House of Lords before LordsWilberforce; Diplock; Fraser of Tullybelton; Scarman; Roskill. 10th July 1980

Lord Wilberforce : my lords,

1. This appeal involves a small sum of money (£16.50), but is said to raise two questions of general importance for airlines and travellers by air. It does, in addition, require discussion of some important issues concerned with the interpretation of treaties.

2. The respondent, Mr. Fothergill, in March 1975 arrived at Luton airport after an international flight on one of the appellant's aircraft. When his registered baggage, consisting of a suitcase containing personal effects, was delivered to him he noticed that it was damaged. He immediately reported this to an official of the airline, and, as is apparently usual, a Property Irregularity Report (P.I.R.) on a printed form, was completed. Under the heading "*Nature of Damage*" there was inserted "*Side seam completely parted from the case. Damage occurred on inbound flight* ". This damage was later fixed at £12.50 and in due course the airline accepted liability for it. After the respondent reached home he discovered that some of the contents were missing: a shirt, a pair of sandals and a cardigan - value £16.50. Mr. Fothergill recovered this sum from his insurers who now support his claim against the airline - in fact, no doubt, their insurers. The flight in question was "*international carriage*" and was governed by the Warsaw Convention of 1929 as amended by The Hague Protocol of 1955.

3. The airline relies on Article 26 as an answer to the claim. This (as amended by Article XV of the Protocol) reads:
   (1) Receipt by the person entitled to delivery of baggage or cargo without complaint is prima facie evidence that the same has been delivered in good condition and in accordance with the document of carriage.
   (2) In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay, the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his disposal.
   (3) Every complaint must be made in writing upon the document of carriage or by a separate notice in writing despatched within the times aforesaid.
   (4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part."

4. The airline claims that Mr. Fothergill should have complained of the loss within seven days and that, since he did not so do, his claim is barred by paragraph 4. Mr. Fothergill's answer to this is first, that no complaint was necessary, since paragraph 2 applies only to damage and not to loss, total or partial; second, that if a complaint was necessary, he made one in time through the P.I.R.

5. The first point, which depends upon the construction of the Article, has been disposed of for the future, as regards cases governed by English law, by the Carriage by Air and Road Act 1979, section 2, which enacts specifically that Article 26 (2) *supra* is to be construed as including loss of part of the baggage. However, it appears that there are outstanding a number of cases which arose before the Act was passed or which the Act cannot affect (It clearly, in my opinion, cannot be used as an aid to interpretation of the pre-existing Convention.) The second point continues to be relevant, and it is no doubt desirable for both airlines and passengers to know what kind of complaint will satisfy the requirement.

6. It is first necessary to establish the nature and status of Article 26. The Warsaw Convention of 1929, which contained an Article 26 in similar form, was agreed to in a single French text, deposited with the Government of Poland. It was introduced into English law (not being, of course, self- executing) by the Carriage by Air Act 1932. This set out in the First Schedule a translation of the Convention into English and provided (section 1) that the provisions of the Convention as so set out should have the force of law in the United Kingdom.

7. In 1955 a Conference was convened at the Hague, in order, *inter alia,* to make changes in the limits on the carrier's liability. Occasion was taken to make other amendments; one such amendment (Article XV in the resulting Protocol) was to substitute for Article 26 (2) (Warsaw) a new paragraph altering the time limits but not otherwise changing the wording. This Protocol was imported into English law by the Carriage by Air Act 1961, which replaced the Act of 1932. This contained a first Schedule in two parts. Part I set out an English text of the Warsaw Convention, as amended. Part II set out the French text of that Convention as amended. Section 1 of the Act provided (subsection (D) that the Convention as amended "*as set out in the First Schedule"* should have the force of law in the United Kingdom. Subsection (2) was as follows:
   "(2) If there is any inconsistency between the text in English in Part I of the First Schedule to this Act and the text in French in Part II of that Schedule, the text ,in French shall prevail."

8. My Lords, some of the problems which arise when the Courts of this country are faced with texts of treaties or conventions in different languages were discussed in ***James Buchanan & Co. Ltd. v. Babco Forwarding and Shipping (UK) Ltd.*** [1978] A.C. 141 It is obvious that the present represents a special and indeed unique case.

9. Here it is not only permissible to look at a foreign language text, but obligatory. What is made part of English law is the text set out *in the First Schedule,* i.e. in both Part I and Part II, so both English and French texts must be looked at. Furthermore, it cannot be judged whether there is an inconsistency between two texts unless one looks at both. So, in the present case the process of interpretation seems to involve:
   1 Interpretation of the English text, according to the principles upon which international conventions are to be interpreted (see ***Buchanan's case*** *vide supra* and ***Stag Line Ltd. v. Foscolo, Mango and Co. Ltd.*** 1932 A.C. 328, 350).
   2 Interpretation of the French text according to the same principles but with additional linguistic problems.

3 Comparison of these meanings.

Moreover, if the process of interpretation leaves the matter in doubt, the question may have to be faced whether " *Travaux preparatoires* " may be looked at in order to resolve the difficulty.

10. I start by considering the purpose of Article 26, and I do not think that in doing so I am infringing any *"golden rule"*. Consideration of the purpose of an enactment is always a legitimate part of the process of interpretation, and if it is usual - and indeed correct - to look first for a clear meaning of the words used, it is certain, in the present case, both on a first look at the relevant text, and from the judgments in the courts below, that no "*golden rule*" meaning can be ascribed. The purpose of Article 26, on the other hand, appears to me to be reasonably clear. It is:
    1 to enable the airline to check the nature of the "damage";
    2 to enable it to make enquiries how and when it occurred;
    3 to enable it to assess its possible liability, to make provision in its accounts and if necessary to claim on its insurers;
    4 to enable it to ensure that relevant documents (e.g. the baggage checks or passenger ticket, or the air waybill) are retained until the issue of liability is disposed of.

11. If one then enquires whether these considerations are relevant to a case of partial loss of objects contained in baggage, the answer cannot be doubtful: they clearly are. Moreover, prompt notification may give the airline an opportunity of recovering the objects lost.

12. In particular, as regards (4), preservation of the baggage check is important in order to establish the relevant weight upon which the limit of liability is fixed - see Article 22(2)*(b)* which explicitly mentions "*any object contained therein*" (e.g. in registered baggage).

13. There seems, on the contrary, to be no sense in making a distinction between damage to baggage - which presumably must include damage to contents - and loss of contents.

14. What then of the language? No doubt in an English legal context, loss is one thing, damage another. But the nature of the text in question does not suggest that it was drafted with strict English meanings in mind. First, in the *English text,* the word *"damage"* in the Convention is used in more than one sense. Sometimes it means *"monetary loss*" - for example in Article 17, or Article 19. Sometimes it means *"physical damage*" e.g. Article 10, line 2, Article 22(2)*(b)*. In some Articles it is used with both meanings, e.g. Article 18. Whether it can include "partial loss" is, textually, open to argument. There can be no doubt that the carrier is liable for loss, total or partial of the contents of baggage - the appellant does not contend the contrary. Article *22(2)(b)* indeed makes provision for this. But when one looks for the word which covers this, the search yields no clear result. Article 18 refers to "loss of*"* registered baggage, and "*damage to"* registered baggage. Nothing there is really apt to cover loss of something contained in the baggage. I am inclined to agree with Lord Denning M.R. when he says *"In article 18(1) I think 'loss of means loss "of the whole suitcase"*. In this state of the text we must see whether the French text can assist.

15. The *French text*. This, at least, avoids part of the English difficulty, in that it compares the use of the word *"dommage"* to monetary loss (Articles 17, 18, 19, 20, 25.). When it refers to physical *"damage"* it uses the word *"avarie"*. So what does "avarie" mean? This raises, once more, the question how the court ought to ascertain the meaning of a word or an expression in a foreign language.

16. My Lords, as in ***Buchanan's*** case, I am not willing to lay down any precise rule on this subject. The process of ascertaining the meaning must vary according to the subject matter. If a judge has some knowledge of the relevant language, there is no reason why he should not use it: this is particularly true of the French or Latin language, so long languages of our courts. There is no reason why he should not consult a dictionary, if the word is such that a dictionary can reveal its significance: often of course it may substitute one doubt for another. (In *Buchanan's* case I was perhaps too optimistic in thinking that a simple reference to a dictionary could supply the key to the meaning of *avarie.)* In all cases he will have in mind that ours is an adversary system: it is for the parties to make good their contentions. So he will inform them of the process he is using, and if they think fit, they can supplement his resources with other material - other dictionaries, other books of reference, text-books, and decided cases. They may call evidence of an interpreter, if the language is one unknown to the court, or of an expert if the word or expression is such as to require expert interpretation. Between a technical expression in Japanese, and a plain word in French, there must be a whole spectrum which calls for suitable and individual treatment. In the present case the word "*avarie*" would not I think convey a clear meaning to an English mind without assistance. The courts (both Kerr J. and the Court of Appeal) therefore looked at dictionaries and at certain text-books and articles and in my opinion this process cannot be criticised. Neither could they have been criticised if they had allowed expert evidence to be called - for "*avarie*" is, or may be, a term of art. There were five dictionaries involved, of evidently different standards: some of English publication, others of French. I regard the latter, which provide an analysis, as of greater value than the former, which provide a translation - since then we have to interpret the translation. Two are of high quality - that of M. Raymond Barraine, docteur en droit, and the Tresor de la langue franchise published by the National Centre of Scientific Research, 1974. They seem to me to show that "*avarie*" has both an ordinary meaning and a special meaning as a term of maritime law. In the ordinary meaning, the word signifies physical damage to a movable; in its special meaning, it is capable of meaning physical damage, or loss, including partial loss. In my opinion this does not carry the matter much beyond the English text: both use words of some ambiguity, perhaps the French text points somewhat more in the direction

of partial loss than does the English. The text-book writers (to be considered) do not favour the view that "*avarie"* naturally means partial loss and I do not think that we can so hold. An attempt was made to carry the argument from the French text further by suggesting that "*avarie*" means "*average*" and *"average*" means partial loss. But I cannot accept that it is sound, in effect, to retranslate "*avarie*" by "*average"* when in fact it is translated by *"damage*". Clearly "*average*" could not be sensibly inserted in the English text in replacement for "*damage*". Nor am I persuaded that "*average*", though it may have to do with partial loss, means partial loss.

