to a treaty or convention *per se* has no legal significance for the domestic legal system but in order that there be municipal impact of any kind there must be enacted appropriate domestic legislation giving effect to the terms or provisions of the treaty or

8 With a capacity in 1987 of 5137 million tonne — km and passenger capacity in 1987 of 34, 438 million seat – km; Singapore Airlines Annual Report 1987-88

9 The UK Carriage by Air (Colonies, Protectorates and Mandated Territories) Order 1934 revoked and in effect re-enacted by the UK Carriage by Air (Colonies, Protectorates and Mandated Territories) Order 1953. See also *Shriro (China) Ltd & Ors* v *Thai Airways International Ltd* [1967] 2 MLJ 91 on the effect of the 1953 Order in Council.

10 Cap 43, 1985 (Rev. Ed.)

11 Charles Lim Aeng Cheng, "The Warsaw System and The Carriage by Air Act 1988 – A Guide and Short Commentary", [1988] 3 MLJ 1xxxv.

convention.[12] It would seem that the order in council was unaffected by the accession and remained as law until 1988 when the present Carriage by Air Act was passed.

If so, then the 1988 Act is much needed. In that it is on the whole *in pan materia* with the UK 1961 Act, its coming into force settles clearly any doubt as to the applicability of the 1961 Act that might well have arisen in the absence of the legislation. On the other hand, in any case arising out of facts occurring before 16 August 1988, doubt as to the applicability of the UK 1961 Act must remain.[13]

The 1988 Act achieves another useful objective in enabling the Minister to pass subsidiary legislation applying the provisions to carriage by air not otherwise within the scope of the Act, and more importantly, in empowering the Minister by order to specify the conversion rate from gold francs into Singapore dollars.[14] If it is correct that the 1932 Act alone would be relevant in the absence of local legislation such as the 1988 Act, the limit of liability would have been fixed at 125,000 gold francs and all the attendant problems of what would be the conversion rate would persist.

It is of course highly unlikely that the 1988 Act was enacted in order to preclude the "importation" of the UK Carriage by Air and Road Act 1979 which has been shown to embody the principle of absolute as opposed to fault liability. In the present view, just as the existence of the unrepealed order in council in the statute books bars further importation of the 1961 Act, so also does it bar the 1979 Act. In any case, s. 5 (2) (b) would render it impossible to import the 1979 Act, being legislation embodying the terms of an international agreement *(i.e.* Montreal Protocols Nos. 3 and 4) to which Singapore is not a signatory. Nevertheless, one may speculate as to whether the passage of the 1988 Act is indicative of an attitude adverse to the Montreal Protocols. It is not unusual for developing countries which are keen to nurture a nascent or inchoate airline to frown upon or at least view with disquiet the principle of absolute liability and of ever-increasing limits. The higher limits set by the Montreal Protocols must inevitably lead to higher liability insurance charges and affect critically the profitability of such airline.

The 1988 Act, as has been said, follows closely the UK 1961 Act, with this consequence. English cases interpreting the 1961 Act will be practically

12 Since there is no such thing in Singapore as a self-executing treaty. Indeed, even where an Act gives effect to a convention, it was once though that unless that convention was itself enacted, recourse to it was not permitted for the purposes of statutory construction; see *Ellerman Lines* v *Read* [1931] A.C. 126, 147-9.

13 Given the non-committal error of Lai Kew Chai J's judgment in *Wai Wah Enterprises & Eastern Watch Co. Pte. Ltd* v *China Airlines Ltd* [1986] 2 MLJ 269, it cannot be said that the learned judge has decided the UK 1961 Act is received via s. 5. However, the problem is as a practical matter slight given that the Convention's limitation period is only two years.

