BOOK REVIEWS

An Introduction to Air Law by **IH Ph Isabella Diederiks-Verschoor** [Deventer, Kluwer Law and Taxation Publishers, 1993, fifth revised edition, xxix + 234 pages, ISBN 9065447202, soft cover]

The fact this textbook is into several editions speaks volumes. Ever since its first appearance in 1982, it has been used by students and lawyers who had to face the subject, air law, for the first time. Although not obvious from the title, the textbook is actually a survey of international air law and is intended for an international audience. It does not deal with the domestic regimes that govern air law. In Australia, for example, the domestic regime consists of state and federal structures.

The success of the textbook rests on three main reasons. First, it incorporates what has been recognised as the essential topics for an introductory survey of the subject. Both public and private law aspects are covered. It starts with the "History and Development of Air Law", [Chapter I] includes fundamental topics like regulation by the 1944 Chicago Convention which established the International Civil Aviation Organisation (ICAO) [Chapter II] and carrier liability within the Warsaw system, [Chapter III] and concludes with a chapter on international criminal air law. [Chapter X] Other chapters are those on Product Liability in Aviation, [Chapter IV] Automation and Air Law, [Chapter V] Surface Damage and Collisions, [Chapter VI] Insurance, [Chapter VII] Rights in Aircraft, [Chapter VIII] and Assistance and Salvage. [Chapter IX] Secondly, this complicated subject is put in perspective and made easy to conceptualise. For example, the author uses a flowchart to explain the Warsaw system. [page 102] Thirdly, and most importantly, the textbook is written by a person who not only possesses a real empathy for the subject, but who has played a significant and continuing role in the shaping of this comparatively new branch of international law.

Of the above topics, liability is of most concern. There are various liability regimes that govern aviation activities and this has caused international air carriage to become complicated in nature. For example, it may concern liability for the death or injury of a passenger on an international flight, or for surface damage. Or it may concern an aircraft or a part of it falling from

the sky and causing damage on the surface of the earth. These two aspects are separately dealt with by the author in Chapters III and VI respectively.

In the first instance, Chapter III deals with the liability of the carrier under the "Warsaw system". [page 55 et seq] If an international carriage occurs and damage is caused to passenger, luggage and goods, or if damage is caused by delay, in all probability the position would be governed by the liability rules of the Warsaw system. The author states:

> The rules of the Warsaw Convention are being applied all over the world and have demonstrated their reliability and usefulness. The passenger knows that, wherever and whenever he flies, there is a certain degree of uniformity in the rules governing the carrier's liability, while the carrier, being aware of the extent of his liability, can make arrangements to insure himself against possible losses. [page 55]

The author then states that "[t]he present chapter will be entirely devoted to these important matters". [ibid] As a consequence, this chapter is by far the largest in the book. [pages 55-102]

The Warsaw system is so-named because it started with the 1929 Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air. Since 1929, it has been amended on a number of occasions, the most important being the 1955 Hague Protocol, and the most recent being the 1975 Montreal Protocols. However, the 1975 Protocols have yet to be sufficiently ratified to enter into force [page 56] and it is doubtful if they ever will. In between, there were the 1961 Guadalajara Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, which entered into force in 1964, and the 1971 Guatemala Protocol which has yet to enter into force. [pages 55-56]

The question of carrier liability is further complicated by the existence of the Agreement Relating to Liability Limitations of the Warsaw Convention and Hague Protocol entered into between the United States Civil Aeronautics Board and carriers, namely, CAB No 18900, more commonly known as "the 1966 Montreal Agreement". [page 56] There is also "the so-called 'Malta Agreement', which is a private agreement between a number of air carriers, mostly from Europe". [ibid]

It is interesting the Montreal and Malta Agreements are usually considered part of the Warsaw system given they are actually "private agreement[s]". [ibid] Unlike the other instruments which are treaties between states, the 1966 Montreal Agreement, for example, is a private agreement between the United States and airlines, like Qantas Airways Ltd. Broadly speaking, the Agreement increases the liability of the carrier beyond that provided by the original Warsaw Convention if the carriage involves United States territory. In other words, before an international carrier can operate into or out of the United States, it must agree with the pre-condition established by the United States government to lift the liability limit so as to match the higher limit that is prescribed by the Agreement. [pages 92-94][1]

As referred to above, anyone engaging in an international flight today would most likely discover that the carriage is governed by the Warsaw system, and more specifically, by the Convention in its original form or in its amended form. So, what does this mean? Although the Warsaw system is the most wellknown, it also happens to be the most confusing. To answer the question, the following Australian example is used to illustrate one of the many aspects of the system.