17. The linguistic argument, alone, remains to my mind inconclusive.

18. The text-books and articles, however, do take the matter further. Professor de Pontavice in his book on Maritime Law and Air Law expresses a clear opinion *"that 'avarie' in Article 26 includes partial loss following"* a theft, approving a decision to this effect by an Argentine Court. Monsieur Max Litvine, of the Free University of Brussels writes, referring to Article 26 (v.s.), "*where the loss or destruction is only partial, it is necessary to decide that article 26 must be effective since the partial loss or destruction a fortiori constitutes damage*". (Droit Aerien 1976.) Professor Rodiere of the University of Paris in his book on Transport Law (Paris 1977) writes (s.607) *"the text" (of Article 26) "relates only to average" (i.e. "avarie"). In my view, it must be extended to the partial loss agreeing with M. Litvine whose work is the safest there is* ". He appears to express a contrary view in the Precis Dalloz (1977) s.271 but the fuller treatment in his own work is, in my view, to be preferred. Dr. Werner Guldimann, Attorney at Zurich, often acting as expert for the Swiss Government, writes in "***Internationales Luftrecht***": *"Article 26, paragraph 2, stipulates time limits for complaints made in respect of damage and delays to goods and baggage. No time limit is set for destruction and loss, since in such cases it may be assumed that the carrier is already aware of the occurrence and is able to make the necessary arrangements required to secure proof— since this is the aim of such time limits. Thus the term damage is given a broad interpretation: simply partial loss and partial destruction are both, basically, considered to be damage."*

19. I quote also from an extract from the Argentine Compendio de Derecho Aeronautico written by Juan La Paz because this well states the reasoning: *"As paragraph 2 of Article 26 only mentions 'damage', it is necessary to determine whether the protest" (i.e. complaint) " is relevant in the case of ' loss ' of the merchandise or luggage. A distinction should be made here between total loss and partial loss. Since the first is a fact which can be verified at any time without the need for proof, a protest is not necessary to bring an action against the transporter and article 13(3) .... is applicable . . . On the other hand, in the case of partial loss, it is vital to establish what is missing as quickly as possible since, as time goes by, the probability of the loss being the result of an event occurring after delivery increases ".*

20. My Lords, this consensus is impressive. It supports an interpretation of Article 26(2) to which a purposive construction, as I hope to have shown, clearly points. The language of both texts is unsatisfactory: some strain, if not distortion, seems inevitable but of the governing French text it can at least be said that it does not exclude partial loss from the scope of the paragraph. I am of opinion therefore, on the whole, that following the sense of the matter and the continental writers, we should hold that partial loss of contents is included in "damage" and that consequent action may be barred in the absence of a timeous complaint. I should add that we were referred to a number of decided cases in various foreign courts, only a few of which were cited below. But, with all recognition of the diligence of Counsel, I do not think that I need, or indeed should attempt to summarise them. For three reasons: first, with the exception of one decision of the Belgian Cour de Cassation, they are not decisions of the highest courts; secondly, the process of law reporting varies from country to country and they may not be exhaustive. The dangers inherent in trying to assess a balance of foreign judicial opinion from available cases were well shown in ***Ulster-Swift Ltd. v. Taunton Meat Haulage Ltd.*** [1977] 1 W.L.R. 625 and in *Buchanan's* case *(vide supra);* thirdly, in any event, it was not beyond argument when the facts of each case were carefully examined on which side the preponderance in quantity, or quality, lay. It is safe to say that your Lordships' decision in this case will not be out of line with the balance of decisions given elsewhere.

21. This conclusion, that a complaint was necessary within seven days, makes it strictly unnecessary to decide whether reliance may be placed on *travaux preparatoires* and, if so, to what effect. But as these matters were relied on in the Court of Appeal by the learned Master of the Rolls, Browne and Geoffrey Lane L.JJ. taking the contrary view, I think that I must add some observations. I make it clear that they relate solely to the use of *travaux preparatoires* in the interpretation of treaties, and do not relate to interpretation of domestic legislation, rules as to which have been recently laid down by this House.

22. There is little firm authority in English law supporting the use of *travaux preparatoires* in the interpretation of treaties or conventions. The passage usually cited in support of such use, is from the judgment of Lord Reading C.J. in ***Porter v. Freudenberg*** [1915] 1 K.B. 857, 876 when reference was made to *"statements made in a committee of the conference which prepared the Hague Convention of 1907 upon the Laws and Customs of war on land."* The judgment contains no reasoning in support of this approach, and the case was decided upon the wording of the relevant article in its context in preference to the (inconsistent) statements. There is a passing reference to *travaux preparatoires* in relation to an international convention in ***Post Office v. Estuary Radio Ltd.*** [1968] 2 Q.B. 740, 761, per Diplock L.J. but even this is tentatively expressed. When dealing with an international treaty or convention I think that there is no doubt that international courts and tribunals (I exclude from this category the Court of Justice of the European Communities which stands in a class apart) do in general make use of *travaux preparatoires* as an aid to interpretation. See O'Connell, *International Law,* 2nd Ed. (1970), p. 262, Brownlie, *Principles of Public International Law* (1979) 627-8. This practice is cautiously endorsed by the Vienna Convention on the Law of Treaties of 1969, Article 32. We are here concerned with what is in effect a private law convention likely to be

litigated primarily in municipal courts. In the interest of uniformity of application we ought, in considering whether to use *travaux preparatoires,* to have regard to the general practice applied, or likely to be applied, in the courts of other contracting states. Professor A. F. Dumon (Advocate-General of the Cour de Cassation of Belgium) in his comprehensive examination of the subject of interpretation, delivered to the Court of Justice of the European Communities in 1976, states (p. 101) as follows: *" It may be stated that in the Federal Republics of Germany, France, Italy, Luxembourg, The Netherlands and Belgium both ' administralive' and other courts have recourse in varying degrees, but generally with prudence and caution, to preparatory work of the laws of the legislature ".*

23. Professor Dumon here is dealing primarily with domestic laws but a footnote indicates that this approach has been used in interpreting an international treaty.

24. An example of this can be found in the United States of America, see ***Day v. Transworld Airlines Inc.*** (1975) 523 F. 2d 31, a decision of the second circuit of the United States Court of Appeals, on the Warsaw Convention. That Court took into account the preparatory work prior to the Warsaw Conference done by the C.I.T.E.J.A. and the Minutes of the Warsaw Conference. It is no doubt true that United States courts are in general more liberal in recourse to legislative history than are courts in this country, but the decision in question is one which I would cautiously follow.

25. A second important illustration is provided by a decision in 1977 of the French Cour de Cassation sitting in Assemblee pleniere - in a case on the Warsaw Convention Article 29 - ***Consorts Lorans v. Air France*** (Jurisprudence p. 268). In his "Co*nclusions*" the Advocate-General M. R. Schmelck said this (my translation): *" I shall not take up time upon the old dispute concerning the general scope of travaux preparatoires. I shall limit myself to the observation that when one is concerned with the travaux preparatoires for an international convention, there may be special reasons for not placing too much reliance on them. The first is that although for a French lawyer these travaux preparatoires may be of some value at least by way of guidance, they have none for a lawyer brought up on the principles of Anglo-Saxon law. Moreover, international tribunals, no doubt under British influence, in general take no account of them. Your Court itself does not attribute to them decisive force because when there is a serious doubt upon the interpretation of a treaty, it considers it necessary to consult the Ministry of Foreign Affairs in order to ascertain the intention of the High Contracting Parties ".*

26. He continues by referring to the case (such as the Warsaw Convention itself) of an open convention which may be acceded to by states not parties to the negotiations.

27. The *travaux preparatoires* of the Warsaw Convention, he concludes, ought not to be treated as gospel truth.

28. The court, in its decision, did not deal directly with these submissions. However, it referred to the decision appealed from as having reached an interpretation of Article 29 of the Warsaw Convention by reference, *inter alia,* to the *travaux preparatoires* without expressing disagreement with the procedure, and reversed it upon another ground, viz. that the Convention contains no express derogation from the rules of French domestic law.

29. My Lords, if one accepts that this reflects a recognition on the part of French law, that in the interest of uniformity with English tendencies (perhaps rather overstated by the Advocate-General), the use of *travaux preparatoires* in the interpretation of treaties should be cautious, I think that it would be proper for us, in the same interest, to recognise that there may be cases where such *travaux preparatoires* can profitably be used.