14 The Carriage by Air (Singapore Currency Equivalent) Order 1988 provides for the following equivalent values:-

250,00 francs = $49,581.85
125,000 francs = $24,790.93
5000 francs = $991.64
250 francs = $49.58

binding on Singapore courts.[15] The basic difference between the two Acts is that the UK 1961 Act legislates into municipal law the Hague Protocol or the amended Warsaw Convention whereas the 1988 Act brings into force both the Warsaw Convention and the amended Warsaw Convention. But since subsidiary legislation in the UK provides for the continued application of the Warsaw Convention where it applies, the position in effect is that in the UK both the convention and the amended convention have their spheres of application.[16] Hence, in the end, the difference between the UK Act and Singapore's is really substantially one of form.

III. Definition

Section 3 is an important section. It spells out the scope of application of the Act. The Act is stated to apply in relation to any carriage by air to which the Convention of the amended Convention applies. So it is Article 1 to which reference must be made and that Article is clear enough. It states that the Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward; and to gratuitous carriage by aircraft performed by an air transport undertaking. International carriage is then defined as any carriage in which the place of departure and the place of destination are either:-

(i) situated within the territories of two High Contracting Parties to the Convention; or
(ii) situated within the territory of a single High Contracting Party if there is an agreed stopping place within another State, although not a High Contracting Party.

Insofar as IATA has applied the Convention rules also to non-Warsaw carriage, the importance of section 3 is lessened. Classification problems, however, can still be troublesome and in a very recent case, *Holmes* v. *Bangladesh Biman Corporation*[17] the House of Lords was prevailed upon to rule that there was no power to legislate that the Convention should apply where the places of departure and destination and any agreed stopping places were all within the territory of a single foreign state.

Subsection 2 of section 3 provides that the authentic French text shall prevail, but it is a matter of regret that the position in the UK 1961 Act was not exactly adopted. There the French text is set out in the Act and a judge may accordingly take judicial notice of it and proceed to a decision on the basis of however slight an understanding of the French text, and unimpeded by failure on the part of counsel to call expert evidence. The departure in the 1988 Act in not incorporating the French text may preserve the

15 *de Lasala* v *de Lasala* [1979] 2 All E.R. 1146.

16 Passed pursuant to s. 10 of the UK 1961 Act, the Carriage by Air Act (Application of Provisions) Order 1967 the 2nd Schedule of which makes the Warsaw Convention applicable in respect of international carriage governed by the Warsaw Convention. Enacting the Warsaw Convention by means of subsidiary legislation has the advantage that if necessary, the Minister himself may alter, repeal or modify its application without need for recourse to Parliament. This envisages a time when the Warsaw Convention becomes obsolete.

17 Reported in The Times, 18 February 1989.

effect of the decision in *Shriro (China) Ltd & Ors* v *Thai Airways International Ltd* where the Court of Appeal refused to look at the French text of the Warsaw Convention in the absence of expert evidence that there was a difference between the French text and the English translation as set out in the 1953 Order in Council. It would seem unduly harsh to require counsel who wishes to submit that a translation is incorrect to call expert evidence to that effect, but that may remain the position in view of the omission of the French text from the 1988 Act.[18]

IV. Liability

As for the liability rules of the Warsaw Convention (which are dealt with in the Third Chapter), it is Articles 20, 21, 22 and 23 which are very important. By Article 20, the carrier is responsible for damage only if he fails to prove that he took all necessary measures to avoid the damage or that it was impossible for him to take such measures.[19] The burden of proof thus is placed on the carrier, no doubt because he would be in a better position to discharge it. It must be noted that negligence in handling of the aircraft would under the Convention (although not the amended One) absolve the carrier from liability. But in fact in the case law history, it seems that there has never been a simple case of negligent handling of the aircraft.[20] The more frequent experience has been damage arising from a combination of bad weather conditions and other uncertain circumstances and pilot error. It is significant that the wording of Article 20 does not at first blush accommodate a defence based on Act of God although a learned writer suggests that perhaps such a defence can be accepted.[21]

Contributory negligence is relevant, as Article 21 shows, in exonerating the carrier wholly or partly from his liability. There are a few things to note. The wording of Article 21 clearly refers to the injured passenger and whilst it can include contributory negligence of the passenger in relation to transport of his luggage, it cannot apply to carriage of cargo. Since there are no such defences as inherent defect, vice of cargo or defective packing, this is a marked omission.