Australia is party to both the 1929 Warsaw Convention and 1955 Hague Protocol. Yet it does not mean that a flight involving Australian territory as a point of embarkation or disembarkation would always attract the provisions of these two instruments. The reason is that treaties, like contracts, require the element of privity to exist before parties are bound. Therefore, if the flight is from Sydney to London, the 1929 Warsaw Convention as amended by the 1955 Hague Protocol would govern the flight because Australia and the United Kingdom are party to both instruments. However, if the flight is from Sydney to New York, the unamended Warsaw Convention would apply because the United States is party to the Convention only, and not the Protocol. In practice, the difference in the regimes results in different laws applying to similar situations of international carriage, including different liability limits.

The above example is one of several variations that make up the entire carrier liability system in existence today. To understand it is a big task. To

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[1] From a practical viewpoint, several airlines have now, as a matter of contract, adopted the higher limit established by the Montreal Agreement

explain it simply and effectively is a bigger task. This is achieved in the textbook. The approach taken to explain the possible variables in the relationships that are governed by the Warsaw system actually makes the textbook an invaluable starting point. It is, therefore, no wonder that the textbook is into its fifth revised edition and it should not surprise anyone if the author is already working on the sixth revised edition.[2]

If this assumption is correct, an area of rethinking and rewriting may be that on the imminent "demise" of the Warsaw system. In October 1995, the International Air Transport Association (IATA) held a conference on intercarrier passenger liability held in Kuala Lumpur. The conference adopted the IATA Intercarrier Agreement on Passenger Liability which is expected to enter into force on 1 November 1996.[3] This Agreement would in effect simplify the existing position by replacing the complicated Warsaw system with just one instrument, resulting in a new liability regime. Like the Montreal Agreement and the Malta Agreement, the IATA Intercarrier Agreement is not an agreement of states; rather, it is an agreement involving carriers.[4] And since the carriers represent the industry, from a practical viewpoint, the "old" Warsaw limits will become redundant when the Agreement's liability regime will enter into force.[5]

Chapter V has an interesting title, "Automation and Air Law". [page 115-124] It is also an apt title as we move into the next millennium. Automation in aviation has affected activities involving "aircraft design, construction, the pilot's performance, weather reports, seat reservations or despatching cargo by air". [page 115] On the air carriage of passengers, for example, "[d]ocumentation and data required for proper ticketing have become more and more complicated over the years." [ibid] Simplification as an issue was first addressed in the 1955 Hague Protocol and later in the 1971 Guatemala

2 The earlier editions were published every three years, in 1882, 1985, 1988 and 1991.

3 At the same time, international airlines agreed to an adjunct Agreement on Measures to Implement the IATA Intercarrier Agreement.

4 Article V(3) of the Agreement on Measures provides: "The Director General of IATA shall declare this Agreement effective on November 1st, 1996 or such later date as all requisite Government approvals have been obtained for this Agreement and the IATA Intercarrier Agreement of 31 October 1995".

5 The existence of the IATA Intercarrier Agreement has spurred ICAO into action. In April/May 1997, the organisation's Legal Committee will meet to prepare a new draft convention to address the ills of the Warsaw system and the current needs of the industry; see note 13.

Protocol. Although the Guatemala Protocol has yet to enter into force, Article 3 foreshadowed "the possibility of a 'substitute' document...[which] would clear the way for ticket-issuing by automatic slotmachines." [ibid]

The use of automatic slotmachines for ticketing is no longer a mere prediction. It became a reality for domestic travel in the United States in 1994. The system is also used in countries in Asia and Europe. Recently, Ansett Australia announced that it will replace the issuing of domestic airline tickets with an electronic ticketing system called E-Ticket in January 1997. It will be the first time electronic ticketing will be used in Australia. Instead of being issued with a paper ticket, passengers will get a receipt and itinerary and they will be issued with a boarding pass at the airport after they show proper identification.