30. These cases should be rare, and only where two conditions are fulfilled. first, that the material involved is public and accessible, and secondly, that the *travaux preparatoires* clearly and indisputably point to a definite legislative intention. It would I think be unnecessarily restrictive to exclude from consideration, as *travaux preparatoires,* the work of the Paris Conference of 1925, and the work of the C.I.T.E.J.A. before 1929, both of which are well known to those concerned with air law, in any case where a clear intention were to be revealed. If the use of *travaux preparatoires* is limited in this way, that would largely overcome the two objections which may properly be made: first, that relating to later acceding states - as to this see Brownlie, *op. cit.,* p.628 citing the International Law Commission - and secondly, the general objection that individuals ought not to be bound by discussions or negotiations of which they may never have heard.

31. The presently relevant *travaux preparatoires* are contained in the Minutes of the Hague Conference of 1955, published by the I.C.A.O. and available for sale in a number of places including H.M.S.O., and so accessible to legislators, text-book writers, airlines, and insurers. I would therefore be in favour of a cautious use of work leading up to the Warsaw Convention and the Hague Protocol.

32. As regards the conclusions to be drawn from the latter in the present case, I have no reason to disagree with those reached by your Lordships.

33. For the reasons I have already given I would hold, in agreement with Lord Denning M.R., that Mr. Fothergill should have lodged a complaint within seven days.

34. Did he then lodge such a complaint? My Lords, I am clearly of opinion that he did not, and that the P.I.R. in no way qualified. It said nothing about the contents of the baggage and it was totally insufficient for the purposes for which it was required—as stated at the beginning of this opinion. One need only figure a case in which the objects lost were valuable jewellery to see the necessity for a specific complaint of the loss.

35. In my opinion, therefore, the appeal must be allowed.

Lord Diplock MY LORDS,

36. I understand your Lordships to be of one mind in thinking that in Article 26 of the Warsaw Convention as amended at The Hague in 1955, which is set out in the Schedule to the Carriage by Air Act 1961, the word "damage" or "*avarie*" in relation to passengers' baggage includes loss of part of the contents of a passenger's suitcase; and that the Property Irregularity Report completed by Mr. Fothergill on his arrival at Heathrow did not comply with the requirements of that Article as respects the contents of his suitcase that were missing. With this conclusion I agree. I would have reached it even without such extraneous aids as are provided by the preparatory work leading to the conclusion of the Convention *(travaux preparatoires),* the commentaries of learned authors *(doctrine),* or the decisions of foreign courts *(jurisprudence)*. *1* accept that both "damage" and "*avarie*" when looked at in isolation or in a context limited to the other words of the sentences in the English or French language in which they are respectively to be found in Article 26, are words that are ambiguous. They are capable of bearing either a narrower meaning confined to physical harm to the subject matter of the damage or *avarie,* and this is the more, usual meaning; or they may bear a more extensive meaning, with which *avarie* in particular is used as a term of legal art in connection with carriage by sea, as including also partial loss of the subject-matter carried. But giving, as one must, a purposive construction to the Convention looked at as a whole, I should have found myself able to resolve the ambiguity in favour of the more extensive, although less usual, meaning by reference to the language of the Schedule to the Act of Parliament alone. I accept and adopt the reasons already stated by Lord Wilberforce for so interpreting the language of the Act.

37. The question that divides this House is whether, in interpreting Article 26, it is legitimate to have recourse to the Official Minutes of The Hague Conference of 1955 at which the protocol to the Warsaw Convention of 1929 was agreed. This, as it seems to me, raises a question of constitutional significance as to the functions of courts of justice as interpreters of written law that is in force in the United Kingdom.

38. For present purposes I can confine my consideration to the interpretation of the language that appears in Acts of Parliament themselves, leaving aside, on the one hand, secondary legislation made pursuant to law-making powers that have been delegated by Act of Parliament to some subordinate authority and, on the other hand, regulations made by the institutions of the European Communities which are directly applicable in the United Kingdom, but in respect of which the ultimate interpretative function is vested in the European Court of Justice by section 3(1) of the European Communities Act 1972. The constitutional function performed by courts of justice as interpreters of the written law laid down in Acts of Parliament is often described as ascertaining " the intention of parliament"; but what this metaphor, though convenient, omits to take into account is that the court, when acting in its interpretative role, as well as when it is engaged in reviewing the legality of administrative action, is doing so as mediator between the State in the exercise of its legislative power and the private citizen for whom the law made by Parliament constitutes a rule binding upon him and enforceable by the executive power of the State. Elementary justice or, to use the concept often cited by the European Court, the need for legal certainty, demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible. The source to which Parliament must have intended the citizen to refer is the language of the Act itself. These are the words which Parliament has itself approved as accurately expressing its intentions. If the meaning of those words is clear and unambiguous and does not lead to a result that is manifestly absurd or unreasonable, it would be a confidence trick by Parliament and destructive of all legal certainty if the private citizen could not rely upon that meaning but was required to search through all that had happened before and in the course of the legislative process in order to see whether there was anything to be found from which it could be inferred that Parliament's real intention had not been accurately expressed by the actual words that Parliament had adopted to communicate it to those affected by the legislation.

39. In purely domestic legislation not designed to give effect to Community directives or to international conventions to which the United Kingdom is a party, the choice of the actual words that are most apt to express with clarity and precision the intention of the promoters of the Bill (generally the Executive Government) will have been that of parliamentary counsel. His advice will also have been available on the wording of any amendments that have been made to the Bill in the course of its passage through the two Houses of Parliament. The audience to whom the language that he chooses is addressed is the judiciary, whose constitutional function is to resolve any doubts as to what written laws mean; and the resulting Act of Parliament will be couched in language that accords with the traditional, and widely criticised, style of legislative draftsmanship which has become familiar to English judges during the present century and for which their own narrowly semantic approach to statutory construction, until the last decade or so, may have been largely to blame. That approach for which parliamentary draftsman had to cater can hardly be better illustrated than by the words of Lord Simonds, L.C. in ***C.I.R. v. Ayrshire Employers Mutual Insurance Association Ltd.*** [1946] 1 All E.R. 637 *"The section . . . sect. 31 of the Finance Act, 1933, is clearly a remedial section .... It is at least clear what is the gap that is intended to be filled and hardly less clear how it is intended to fill that gap. Yet I can come to no other conclusion than that the language of the section fails to achieve its apparent purpose and I must decline to insert words or phrases which might succeed where the draftsman failed ".* (p.641).

40. The unhappy legacy of this judicial attitude, although it is now being replaced by an increasing willingness to give a purposive construction to the Act, is the current English style of legislative draftsmanship. It is wary of laying down general principles to be applied by the courts to the varying facts of individual cases rather than trying to provide in express detail what is to be done in each of all foreseeable varieties of circumstances. In the attempt to do this the draftsman will have taken account of technical and competing canons of construction that are

peculiar to English written law; and will have relied heavily on precedent in his use of words and grammatical constructions and general layout used in earlier Acts of Parliament that have been the subject of judicial exegesis.

41. So far as purely domestic legislation is concerned it is well established as a principle of interpretation that, even where the words of a statute are ambiguous or obscure, the proceedings in Parliament during the course of the passage of the Bill may not be resorted to for the purpose of ascertaining what ambiguities or obscure provisions mean. The reasons why the nature of the parliamentary process at Westminster would make this an unreliable and inappropriate guide to the interpretation of a statute have been often stated by this House and need no repeating. So Hansard can never form part of the "*travaux preparatoires*" of any Act of Parliament whether it deals with purely domestic legislation or not. Where the Act has been preceded by a report of some official commission or committee that has been laid before Parliament and the legislation is introduced in consequence of that report, the report itself may be looked at by the court for the limited purpose of identifying the " mischief " that the Act was intended to remedy, and for such assistance as is derivable from this knowledge in giving the right purposive construction to the Act. Only to this limited extent are what would in continental legal systems be classified as "*travaux preparatoires*", legitimate aids to the construction of an Act of Parliament of the United Kingdom which deals with what is purely domestic legislation.

42. It is, however, otherwise with that growing body of written law in force in the United Kingdom which, although it owes its enforceability within the United Kingdom to its embodiment in or authorisation by an Act of Parliament, nevertheless owes its origin and its actual wording to some prior law-preparing process in which Parliament has not participated, such as the negotiation and preparation of a multilateral international convention designed to achieve uniformity of national laws in some particular field of private or public law, which Her Majesty's Government wants to ratify on behalf of the United Kingdom but can only do so when the provisions of the Convention have been incorporated in our domestic law. The product of this law-preparing process is generally contained in texts expressed in several different languages all of which are of equal authenticity and can be looked at to clarify the meaning of any one of them. The Warsaw Convention of 1929 and its later protocols are exceptions inasmuch as the only authentic text is that expressed in the French language which is set out in Part 2 of the Schedule to the Carriage by Air Act 1961.

43. The language of that Convention that has been adopted at the international conference to express the common intention of the majority of the states represented there, is meant to be understood in the same sense by the courts of all those states which ratify or accede to the Convention. Their national styles of legislative draftsmanship will vary considerably as between one another. So will the approach of their judiciaries to the interpretation of written laws and to the extent to which recourse may be had to *travaux preparatoires, doctrine* and *jurisprudence* as extraneous aids to the interpretation of the legislative text.