An issue of contributory negligence will be resolved in accordance with the *lex fori* and section 9 declares that the *lex fori* for this purpose includes the Contributory Negligence and Personal Injuries Act.[22] The declaration in section 9 is necessary to avoid any dispute whether the Contributory Negligence Act would apply to a contractual claim but in turn it generates a not insignificant problem. Suppose the plaintiffs injuries are assessed at 250,000 gold francs. The Warsaw limit is 125,000

18 Unless it is possible to argue that the authority on which *Shriro (China)* Ltd was based is "dated" because s. 3 (2) says the French text shall prevail, and the true position now is that the courts are entitled to consult a treaty even when there is no ambiguity in the enactment.

19 See *e.g. Faurer* v. *Sabena and Belgium,* Cour d'Appel de Bruxellers 10 June, 1950, USA vi R 1950, 392-397; *Rugani* v. *KLM,* USAVIR 1954, 74-77.

20 See Christian Verwer, *Liability for Damage to Luggage in International Air Transport,* (Deventer, The Netherlands, 1986) at p. 32.

21 *Op.cit.*

22 The draftsman of the 1988 Act evidently thought that the forum court was precluded from applying its conflict rules on an issue of contributory negligence.

gold francs and the plaintiff is 25 % contributorily negligent. There are two possible ways of calculating the damages recoverable. First, since the plaintiff is 25% contributorily negligent, the damages recoverable would be 75% of 250,000 gold francs *(i.e.* 125,000 + 62500 = 187,500 gold francs). Since the Warsaw limit is exceeded, plaintiff gets the limit. In the alternative, since the plaintiffs claim (disregarding contributory negligence) exceeds the Warsaw limit, it must be trimmed down to the limit. Now taking into account his contributory negligence, his award will be 75% of 125,000 gold francs *(i.e.* 62,500 + 31,250 = 93,750 gold francs). Both ways of calculating the impact of contributory negligence are possible but the difference in result can be considerable. It is suggested that the first method is the correct method in the light of the fact that the objective of the Convention was to establish a final overall limit. It is consonant with that objective first to take contributory negligence into account before applying the Convention limits. But it certainly would have helped to have made it beyond controversy in the 1988 Act.

This leads us to Article 22 which has been called the "core of the Convention". Liability for personal injuries under the 1929 Convention is fixed at 125,000 francs *(i.e.* S$24,790.93) but is double *(i.e.* S$49,581.85) under the amended Convention. In the carriage of registered baggage and of cargo the fixed limit is 250 francs per kg *(i.e.* S$49.58) unless the passenger or consignor has made a special declaration of value ("interest in delivery at destination" under the amended Convention) and has paid a supplementary sum if the case so requires. As regards unchecked baggage, the limit is 5000 francs *(i.e.* S$991.64) per passenger. This apparently rigid system of limits can only be varied by agreement by the carrier to accept the extra risk following a unilateral declaration of value. Although not certain in the Warsaw Convention, the possibility of variation would clearly extend to both freight and luggage transport under the amended Convention. The main problems in this area seem to be: (1) establishing when it can be said that the special declaration was made; and (2) determining whether there must be an offer to pay the extra charge *(une taxe eventuelle)*.[23]

There is a sense in which section 6 takes the provisions in Article 22 much further. It provides that Article 22 shall apply whatever the nature of the proceedings by which liability may be enforced. This obviously has implications for the manufacturer of the aircraft, the air traffic control agency and the sub-contractor.[24] It would have been impossible to have included the manufacturer in the Warsaw Convention[25] and the Conven-

23 *Wai Wah Enterprises & Eastern Watch Co. Pte. Ltd* v. *China Airlines Ltd.* [1986] 2 M.L.J. 269 is an example of (i). Lai J. held that where there was a blank declaration in the appropriate box, the declaration of value in an invoice contained in a sealed envelope and unseen by the defendant carrier could not amount to a special declaration of interest. On (ii), see *Mayers* v. *KLM* (1951) NY S. Ct.