However, it should be noted that in spite of some reprieve offered by the 1955 Hague Convention regarding international air carriage documentation, and until the Warsaw Convention is able to accommodate the practice of electronic ticketing, it would be difficult for the industry at this stage to unilaterally overcome the Convention's "rather stringent rules" [page 119] concerning international airline tickets [page 60-61], baggage checks [page 61-63] and air waybills for the carriage of goods. [page 63-65]

Chapter VI should have a special significance for Australia. It deals with the 1952 Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface. The Convention applies to Australia as one of the "38 out of the over 170 ICAO members" that ratified the Convention. [page 126] However, the author states:

> [T]hat number did not...include major powers like the United States, United Kingdom, the German Federal Republic or Canada. The reasons for this rather spectacular lack of interest may be described as follows:
> (1) the limits for compensation mentioned in the Convention were considered too low;
> (2) national legislation provided adequate safeguards for the interests of third parties on the surface; it was felt that there was no need for international rules on the subject;
> (3) the Convention did not deal with problems such as noise, sonic boom or nuclear damage; [and]
> (4) there were objections against creating only one forum. [ibid]

In 1978, the 1952 Rome Convention was amended by the Montreal Protocol "to [widen] the Convention's scope by providing...better protection for the injured party". [page 128] However, the Protocol is yet to enter into force [ibid] and is still restricted to "damage caused by air collision to the extent that such damage is sustained on the surface of the earth: damage caused in the air is outside the scope of the Convention (Art. 24)." [page 129]

Be that as it may, it has been suggested that it would be in Australia's interest to reassess its position and join the major powers by renouncing the Convention. The unrealistically low liability limits referred to under (1) above should, without more, be sufficient reason for any state to do that.

The textbook refers to a multitude of cases and as expected, the largest body of case law is from the United States. However, interesting comparisons and insights are provided by the author with the use of cases from other jurisdictions including the United Kingdom, The Netherlands, Israel, Germany, and even Australia. For example, see *Helicopter Sales (Australia) Pty Ltd v Rotor-Works Pty Ltd;*[6] [note 2 page 103] and *SS Pharmaceutical and anor v Qantas Airways Ltd.*[7] [note 123 page 98]

The cases have resulted in the creation of a jurisprudence in international air law which contains a curious mix of approaches and philosophies from civil and common law jurisdictions. For example, the fact that the 1929 Warsaw Convention is in only one official language, namely French, has resulted in protracted controversy over the meaning of "bodily injury". That phrase is used as the English translation of *"lésion corporelle"* which is found in Article 17 of the Convention. But what is included within the meaning of "bodily injury"? Does it mean the same thing as "personal injury"? If so, is mental trauma included within that meaning? And if mental trauma is included, should there be some manifesta-tion of physical injury? Or should the former result from the latter?

It is interesting to note that the author does not delve into this controversy in greater detail. She was quite content to allow the American cases on the

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6 [1974] 48 Australian Law Journal Report 390.

7 [1991] 1 Lloyd's Report 228.

matter to point the way, starting with *Rosman v Trans World Airlines.*[8] [page 76-77] With the divergence in views resulting in confusion in the area, perhaps it was deemed wiser to leave it well alone.[9]

The author had traced "the trend in favour of compensation for mental suffering", [ibid] and referred to the setback in the form of *Beck et al v KLM.*[10] In *Beck's case* the New York Supreme Court "ruled that the psychic trauma suffered by passengers who were former citizens of Hungary and who, on a flight from Amsterdam to Budapest, were forced to spend six to eight hours within the confines of Prague airport because of engine trouble, did not constitute 'bodily injury' in terms of Article 17 of the Warsaw Convention". [ibid]

After the years of flux alluded to above, at least the American jurisprudence on this point now seems to have been settled by the more recent United States Supreme Court case, *Eastern Airlines Inc v Floyd.*[11] This case is not mentioned in the textbook. The case had held that mental anguish which was not accompanied by or linked to physical injury, namely, mental trauma or nervous shock by itself, could not be the subject of a claim for compensation. *Floyd's case* seems to have followed *Rosman's case* which had "ruled that only mental injury directly resulting from bodily injury could be compensated". [page 77] This is an interesting outcome because the decision in *Rosman's case* had been rejected in a later case, *Husserl v Swissair.*[12] The United States District Court in *Husserl's case* had preferred to award "compensation for mental injury, irrespective of any link with bodily injury". [ibid]

Outside the United States, the position is still unclear as can be seen in cases like *Georgopolous and anor v American Airlines Inc.*[13] When appealed by

8 [1974] United States Aviation Report 1.