44. The language of an international convention has not been chosen by an English parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges. It is addressed to a much wider and more varied judicial audience than is an Act of Parliament that deals with purely domestic law. It should be interpreted as Lord Wilberforce put it in ***James Buchanan & Co. Ltd v. Babco Forwarding and Shipping (UK) Ltd.*** [1978] A.C. 141. at 152, "*unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation*".

45. My Lords, it would seem that courts charged with the duty of interpreting legislation in all the major countries of the world have recourse in greater or less degree to "*travaux preparatoires*", or "legislative history" (as it is called in the United States) in order to resolve ambiguities or obscurities in the enacting words; though the extent and character of the extraneous material to which reference is permitted under this head varies considerably as between one country and another. As Lord Wilberforce has already pointed out, international courts and tribunals do refer to *travaux preparatoires* as an aid to interpretation of treaties and this practice as respects national courts has now been confirmed by the Vienna Convention on the Law of Treaties of 1969, to which H.M. Government is a party and which entered into force a few months ago. It applies only to treaties concluded after it came into force and thus does not apply to the Warsaw Convention and protocol of 1955; but what it says in Articles 31 and 32 about interpretation of treaties, in my view, does no more than codify already-existing public international law. So far as needs citation here they read as follows:

46. Article 31(1) of the Vienna Convention:
"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

47. Article 32:
"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or " unreasonable."

48. My Lords, the delegates of the States represented at the international conference at which The Hague Protocol to the Warsaw Convention was concluded may be taken to have known that " the preparatory work of the treaty and the circumstances of its conclusion " could be taken intoconsideration in determining the meaning of the Convention where the actual terms, even when read in their context and in the light of the treaty's object and

purpose, leave the meaning still ambiguous or obscure. An example of their awareness of this is to be found in the Minutes of the Meeting of the Conference on 20 September 1955 where, in relation to a vote taken on a proposed amendment to Article 19, it is recorded: *" The President stated that, in the event of a negative vote on the proposal, the Conference would be understood as having stated that the word 'unreasonable' was not necessary because it was already implied in Article 19 as at present drafted ".*

49. Accordingly in exercising its interpretative function of ascertaining what it was that the delegates to an international conference agreed upon by their majority vote in favour of the text of an international convention where that text itself is ambiguous or obscure, an English court should have regard to any material which those delegates themselves had thought would be available to clear up any possible ambiguities or obscurities. Indeed, in the case of Acts of Parliament giving effect to international conventions concluded after the coming into force of the Vienna Convention on the Law of Treaties, I think an English court might well be under a constitutional obligation to do so. By ratifying that Convention, H.M. Government has undertaken an international obligation on behalf of the United Kingdom to interpret future treaties in this manner and since under our constitution the function of interpreting the written law is an exercise of judicial power and rests with the courts of justice, that obligation assumed by the United Kingdom falls to be performed by those courts.

50. My Lords, although each of your Lordships would, I believe, have reached the same conclusion that in Article 26 of the Warsaw Convention (as amended) "damage" or "*avarie*" in the case of passenger's baggage does include partial loss of contents, even if no recourse is had to any "*travaux preparatoires*", it would, in my view, be unrealistic to deny that the language of the Article is ambiguous, seeing that Kerr J. and two of the members of the Court of Appeal ascribed a narrower meaning to it. So I think the case is one where it is right to have recourse to the Minutes of the Conference at The Hague to see if they confirm or contradict or contain nothing capable of affecting the *prima facie* view which consideration of the terms of the Convention itself has led your Lordships to form as to the meaning which the expression " damage " in Article 26 was intended to bear.

51. This said, I do not myself derive any great assistance from this source. With some personal experience of international conferences of this kind. 1 should not attach any great significance to the fact that two delegates in withdrawing an amendment to Article 26 which would have included in the Article an express reference to partial loss as well as to damage, said, without contradiction by any other delegates who happened to be present at that time, that they did so on the understanding that partial loss was included in the expression damage. Macchiavellism is not extinct at inter- national conferences. For what it is worth, however, it tends to confirm the *prima facie* view at which your Lordships had already arrived; and there is nothing else in the Minutes of the Proceeding which contradicts it.

52. My Lords, I can deal much more briefly with "*doctrine"* and "*jurisprudence"*. Those commentaries by learned authors on the text of the Convention to which your Lordships have been referred were published after the Convention had been concluded. They did not precede it; the delegates cannot have taken them into account in agreeing on the text. To a court interpreting the Convention subsequent commentaries can have persuasive value only; they do not come into the same authoritative category as that of the institutional writers in Scots Law. It may be that greater reliance than is usual in the English courts is placed upon the writings of academic lawyers by courts of other European states where oral argument by counsel plays a relatively minor role in the decision-making process. The persuasive effect of learned commentaries, like the arguments of counsel in an English court, will depend upon the cogency of their reasoning. Those to which your Lordships have been referred contain perhaps rather more assertion than ratiocination, but for the most part support the construction favoured by your Lordships.

53. As respects decision of foreign courts, the persuasive value of a particular court's decision must depend upon its reputation and its status, the extent to which its decisions are binding upon courts of co-ordinate and inferior jurisdiction in its own country and the coverage of the national law reporting system. For instance your Lordships would not be fostering uniformity of interpretation of the Convention if you were to depart from the *prima facie* view which you had yourselves formed as to its meaning, in order to avoid conflict with a decision of a French court of appeal that would not be binding upon other courts in France, that might be inconsistent with an unreported decision of some other French court of appeal and would be liable to be superseded by a subsequent decision of the Court of Cassation that *would* have binding effect upon lower courts in France. It is no criticism of the contents of the judgments in those foreign cases to which your Lordships have been referred if I say that the courts by which they were delivered do not appear to me to satisfy the criteria which would justify your Lordships in being influenced to follow their decisions in the interests of uniformity of interpretation.

Lord Fraser of Tullybelton ; My lords,

54. I need not repeat the facts in this appeal which are in small compass and have been explained by my noble and learned friend, Lord Wilberforce. The appeal raises two questions on the construction of the Warsaw Convention, as amended at The Hague, 1955 all as now set out in Schedule I to the Carriage by Air Act 1961 ("the Convention ").

55. The first question is whether the word "*damage*" in Article 26 (2) of the Convention includes partial loss of some of the contents of baggage, with the result that the owner cannot claim for the loss unless he has complained to the carrier within seven days of receipt of the baggage. If damage does include partial loss, the second question is whether the appellant made sufficient complaint in this case. The Carriage by Air Act, 1961 provides in section 1(1) that the Convention "*as set out in the First Schedule to this Act*" shall have the force of law in the United

Kingdom. By section 1(2) it provides: *"(2) If there is any inconsistency between the text in English in Part I of the First Schedule to this Act and the text in French in Part II of that Schedule, the text in French shall prevail "*.

56. Clearly an English court must consider first the text in English and I shall do so. Article 26 has already been quoted in full by my noble and learned friend, Lord Wilberforce, and I do not repeat it. The respondent contends that the word "damage" in Article 26(2) applies only to the physical damage to his suitcase and not to the loss of contents, because the latter is not damage but partial loss. On a literal reading of the words I agree with Kerr J. and with Browne and Geoffrey Lane LJJ. that the respondent's contention is correct. That was apparently the view of the appellants whose tickets contained a notice informing passengers (presumably in compliance with Article 4(l)(c) of the Convention) that *"in case of damage to baggage . . . complaint must be made in writing to carrier forthwith after discovery of damage and, at latest, within seven days from receipt."* (Emphasis added).

57. But we are here concerned with construing an Act which gives effect to, and actually incorporates, an international convention, and for that purpose a strictly literal construction is not appropriate. Applying the broad principles of construction which are appropriate - see Lord Macmillan in ***Stag Line Ltd. v. Foscolo, Mango & Co., Ltd***. [1932] A.C. 328, 350 - I am left in doubt whether "damage" was used in a wider sense to include partial loss or not. There is much to be said for the wider construction. Article 26 of the Convention forms part of a package deal to hold the balance fairly between carriers by air, on the one side, and passengers and consignors of cargo, on the other. The main elements of the package, so far as passengers are concerned, begin with Article 18 which makes the carrier liable for damage sustained in the event of destruction or loss of or damage to any registered baggage, without proof of fault on his part. The only way that the carrier can completely escape liability under Article 18(1) is by proving that he has taken all necessary measures to avoid the damage, or that it was impossible for him to take such measures (Article 20). But his liability is limited in amount by reference to the weight of the registered baggage or cargo (Article 22(2)*(a)*). Article 22(2)*(b)* contains the only reference to the contents of baggage or cargo. It provides as follows: *" (b) In the case of loss, damage or delay of part of registered baggage or cargo, or of 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 ...'"*. (Emphasis added).

58. The English text of that paragraph is not very happily worded, but its meaning is clear enough, and it recognises that baggage or cargo consists of the whole package - both container and contents. That is sensible, especially as the contents will usually be more valuable than the container. It is difficult to see why it should be necessary to complain forthwith about damage to the container but not about loss of all or part of its contents; yet that would be the result if the respondent's contention is successful. There are at least two reasons for requiring complaints to be made promptly. One is to enable the carrier to make enquiries into the loss or damage while there is still hope of discovering how it occurred and of recovering anything lost, and the other is to enable him to check the *bona fides* of the complainer. Both reasons apply just as much to contents as to the container. It is true that complaint is not required in case of total loss, but that is probably because total loss will inevitably be brought to the notice of the carrier when the person entitled to delivery fails to obtain it. The absence of a requirement for complaint in the case of total loss therefore does not effect the argument that in case of partial loss complaint is necessary.