24 It is important to note that the following other inter-related aspects of aviation accident liability are not covered by the Convention:-

i) liability for damage arising out of aerial collisions,
ii) liability of air traffic control agency or other certifying agency,
iii) liability of manufacturer and of operator for damage on the surface, (this is subject to the Rome Convention 1952, amended in 1978)

25 See Robert Boyle, "The Warsaw Convention — Past, Present and Future", in *Essays in Air Law,* ed. by Arnold Kean (The Hague, 1982).

tion therefore is far from imposing joint and several liability on all who have participated in one way or another in the process of assembling a plane and flying it. The Convention's concern is with the carrier; the carrier alone is the party liable. Liability *inter se* between manufacturer, sub-contractor and air traffic control agency remains therefore subject to the particular national law which applies according to the forum's choice of law rules. But it is interesting that by virtue of section 6, where the forum is Singapore, the same Warsaw limits apply to all questions of liability *inter se* which will arise in contribution proceedings. In this way the benefit of lower insurance charges and hence lower operating costs is thought to be assured. There are of course other situations in which parallel or multiple proceedings may be brought either within the same territory or partly within and partly without. Whatever the nature of the proceedings, the Court is given discretionary power to ensure that the efficacy of the Warsaw limits are not put in jeopardy of being exceeded.

V. *Exemptions*

Article 23, which is vital to the Convention's success, seems to deny any possibility of exemption from the liability rules. Any attempt, it says, tending to relieve the carrier of liability or fix a lower limit of damages will be null and void.[26] Nevertheless, case law both before and after 1929 suggests the possibility of some exemption. For example, it seems to be accepted that exclusion of liability on ground of the passenger's contributory negligence does not offend Article 23.[27] But agreeing to a shorter limitation period will be unacceptable.[28] On principle too, since the Convention does not oblige the carrier to carry whoever demands to be carried or whatever is presented for carriage, the carrier is free to exclude certain persons or goods from the carriage. The difficult point is whether supposing the carrier does accept these persons or goods he is free to exclude liability in relation to them.[29]

Article 25 of the Warsaw Convention is in a sense the obverse of Article 23, in providing that the Warsaw limits are lifted where the carrier is guilty of wilful conduct. In comparison with Article 23, it has generated a good deal more case law[30], in which more often than not, wilful conduct is found in the increasingly complex process of luggage handling. There are important differences between the Convention and the amended version of Article 25. In the amended version, the difficult concept of wilful conduct (ie *dol)* is replaced by an express description of the maliciousness or recklessness which will lead to unlimited liability. In

26 This wording will ensure that an agreement conferring jurisdiction to the Courts of a non Warsaw country will be null and void if the effect of those courts assuming jurisdiction will be to allow higher recovery. Cf. *The Hollandia* [1983] 1 A.C. 565 and *The Epar* [1958] 2 M.L.J. 3.

27 Verwer, *op.cit.* at p 145.

28 *Braathens South American & Far East Air Transport AS* [1959] 2 MLJ 253. Nor would non-guarantee – clauses for departure and arrival times where long delays occur: *Sonillac* v. *Air France* 26 June 1964, Tribunal de Grande Instance de la Seire, XXVIII, RGA 1965, pp 15-20.

29 Verwer, *op.cit* at pp 82.

30 See Verwer, *op.cit* at pp. 148-149

addition to that maliciousness or recklessness, it must be shown that where the maliciousness or recklessness is that of a servant or agent, that servant or agent was acting within the scope of his employment.

VI. Time Limitations

The time limitations on proceedings are contained in Articles 26 and 29 and are obviously important in that, as the case law experience shows, they are defences frequently invoked by carriers. Article 26 deals with damage to baggage or cargo. Receipt without complaint is *prima facie* evidence of delivery in good condition. As regards the type of damage, there is a further differentiation between actual damage and loss due to delay in delivery. 7 days are allowed for baggage and 14 days for cargo damage during which notice of complaint must be lodged. In case of delay, 21 days are specified. Article 29 then lays down 2 years as being the limitation period for an action for damages, with the method of computing the limitation period being left to the forum court.