9 For example, see the discussion on *Floyd's case* and *Georgopolous' case* below.

10 (1977) 14 CCH Aviation Report 18,210.

11 (1991) 111 Supreme Court 1489.

12 (1975) 13 CCH Aviation Report 17,603.

13 Unreported decision of 10 December 1993. This decision had preferred the broader approach taken by the Supreme Court of Israel in *Cie Air France v Teichner* (1984) 38 (III) PD 785. However, when it came to the question of *lex loci delicti,* Ireland J adopted the narrower, nationalistic approach and held that since the incident had happened over Australian territorial waters, Australian tort law should apply. See Francey, "Damages recoverable for nervous shock" (March 1994) 10:4 Australian

stated case from the New South Wales Local Court, Ireland J in the New South Wales Supreme Court (Common Law Division) appeared to suggest that damages were recoverable for nervous shock, anxiety and depression, as they were deemed "bodily injury" under the Warsaw Convention. This decision was also appealed and the appeal was recently allowed by the New South Wales Court of Appeal,[14] but for different reasons.[15] In this case, the plaintiffs (husband and wife) were on a flight from Sydney to Honolulu when a cabin door of the aircraft became ajar.

New editions of legal textbooks always require a review of the case law. If this textbook is into a new revised edition, a case review would be an expectation. One of the problems that faces any author is how he or she should exercise discretion when selecting cases for the next edition. The task is made more difficult by the international and comparative nature of air law. So far, the author has done an excellent job and there is no reason to believe she will not continue her fine tradition. When the cases are reviewed, *Georgopolous' case* might find itself mentioned, including the following which were recently heard in separate jurisdictions.

Malibu Travel Inc et al v KLM is an unreported case from The Netherlands on the contract of carriage involving the cross-border sale of airline tickets and the sequential use of flight coupons. The tickets (London-Amsterdam-Accra), although issued by Malibu's United Kingdom agent, had been sold in The Netherlands. The practice had begun because it was cheaper for passengers who wished to travel from Amsterdam to Accra to buy their travel from Malibu and then discard the London-Amsterdam ticket, than buy an Amsterdam-Accra ticket, a route flown by KLM only. On appeal from summary proceedings, the Amsterdam District Court confirmed that KLM's insistence on the sequential use of airline tickets (namely, London-Amsterdam-Accra), which was contained in IATA's Recommended Practice 1724, was valid in contract. Further, until the European Union's Directorate General for Competition took positive action against IATA's

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Product Liability Reporter 113. When ICAO's Legal Committee meets in April/May 1997 to prepare a new draft convention on carrier liability, perhaps (and it is hoped) the draft will refer to "personal" rather than "bodily" injury; refer page 133 above.

14 As yet unreported decision of 26 September 1996 (per Clarke, Sheller JJA, and Simos AJA).

15 The case is to be remitted to the Local Court to hear evidence and make findings of fact.

recommended practice on the matter, there was no breach of European Union competition rules by KLM.[16]

Hitachi Data Systems Corporation v Nippon Cargo Airlines[17] is an American case where two issues arose from the carriage of goods. The first dealt with the application of the Warsaw Convention to the carriage. On this point, the United States District Court held that although it was difficult to establish where or when the damage had occurred, there was a presumption under the Convention that it had taken place during the transportation. The second concerned alleged technical irregularities in the air waybill. Under the Convention, the carrier had to comply with the provisions on the air waybill before it could rely on the established liability limits. The court held that although the freight forwarder which was listed on the air waybill had contracted the carriage to another party, under common law, the freight forwarder would still be considered the carrier for the purposes of the Convention. Therefore, the application of the Convention to the carriage could not be excluded and the claims of the shipper were rejected.

Technically, the textbook is well-presented and accurate in substance, the result of the author's expertise and rigour in updating it. It is also the product of her obvious commitment to the project. A novice starting with the contents page immediately obtains a panoramic view of the subject's scope. There is a Table of Cases which is jurisdiction-based, to facilitate searches. It also highlights the transnational manner in which international air law has been evolved and applied. The end product is a commendable and up-to-date publication, which also happens to be an invaluable and comprehensive starting kit for the study of international air law.

Alexis Goh

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[16] For further discussion see Haanappel, "Malibu Travel Inc et al v KLM: sequential use of flight coupon and cross-border sales of airline tickets" (1996) XXI:3 Air and Space Law 161.

[17] (1995) 24 CCH Aviation Report 18,433.