59. For these reasons the meaning of "damage" in Article 26(2) of the English text is, in my opinion, ambiguous. It therefore becomes necessary to refer to the French text. Such reference would have been proper even if the French and English texts had been equally authentic, and it is essential in this case, where the French text is to prevail. But even in this case it would not be necessary to refer to the French text unless either (1) the English text was ambiguous, or (2) the court was invited by one or both parties to refer to the French text for the purpose of considering an alleged inconsistency between the French and the English texts. I do not think that the judge has a duty to search out inconsistencies for himself, although if he happened to notice what he thought was an inconsistency he should invite argument upon it.

60. On the question of how reference to the French text is to be made, I respectfully agree with the view expressed by Lord Wilberforce in ***Buchanan & Co. v. Babco*** [1978] A.C. 141, 152 that precise rules are inappropriate. Certainly a rule that the judge should not be permitted to refer to the French text without evidence from qualified experts, would be unreasonably restrictive. When the judge's personal knowledge of French, or other relevant foreign language, is inadequate for the immediate task, he should rely on dictionaries, or, if they are not sufficient, on evidence from qualified experts, as seems to him appropriate in the particular case.

61. In the present case the French word to be considered is "*avarie*". The English word "damage" is used throughout the Convention in two senses. In some places it is used to mean economic loss (e.g. in lines 1 and 3 of Article 18(1)), and the corresponding word in French in those places is *"dommage"*. In other places (e.g. in line 2 of Article 18(1), damage is used in the sense of physical injury, and in those places the French equivalent is " *avarie* ". We were referred to several French dictionaries from which I learn that " *avarie* " is derived from the same root as the English word "average" and that it has various meanings including, in maritime law, damage and loss. But the dictionaries do not satisfy me that it unambiguously means partial loss, such as occurred here, and several writers learned in French law. to whose works we were referred, apparently do not consider that it does. One such writer is Professor Rodiere, Professor of Maritime and of Transport Law in the Faculty of Law in Paris. Writing in *Transport Law,* published in Paris in 1977, with reference to Article 26(2), Professor Rodiere says (in translation): *" The text thus relates only to average [avarie]. In my view, it must be extended to the partial loss . . .". (for reasons which he explains).*

62. Professor Emmanuel Pontavice, Professor of the Faculty of Law and Economic Science of Nantes, in an article entitled *Air Law,* published in the Revue Tremestriel de Droit Commerciale, Volume 21, 1968, referred to a decision by the Federal Chamber of Buenos Aires, that a partial loss by theft constituted an average, in the sense of Article 26(2) and said this: *" This judgment must be approved. In particular, the judgment carefully distinguishes between total loss, which comes under Article 13(3) of the Warsaw Agreement, and partial loss deriving from theft, which must be assimilated to the average ".*

63. If "*avarie*" meant partial loss without ambiguity, there would be no need to "extend" its application or to "assimilate" partial loss to it. Accordingly, I do not consider that reference to the French text and the use of French dictionaries and commentaries on the word "*avarie*" remove the ambiguity of the English text. Nor do the decisions of foreign courts show, in my opinion, that there was a corpus of foreign law that we ought to place on this matter.

64. On the other hand I do consider that the writings of the learned authors from abroad to which we are referred, strongly support the purposive construction of Article 26(2) which would, in any event, have been possible for an English court construing the English text alone. On this matter I entirely agree with my noble and learned friend Lord Wilberforce, and I would adopt his reasoning, and his conclusion that we should hold that partial loss of contents is included in "damage" in Article 26(2).

65. That would be enough to dispose of the appeal but, having regard to the use that was sought to be made, on behalf of the appellants, of *travaux preparatoires,* I wish to refer to that matter. It may be legitimate for English courts, when construing an Act of Parliament which gives effect to an international agreement, to make cautious use of the *travaux preparatoires'* for the purpose of resolving any ambiguity in the treaty - see ***Black-Clawson International Ltd. v. Papierwerke A.G.*** [1975] A.C. 591, 640 per Lord Diplock. Even if that be so, we are in this case being invited to go a stage further and I for my part would decline to do so. We were invited to refer to the minutes of The Hague Conference of 1955, at which the Protocol to amend the Warsaw Convention of 1929 was agreed, for the purpose of finding there recorded an agreement between the states represented at the conference that "damage" in Article 26(2) was to be construed as including partial loss. It was said to be the duty of British courts to give effect to the alleged agreement. I shall assume, for the moment, that such an agreement is recorded in the minutes, although in fact I do not think it is. Making that assumption, I am of opinion that we should decline to give effect to the alleged agreement or to take judicial notice of it, because it has not been sufficiently published to persons whose rights would be affected by it, such as Mr. Fothergill, the respondent. They ought to be entitled to rely on the texts English and French, scheduled to the Act, without finding that the meaning of the text is controlled by some extraneous agreement of which they have no notice. If the meaning of an expression in an Act of Parliament, giving effect to a treaty which directly affects the rights of private citizens, has been defined by some extra-statutory agreement between the British government and other governments, I do not think the definition ought to be applied as part of English law unless it has been published to the same extent as the Act, as if it were an interpretation clause, in the Act, which is what in substance it is. True, the minutes of The Hague Conference were published by the International Civil Aviation Organisation in 1956, in English, French and Spanish, and were on sale at H.M. Stationery Office. Whether they are (or were in March 1975) still obtainable there I do not know, though I have my doubts. In any event, they have never been as readily accessible as the Act itself, and in my opinion they have never been reasonably accessible to private citizens, or even to lawyers who do not happen to specialize in air transport law. To treat an agreement buried in such material as capable of containing a binding definition of an expression in a Statute, seems to me to offend against the basic principle that *"It is requisite that "the resolution [of the legislator] be notified to the people who are to obey it" - Blackstone's Commentaries,* 21st edition, (1844), p.45. I agree with Browne L.J. that that passage is very apposite. The fact that the parties with the real interest in this appeal happen to be insurers who are probably familiar with the minutes in question does not, in my opinion, affect the principle.

66. It is not as if there would be any difficulty in publishing an international agreement on the construction of a treaty. A declaratory provision could be included in the Act of Parliament giving effect to the treaty. That has now been done on this very point, by the Carriage by Air Act 1979, section 2(1), although that Act can have no bearing upon the construction of the 1961 Act for the present purpose. An agreement, such as is alleged to have been made in this case, must be fairly short and precise, and it differs in that respect from information about the legislative history of the convention which might be found in travaux preparatoires, or in the report of the official rapporteur of a conference. Such information, as Kerr J. said, *"cannot conveniently be compressed into the text of the convention".* It might be equally inappropriate for inclusion in an Act of Parliament. I am not here concerned with information of that sort, but only with an agreement, or a precisely stated understanding, on the construction of a word or a phrase in a convention. I can conceive of no good reason why the agreed construction should not be expressly set out in an interpretation section of the statute giving effect to the convention. If that is not to be obligatory, as in my opinion it ought to be, then at the very least, the statute should draw attention to the agreement. I agree with Kerr J. that the statute should expressly provide that any report by an official rapporteur may be referred to as an aid to its interpretation. That would at least draw attention to the existence of such a document.

67. The Vienna Convention on the Law of Treaties, dated 23rd May 1961, had not received sufficient ratifications to come into force by the date with which this appeal was concerned, and accordingly, it is not relevant to the present question. But it will apply to future treaties, and the British government, by ratifying it, may have undertaken that future treaties will be interpreted in accordance with the rules stated in the Convention. If so, it

seems to me that the only way the government can implement its understanding is by ensuring that the legislation for giving effect to future conventions is properly drafted, and in particular, that it expressly sets out any agreed definitions. If that is not done, my conclusion would be that the government had failed to carry out its undertaking.

68. With regard to the question of whether there was an agreement at The Hague Conference on the construction of the word "damage" in Article 26(2), the minutes show that there was discussion in which some delegations expressed the view that damage clearly included partial loss and others (including the British) expressed the opposite view. At a meeting on 27 September 1955, the delegate from The Netherlands proposed, seconded by the Swedish delegate, the addition of the words "or partial loss" after the word "damage". The minutes record that eventually they *"withdrew their proposal on the understanding that the word 'damage' was to be understood as including the words 'partial loss' "*. But the minutes do not show that that understanding was generally accepted, or that it was given official recognition by the President; it is to be contrasted with an understanding relating to Article 19 of which the minutes of a meeting on 20 September 1955 record that "The President stated that, in the event of a negative vote on the proposal, the conference would be understood as having stated that the word ' unreasonable' was not necessary because it was already implied in Article 19 as at present drafted ". Accordingly, if it was necessary, I would hold that the alleged agreement or understanding relating to Article 26(2) has not been established.