The time limitation provisions are not provisions excluding or limiting the carrier's liability and may be relied upon by a carrier although in breach of some other obligations such as Article 4 which stipulates for the documentation in respect of baggage check.[31] This partly explains why they are often relied upon by carriers.

Article 26 is of course not free from difficulty. Some thirty years of experience with Article 26 in the amended Convention have shown that there are two difficult areas. Both were discussed in the House of Lords decision in *Fothergill* v *Monarch Airlines*.[32] The first is now removed by express provision in s. 7 of the 1988 Act. Thus, damage for purposes of Article 26 includes partial damage, so that the notice of complaint contemplated by Article 26 must be given in case of partial loss of the baggage. Furthermore the usefulness of s. 7 is that it dispels any uncertainty in relation to partial loss of cargo. In countries where an equivalent provision is lacking, it has been said that the *Fothergill* case is far from clearly deciding what interpretation of Article 26 has been applied and so s. 7 which in fact follows the English amendment to the UK 1961 Act, would seem necessary.

The second problem is with the time limits in Article 26. They do not seem apt where the passenger chooses to claim against his own insurer, leaving his insurer to claim on his behalf against the carrier. In these circumstances, which happened in the *Fothergill* case, the time limits seem to be too short. The problem, however, is not addressed by the 1988 Act and remains.

Apart from Articles 26 and 29, we find in the 1988 Act a rather formidable section, namely s. 8, which attempts to apply the Warsaw principles of time limits as between the carrier and his servants or agents

31 *Wexler* v. *Eastern Airlines and Air BVI* 18 Avi 17.
32 [1980] 2 All E.R. 696.

on the one hand and the carrier and other third parties on the other. Since the legal possibility of suing the servant exists,[33] s.8 is necessary to ensure consistency of treatment and in particular, that a plaintiff is not put in a position to escape the time limits by bringing suit against the carrier's servant instead of the carrier himself where both are liable. In case such a suit is brought, the prescribed limitation period is 2 years reckoned from certain Warsaw benchmarks,[34] provided the servant must have been acting within the scope of his employment. Although technically an agent may be outside the scope of s. 8 because the phrase "scope of employment" might be inapt in relation to an agent,[35] it should not be too difficult for a court either to (i) rule that an agent is within s. 8, adopting a purposive approach or (ii) to rule that the phrase "scope of employment" is a technical phrase and as used in the Act bears a wider meaning. A more serious omission, it would seem, is in not providing for the applicability in such suits of the time limits in Article 26. So it appears that suit may be brought against the carrier's servant although no notice of complaint was ever given which omission would have led to a dismissal of a suit against the carrier.

In proceedings to recover contribution, subsection 2 of s. 8 says that Article 29 is inapplicable. This is necessary to preclude any argument that Article 29 implies that proceedings to recover contribution must be brought within two years of the Warsaw benchmarks. To stress that the benchmark for contribution proceedings is different, subsection 3 then provides that the period for contribution proceedings is also two years but reckoned from the time judgment is given. There are two differences between s. 8 (2) and (3) and the corresponding provision, s. 5 (2), in the UK 1961 Act. First, instead of the term "tortfeasors" the Singapore sub-sections refer to "persons liable". The improvement in the Singapore subsections over the UK provision takes into account the changes effected by the UK Civil Liability (Contribution) Act 1978. It ensures that contribution proceedings in which the right of contribution arises not out of tort but contractually will unequivocally also be covered. Secondly, subsection 3, unlike the corresponding UK provision, is made subject to sections 4 and 29 of the Limitation Act. The effect of this seems to be to require express pleading of the Limitation Act in any case where civil procedure