69. It follows from what I have said that, in my opinion, the respondent's claim against the carrier is dependent upon his having complained to them, at latest, within seven days from receipt of his baggage, that some of the contents had been lost. I do not consider that the entry on the P.I.R. form was sufficient to cover loss of contents. It gave no hint that such loss had occurred, and indeed, by referring only to damage to the suitcase, it implied that that was the only matter of complaint. I entirely agree with the opinion of Kerr J. at p. 120A to the effect that: *" The complaint must relate to the claim which the passenger is seeking to enforce. It must give sufficient notice to the carrier to enable him to make the relevant inquiries."*

70. For these reasons I would allow the appeal.

Lord Scarman ; MY LORDS,

71. I agree with the speech delivered by my noble and learned friend, Lord Wilberforce. If there be any difference between us, it relates only to our respective views as to the ordinary, or more common, meaning of the word "damage" in the English usage. But for the reasons appearing in his speech, and mine, the difference, if any there be, is of no moment.

72. I venture, however, to add some comments of my own as to the correct approach by our courts to the interpretation of international conventions. I do so because of the growing importance of the task. I confidently expect that the municipal courts of the United Kingdom will have increasingly to tackle this job: and, if they are to do it successfully, they will have to achieve an approach which is broadly in line with the practice of public international law. Faced with an international treaty which has been incorporated into our law, British courts should now follow broadly the guidelines declared by the Vienna Convention on the Law of Treaties 1969, to which my noble and learned friend refers. Lord Denning M.R. reconnoitred the ground - or, rather, the waters - of this new judicial operation in the area of the common market when he spoke of an incoming tide of law flowing into our rivers and estuaries: see his dicta in ***Bulmer Ltd. v. Bellinger S.A***. [1974] 1 Ch. 401 at pp. 418F, 425 C-H. But the waters are not confined to the legal outpourings of the Rhine and the Scheldt: they comprise the oceans of the world. The Warsaw Convention is itself world-wide.

73. The case concerns the Warsaw Convention for the unification of certain rules relating to international carriage by air. Upon a literal construction of Article 26(2) of the Convention I would agree with the interpretation placed upon the word "damage" in the article by Kerr J. at first instance and by Browne and Geoffrey Lane L.JJ. in the Court of Appeal. I would construe it as meaning physical injury to the baggage (or cargo) and as excluding a partial loss of the contents. Linguistically, I agree with the American judge in ***Schwimmer v. Air France*** (1976) 14 Avi. 17,466 that in ordinary usage "damage is damage and loss is loss". Moreover I am satisfied that the ordinary meaning of "avarie", the word used in the French text, is physical harm, or injury to an object. Notwithstanding the specialist meaning of "avarie" in French maritime law where it does also include a maritime loss (compare the use of our word "average" in marine insurance), there would be no inconsistency between the English and French texts unless the context of Article 26(2) be such that one must give to "avarie" this highly specialised meaning: but in my opinion, the context does not so require.

74. If, therefore, the literal construction be legitimate, I would dismiss the appeal. But, in my judgment, it is not. It makes commercial sense to apply, if it be possible, the same time limits for giving notice of a complaint of partial loss of contents as for one of physical damage: and I am equally in no doubt that it is the duty of the English courts to apply, if possible, an interpretation which meets the commercial purpose of the Convention. In my judgment, such an interpretation is possible; and I have derived a measure of assistance in reaching my conclusion from certain aids to interpretation which, if we were not concerned with an international convention, it would not be legitimate to use.

75. The trial judge's error was, I think, to construe the article as though it were merely a term of a ticket contract. It is much more than that. It is part of a convention intended to unify the rules relating to the carriage of persons and goods by air. The majority of the Court of Appeal (Browne and Geoffrey Lane L.JJ.) was, I think, also misled by the ordinary meaning of "damage" into interpreting the Convention in a way inconsistent with its purpose. It is

because I consider it our duty to interpret, if it be possible, Article 26(2) in a way which is consistent with the purpose of the Convention, that I think it necessary to discuss the intricate questions raised as to the correct approach of a British court to a convention of this character.

76. The issue between the parties is as to the construction to be put upon an Act of Parliament. But the Act requires the courts to interpret an international convention. The Convention is in French. The French text, as well as an English text, is scheduled to the Act. In the event of any inconsistency between the two texts, the French is to prevail. The French text is, therefore, English law. The English text is secondary—a statutory translation. Three problems of importance arise: —

- What is the approach to be adopted by British courts to the interpretation of an international convention incorporated by statute into our law?
- To what aids may our courts have recourse in interpreting such a convention?
- If our courts may have recourse to " *travaux preparatoires*", to foreign judicial decisions, and to the writings of distinguished jurists expert in the field of law covered by the Convention, by what criteria are they to select such material and what weight are they to give it?

77. The Convention under consideration is "*The Warsaw Convention as amended at The Hague, 1955*". Its purpose is to promote uniformity in its field. The Convention was signed on behalf of the United Kingdom at Warsaw on the 12th October 1929. An English text was scheduled to the Carriage by Air Act 1932, which provided that, in so far as they related to the rights and liabilities of carriers, passengers, consignors, consignees, and others concerned in the international carriage of persons, luggage or goods by aircraft for reward (or gratuitously by an air transport under- taking), the provisions of the Convention should have the force of law in the United Kingdom: section 1 and the 1st Schedule to the Act. The French text was not scheduled to the Act: but Article 36 of the Convention provided that "*the Convention is drawn up in French*". The Convention was amended at an international conference at The Hague in 1955. The outcome of the conference was an amended text drawn up in French. Parliament legislated to repeal the 1932 Act and to give effect to the amended Convention by the Carriage by Air Act 1961. This is the statute which has to be construed in this appeal. It follows the pattern of its predecessor. The amended Convention is set out in the 1st Schedule to the Act. The Schedule is in two parts, Part I being the English text and Part II the French text. Section 1(2) of the Act provides that:

"1.(2) If there is any inconsistency between the text in English in Part I of the First Schedule to this Act and the text in French in Part II of that Schedule, the text in French shall prevail ".

78. Section 4 of the Act declares that the limitations on liability in Article 22 of the amended Convention are to apply; and section 4 extends to a carrier's servant or agent the time limit of two years set by Article 29 of the Convention (as I shall hereafter call the amended Convention) for bringing an action for damages against a carrier.

79. The scheme of the Convention is simple and sensible, being designed to avoid costly litigation, to protect the rights of the users of air carriage, and to set reasonable limits upon the liabilities of the carrier. As this appeal relates only to the provisions of the Convention dealing with damage to baggage or cargo, I will refer only to them. The carrier's liabilities are strict. He is liable if the occurrence which caused the damage took place during the carriage, Article 18(1). He is liable for damage caused by delay: Article 19. Article 20 gives him a defence if he can prove - usually an impossible task - " *that he and his servants or agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."* Article 21 makes available a defence (in whole or in part) of contributory negligence. Article 22, one of the critically important provisions of the Convention, limits the carrier's liability. Sub-paragraph 2*(b)* of this Article is notable because it contains the only reference in the Convention to a partial loss of contents. It is in these terms:

"2(b) In the case of loss, damage or delay of part of registered baggage or cargo, or of 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 of an object contained therein, affects the value of other packages covered by the same baggage check or the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability."

80. Article 25 excludes the Article 22 limits of liability if the damage was caused intentionally or recklessly. Article 26 provides certain safeguards for the carrier. Since it is central to this appeal, I set it out in full: — "*Article 26*

(1) Receipt by the person entitled to delivery of baggage or cargo without complaint is prima facie evidence that the same has been delivered in good condition and in accordance with the document of carriage.

(2) In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest within seven days from the date of receipt in the case of baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of carriage or by separate notice in writing despatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part".

81. Article 29 provides that the right to damages shall be extinguished, if action is not brought with two years; and Article 36 provides (in the same terms as in the original Convention) that the language of the Convention is French.

82. The broad approach of our courts to the interpretation of an international convention incorporated into our law is well settled. The international currency of the convention must be respected, as also its international purpose. The convention should be construed "*on broad principles of general acceptation* ". This approach was formulated by Lord Macmillan in ***Stag Line Ltd. v. Foscolo, Mango & Co***. [1932] A.C. 328, 350; it was adopted by this House in the recent case of ***Buchanan & Co. v. Babco Ltd***. [11978] A.C. 141.

83. The implications of this approach remain, however, to be worked out by our courts. Some can be explored in this appeal: but it would be idle to pretend that all can be foreseen. Our courts will have to develop their jurisprudence in company with the courts of other countries from case to case - a course of action by no means unfamiliar to common law judges. I propose, therefore, to consider only the implications and difficulties which arise in the instant case, and to direct myself broadly along the lines indicated by Article 32 of the Vienna Convention.

84. First, the problem of the French text. Being scheduled to the statute, it is part of our law. Further, in the event of inconsistency, it shall, as a matter of law, prevail over the English text. It is, therefore, the duty of the court to have regard to it. We may not take refuge in our adversarial process, paying regard only to the English text, unless and until one or other of the parties leads evidence to establish an inconsistency with the French. We are to take judicial notice of the French. We have to form a view as to its meaning. Given our insular isolation from foreign languages, even French, and being unable to assume that all English judges are familiar with the language, how is the court to do its duty? First, the court must have recourse to the English text. It is, after all, the meaning which Parliament believes the French to have. It is an enacted translation, though not binding in law because Parliament has recognised the possibility of inconsistency and has laid down how that difficulty is to be resolved. Secondly, as with the English language, so also with the French, the court may have recourse to dictionaries in its search for a meaning. Thirdly, the court may receive expert evidence directed not to the questions of law which arise in interpreting the convention, but to the meaning, or possible meanings (for there will often be more than one), of the French. It will be for the court, not the expert, to choose the meaning which it considers should be given to the words in issue. The same problem arises frequently with the English language, though here the court relies on its own knowledge of the language supplemented by dictionaries or other written evidence of usage. At the end of the day, the court, applying legal principles of interpretation, selects the meaning which it believes the law requires.

85. I come now to consider to what aids our courts may have recourse in interpreting an international convention. It matters not how the convention has entered into our law. Once it is part of our law, its international character must be respected. The point made by Lord Macmillan in the *Stag Line* case *(supra,* p.350) is to be borne in mind. Rules contained in an international convention are the outcome of an international conference; if, as in the present case, they operate within the field of private law, they will come under the consideration of foreign courts; and uniformity is the purpose to be served by most international conventions, and we know that unification of the rules relating to international air carriage is the object of the Warsaw Convention. It follows that our judges should be able to have recourse to the same aids to interpretation as their brother judges in the other contracting states. The mischief of any other view is illustrated by the instant case. To deny them this assistance would be a damaging blow to the unification of the rules which was the object of signing and then enacting the convention. Moreover, the ability of our judges to fulfil the purpose of the enactment would be restricted, and the persuasive authority of their judgments in the jurisdictions of the other contracting states would be diminished.

86. We know that in the great majority of the contracting states the legislative history, the "*travaux preparatoires*", the international case law C *la jurisprudence*'), and the writings of jurists ('*la doctrine*'), would be admissible as aids to the interpretation of the convention. We know also that such sources would be used in the practice of public international law. They should, therefore, also be admissible in our courts: but they are to be used as *aids* only.

87. Aids are not a substitute for the terms of a convention: nor is their use mandatory. The court has a discretion. The exercise of this discretion is the true difficulty raised by the present case. Kerr J. at first instance and Geoffrey Lane L.J. in the Court of Appeal plainly thought it was unnecessary to have recourse to any aids to interpretation other than the words of the convention. Although I disagree with their conclusion, I think their initial approach was correct. They looked to the terms of the convention as enacted, and concluded that it was clear. I agree with them in thinking that the court must first look at the terms of the convention as enacted by Parliament. But, if. there be ambiguity or doubt, or if a literal construction appears to conflict with the purpose of the convention, the court must then, in my judgment, have recourse to such aids as are admissible and appear to it to be not only relevant but helpful on the point (or points) under consideration. Mere marginal relevance will not suffice: the aid (or aids) must have weight as well. A great deal of relevant material will fail to meet these criteria. Working papers of delegates to the conference, or memoranda submitted by delegates for consideration by the conference, though relevant, will seldom be helpful: but an agreed conference minute of the understanding upon the basis of which the draft of an article of the convention was accepted may well be of great value. And I agree with Kerr J. that it would be useful if such conferences could identify, - perhaps even in the convention, documents to which reference may be made in interpreting the convention.

88. The same considerations apply to the international case law and the writings of jurists. The decision of a supreme court, or the opinion of a court of cassation, will carry great weight: the decision of an inferior court will not

ordinarily do so, The eminence, the experience, and the reputation of a jurist will be of importance in determining whether, and, if so, to what extent the court should rely on his opinion.

89. Nevertheless the decision whether to resort to these aids, and the weight to be attached to them, is for the court. However, the court's discretion has an unusual feature. It is applied not to a factual situation but to a choice of sources for help in interpreting an enactment. It operates in a purely legal field. An appellate court is not, therefore, bound by the lower court's selection of aids, but must make its own choice, if it thinks recourse to aids is necessary. This legal process is not unlike the use made by our courts of antecedent case law, though it lacks the inhibitions of any doctrine of precedent. To those who would say that there is a risk of our courts becoming burdened with an intolerable load, if this material is to be available, I would reply that the remedy lies with the court. It need look at no more than it thinks necessary.

90. I now apply these criteria to the present case. First, I look at the terms of the Convention. The two texts of Article 26(2) are not inconsistent. Their literal construction suggests, in the absence of indications to the contrary, that "damage" or "avarie" is limited to physical harm or injury. But this appears, for the reasons which my noble and learned friend has developed and which I accept, to be inconsistent with the purpose of Article 26. Moreover, it is possible, linguistically, to construe "damage", or "avarie", as covering not only damage to, but partial loss of contents of, baggage or cargo; for - a common feature of language in a complex society - each word can, and does, take a different shade of meaning from its context. Which construction is to be accepted? At this stage, it is helpful to have regard to the aids which the courts of other contracting states would use in ascertaining the meaning of "damage" or "avarie" in the context of the Article. The minutes of the conference of 1955, the outcome of which was the convention enacted by the Act of 1961, suggest that "damage" in the context of the Article was intended to cover partial loss of contents. These minutes, it should be noted, were published in 1956, not only in Montreal (the headquarters of the International Civil Aviation Organisation) but also by HMSO in London: and, probably, elsewhere as well. They are in no way secret. But they are not conclusive. Further, the weight of the international case law and of the writings of jurists supports the same conclusion. For all these reasons, therefore, i.e. the commercial sense of such an interpretation, the context (including in particular Article 22(2)(b) of the Convention) the minutes of the conference, the case law and the writings of jurists, I conclude that in Article 26(2) of the Convention damage to baggage includes partial loss of its contents. Unless, therefore, complaint of the loss be made within the time limited by the Article, no action lies against the carrier.

91. Upon the subsidiary point that the respondent had given notice of his complaint of partial loss of the contents of his baggage within the time limit set by Article 26(2), I agree with Kerr J. He plainly had not.

92. I would, therefore, allow the carrier's appeal.

Lord Roskill ; MY LORDS,

93. In common with all your Lordships I have reached the conclusion that this appeal should be allowed. I add some observations of my own because the issues raised by this appeal have been widely and ably argued before your Lordships' House. The sum involved is trivial, namely, £16.50 and it is the insurers of the respondent, Mr. Fothergill, and not Mr. Fothergill himself who in truth are concerned on the plaintiff's side. Mr. Fothergill, like other prudent passengers by air, had insured his luggage on the relevant flight, from Rome to Luton, on the 13th May 1975. His claim, arising from his undoubted loss, has been properly met by those insurers. They, in their turn, seek to recover from the airline, or more accurately, from the airline's insurers. Thus is issue joined in order to obtain the decision of your Lordships' House upon which set of insurers Mr. Fothergill's loss should fall. Both the learned judge, Kerr J., and the Court of Appeal have held that that loss should fall upon the airline. But the Court of Appeal though unanimous in their conclusion were far from unanimous in their reasons. Browne and Lane L.JJ. in substance agreed with Kerr J. on the main issue and for the same reasons as the learned judge. But Lord Denning, M. R., reached his conclusion by a different route.

94. My Lords, your Lordships have to determine the true construction of Article 26(2) of the Warsaw Convention, as amended at The Hague, both the English and French texts of which are scheduled to the Carriage by Air Act 1961. But, uniquely so far as my own experience goes, that Act by section 2(1) provides that if there be any inconsistency between the English and French texts, the text in French shall prevail. Not the least important of the tasks before your Lordships' House, is to determine how the courts of this country should approach the novel question of the construction of a United Kingdom statute designed to give effect to an international convention, but which expressly enjoins the court concerned to give preference to a text in a language other than that of that court, a language with which the judge or judges of that court may or may not be familiar.

95. My Lords, the policy of our courts in relation to problems of this kind has evolved gradually over the last sixty years or so. The making of rules designed to secure by international convention uniformity of contracts of carriage is, I believe, a development of this century and first arose in connection with contracts of carriage by sea. During the nineteenth century British shipowners were free to impose, and did impose, upon those who entrusted their goods to them for carriage by sea exemptive conditions highly beneficial to those shipowners and their insurers. The laws of other countries, notably of the United States of America, were less well disposed to their shipowning nationals. Different countries at different times legislated in relation to this matter and other connected topics in different ways.

96. One of the earliest attempts to secure uniformity of rules of law regarding maritime matters, was successfully achieved by the Brussels Convention of 1910, unifying certain rules of law in regard to collisions at sea and

salvage. But when Parliament gave statutory effect to those Conventions by the Maritime Conventions Act 1911, that Act, while expressly referring to those two Conventions in its preamble, and implicitly, of course, by its very title, not only did not schedule the texts of those Conventions to the statute, but provided that that statute should be construed " *as one with the Merchant Shipping Acts 1894-1907* ", which were purely domestic legislation.

97. So far as I have been able to trace the first occasion upon which any Convention text was scheduled to a United Kingdom statute was in the Carriage of Goods by Sea Act 1924. It is sometimes overlooked that the rules scheduled to that Act were those contained in a draft Convention as amended—see the preamble to the Act—that Act having received the Royal Assent on the 1st August 1924, and the final Convention not having been signed until the 25th August 1924. The official text both of the draft Convention as amended and of the final Convention, was French, and the two texts are not identical. Thus the English text of the rules scheduled to the Act is but a translation from the French text of the draft Convention. It is not, unlike the English text of the Warsaw Convention in Part I of the First Schedule to the 1961 Act, an authentic English text of the draft Convention and still less it is the authentic English text of the final Convention.