[33] At common law, a suit against a servant acting within the scope of his employment would normally be brought against the master. By virtue of the doctrine of vicarious liability the tort is considered to be the master's. However, if the servant breaches a statutory duty imposed on him without being negligent at Common Law, a suit can be maintained only against the servant. As for an agent, a tort committed by him is his tort and the principle of vicarious liability is inapplicable. (There seems to be no distinction for purposes of tort law between an agent and an independent contractor). However, the cases show that the master who employs an agent may be held to have breached some duty owed to the plaintiff as well; *e.g. Saper* v. *Hungate Builders Ltd* [1972] R.T.R. 380; *Rain* v. *Rew* (1916) 32 T.L.R. 451. On the other hand, it is also a general rule that where a servant commits a misfeasance in the scope of his employment, master and servant are joint-tortfeasors. A servant therefore can also be sued where he is guilty of misfeasance (as opposed to mere nonfeasance or omission of duty). In the case of agency, where the agent commits a tort on behalf of his principal both are joint-tortfeasors.

[34] Which are the date of arrival at destination or the date on which the aircraft ought to have arrived or the date on which the carriage stopped.

[35] Very technical because even where a servant is concerned it is not unusual to talk about "scope of authority" and indeed to use the expressions "scope of employment" and "scope of authority" interchangeably.

so requires and to postpone the period of limitation in case of fraud or mistake. That only seems to be the effect. It is arguable that subjecting s. 8 (3) to s. 4 of the Limitation Act does not work because s.4 refers expressly to pleading the Limitation Act. This is irrelevant because the carrier would not want to plead the Limitation Act but the third subsection of s. 8 of the 1988 Act. However, it may be that what is intended is to introduce the statutory method of calculating the time period which is contained in section 29 so that what is required by s. 8 (3) is that the carrier who wants time to be computed from the date of discovery of fraud or mistake must allege in his pleadings that he seeks to rely on section 29 of the Limitation Act. There would be a significant difference between a liability suit and contribution proceedings. In liability proceedings against the carrier, the Limitation Act is inapplicable because although Article 29 (2) says that the *lexfori* shall determine how the limitation period shall be computed, unfortunately the Limitation Act states that it shall not apply where there is provision by other written law (and Article 29 (1) is such other written law). So if the Limitation Act is to apply (and essentially it is only s. 29 that is relevant), the Convention must be made subject to it. This is done in the case of contribution proceedings but there does not seem to be any good reason for not applying s. 29 to liability proceedings in the first place. Supposing the carrier practises fraud on the passenger or consignee, it seems right that time should not run until discovery of the fraud. As the matter stands, it is odd that in an Act that is supposed to have the user's interests equally in mind, it is in fact contribution proceedings that are more favoured than liability proceedings. The UK 1961 Act was at least logical in adhering to the same basic period of two years (although starting from different benchmarks) and disallowing any effect where there is fraud or mistake. The 1988 Act recognizes the possibility of postponement because of fraud or mistake in contribution proceedings but not in liability proceedings.

VII. Conclusion

The foregoing are only some of the comments that can be made on the 1988 Act. They do not exhaust the possibilities because the subject is a vast one and the field rich in details. Reference may be made to Charles Lim's comprehensive article which makes many other useful points. Speaking generally as to the prospect of the 1988 Act, it may be that the Act will remain on the statute books for a long time. The Act as enacted is actually out-dated. Since the time of the early 1970's, the current of feeling in the industry has shifted from favouring fault liability to absolute liability with unbreakable limits. As mentioned earlier the UK Parliament has in fact enacted the Carriage by Air Act 1979 which will give effect to the Montreal Protocols Nos. 3 and 4 as soon as these come into force. It may be that the government will take the view that absolute liability plus high unbreakable limits will be incompatible with the nurture of a national airline, since it is fact that aviation liability can assume staggering dimensions: *e.g.* the American Airlines DC-10 accident at O'Hare Airport in Chicago was estimated to cost $100 million in 1979. It must be noted however, that although the principle of absolute liability may be unacceptable for some

time, there is much in the Montreal Protocols pertaining to cargo transportation that deserve serious consideration; for example, the introduction of defences such as inherent defect and vice of cargo, simplified documentation to pave the way for electronic data processing techniques and receipt of documentation separate from shipment.

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