98. My Lords, it was not long before problems of interpretation of The Hague rules arose. What was meant by the phrase "*management of the ship*" in Article IV *2(a) 'I* How was the word "or" to be construed in Article IV 2(q) in the context of "*or without the fault or neglect of the agents or servants of the carrier*" - disjunctively or conjunctively? In ***Hourani v. T. & J. Harrison*** (1927) 32 Com. Cas. 305, the Court of Appeal had no difficulty in construing the word "or" as "and", but neither they nor Wright J., as he then was, in ***Gosse Millard Ltd. v. Canadian Government Merchant Marine Ltd.*** [1927] 2 K.B. 433 at 435, ever thought of looking at the French text of the draft Convention, which when one looks at it to-day one might be forgiven for thinking afforded an easy guide to the same answer as that at which those courts arrived as a matter of construction, according to ordinary English principles. Indeed, when the ***Gosse Millard*** case reached your Lordships' House [1929] A.C. 223, their Lordships construed the phrase "*management of the ship*" in accordance with all the antecedent English precedents. Viscount Sumner, at pp. 236-7, while accepting that these words appeared in an international convention, assumed that they were intended to be used in the judicially established sense, and the House without doubt construed The Hague rules in the same manner as it would have construed any ordinary United Kingdom statute.

99. A slightly more liberal approach is, however, to be found in the speeches in your Lordships' House in ***Stag Line Ltd. v. Foscolo, Mango & Co.*** [1932] A.C. 328. Your Lordships have referred to the well-known passage in the speech of Lord Macmillan at p. 350, and I will not again quote what he said. I would, however, add a reference to the speech of Lord Atkin on the same point at pp. 342-3 of the report. But the House, notwithstanding that more liberal approach in theory, in practice applied the antecedent English decisions to the construction of Article IV Rule 4 of The Hague rules.

100. There matters remained for nearly a quarter of a century. It is notorious that in this period any attempts made by counsel to invite attention to the French text of the draft Convention in order to construe the Rules scheduled to the English Act, were firmly discouraged by the courts and sometimes even made a matter of judicial reproof.

101. However, in ***Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd.*** [1954] 2 Q.B. 402, Devlin J., as he then was, had to construe Article 1*(b)* of the Rules. Having stated his conclusion at p. 421 of the report he added: *"I base this conclusion upon the sense of the paragraph as a whole as well as upon its punctuation. If there is any doubt the French text . . . makes it quite clear. Having regard to the preamble to the Act and the fact that the French text is the only authoritative version of the Convention, I think, notwithstanding Mr. Megaw's objection, that it is permissible to look at it. I agree that it is not conclusive, but it may help to solve an ambiguity if there be one. I agree also that unless the court is assisted by a French lawyer it should be looked at cautiously; but the appreciation of this particular point needs no more French than every schoolboy knows and I think it would be pedantic to ignore it."*

102. Thus to look at the French text was for the first time regarded as permissible in an English court.

103. My Lords, it will have been observed that the cases to which I have referred so far all arise from carriage by sea. At the time of all those cases save ***Pyrene,*** air carriage whether of goods or passengers was in its infancy. But as air transport has developed, maritime law was an obvious source from which solutions of the novel problems of air transport law might be derived, and one has only to glance at some of the provisions of the Warsaw Convention to see whence their philosophy comes. It would not, therefore, be surprising to find words used in the Convention whether one has regard to the French text or to the English text, or to both in the same sense as that in which those words had long been used in maritime law.

104. But the change foreshadowed in ***Pyrene*** was not limited to the approach of the courts in construing The Hague rules. In ***Salomon v. Commissioners of Customs & Excise*** [1967] 2 Q.B. 116, the Court of Appeal was concerned with a problem of valuation under the Customs & Excise Act 1952. The relevant provisions had been enacted in fulfilment of an antecedent convention entered into in 1950. The Court of Appeal had no difficulty in holding that it was proper to look at the convention even though there was no express reference to it in the statute in order to determine the true meaning of the statute if that meaning were not clear from its own language. I refer to but do not quote from the judgment of my noble and learned friend, Lord Diplock, then Lord Justice Diplock, at pages 142 to 145 of that report.

105. In ***Post Office v. Estuary Radio Ltd.*** [1968] 2 K.B. 740, my noble and learned friend giving the judgment of the Court of Appeal followed the previous decision in the *Salomon* case and once again the Court of Appeal found

no difficulty in looking at the relevant convention, even though it was not referred to in the relevant Order in Council.

106. By the time, some ten years later, when your Lordships had to consider the problem once more in ***James Buchanan & Co. Ltd. v. Babco Forwarding & Shipping (U.K.) Ltd.*** [1970] A.C. 141, my noble and learned friend Lord Wilberforce at page 152 in agreement with your Lordships had no difficulty in holding that it was legitimate to look at the French text of the Convention scheduled to the Carriage of Goods by Road Act 1965 if the English text were ambiguous.

107. That decision of your Lordships' House shows how changed the position had become at the end of the sixty year period to which I have referred from what it was at the beginning. In my judgment it is now clear law that where the source of the legislation in question is not the ordinary parliamentary process, but is an international treaty or convention and the statute is designed to give effect to that treaty or convention, it is legitimate to look at that source in order to resolve ambiguities in the legislation which has made those treaty or convention provisions part of the ordinary municipal law of this country.

108. But in the present case the relevant statutory enactment goes further. It enjoins the court in the event of inconsistency between the English and French text to allow the French text to prevail. How then is the court to perform its task once an issue of an alleged inconsistency arises? It may be that reference to the French text will if properly understood shed clear light upon the meaning of the English text. Clearly on the authorities as they now stand, that is a legitimate approach to the construction of the English text where any doubt arises as to the meaning of the latter text. In such a case there will be no inconsistency. But in the present case the alleged inconsistency is between the English word "damage" where it appears in the relevant place in Article 26(2) of the English text, and the French word "avarie" in the corresponding place in the French text of that article. In order to determine whether there is an inconsistency, the court must be in a position to ascertain the meaning of both words.

109. "Damage" is an ordinary English word susceptible of several meanings according to the precise context in which the word is used. "Avarie" is a French word also susceptible of several meanings according to its context. An English court will construe the word "damage" as it will construe any other word which it is required to interpret - according to the context in which the word is used. But it is likely that the court will require extrinsic help in construing the French word. Like my noble and learned friend, Lord Wilberforce, I decline to lay down any precise rules whence that help should come. If the judge concerned is possessed of some knowledge of the French language, it will be pedantic and perhaps also intellectually impossible to deny him the right to use that which he knows perfectly well. Once both French and Latin were languages in current use in our courts. Latin phrases still make a frequent appearance in our jurisprudence and a judge is perfectly free to use such knowledge of Latin as he may still possess in order to interpret and apply such a phrase. Why then should a different rule be applied in the case of a modern as opposed to an ancient language? Of course the same problem could arise hereafter with authentic texts of conventions in languages in less frequent use and therefore less well known in Western Europe than for example French or German. In such a case a judge will be likely to require more help than in the case of those two languages. But a judge will usually be unlikely to be willing to rely solely upon his own knowledge of the relevant language even if he be as well versed in that language as the learned trial judge concerned in the present case. Such a judge can always have recourse to dictionaries. He can have regard to the writings of learned writers upon the relevant topic. He can have regard to judicial decisions of the courts of other countries concerned with the same problem. Such sources are clearly not exhaustive. I doubt whether in a case such as the present the evidence of an ordinary interpreter would greatly assist, though such evidence might be essential if the language were unknown or little known to the judge. But if for example in the present case oral evidence had been called from one or more of those learned writers extracts from whose written work is referred to in various of your Lordships' speeches, I do not doubt that Kerr J. and indeed the Court of Appeal would have derived much help from their evidence. I think it was evidence of this nature that Lane L.J. had in mind in the opening paragraph of his judgment at [1979] 2 W.L.R. at page 506. It would obviously be of greater help if the expert were bilingual though I would not regard that as essential since primarily his evidence would be directed to the meaning of the French text. Clearly such an expert must not tell the court how he thinks the court should decide the case, but he could give great assistance as to what he thought the true meaning of the relevant word was in the French language and how the sense of that meaning compared with the sense of the corresponding word used in the English text—the latter only of course if he were familiar with the English language.

110. In passing I would observe that in cases where an issue of inconsistency is said to arise, there must be no question of one party taking the other by surprise. The meaning of a word in a foreign language is at least in most cases a question of fact and I would have thought ought to be specifically pleaded by the party asserting some special meaning. But whether or not that be correct, clearly notice of any intention to raise such a point must be given to the other side so that each side can come to trial forewarned and forearmed with the evidence whether written or oral with which each proposes to assist the court.

111. If one has regard only to the English text of Article 26(2) and construes the relevant word "damage" in that article upon strict English principles of construction, I would be disposed to agree with Kerr J. and with Browne and Lane L.JJ. that "damage" is used in antithesis to "partial loss" so that the former word does not include the latter expression, though with respect I do not think it right to construe "damage" in this context by reference to such English authorities as the well known line of ticket cases.

112. But once the issue of inconsistency is raised, in my view no concluded view as to the meaning of the word in the English text can or should be reached without first considering the meaning of the word "avarie" in the French text. I unreservedly accept Mr. Staughton's warning against the dangers of construing "avarie" in the French text as equivalent to "partial loss" because in an English marine insurance context "average" is a synonym for "partial loss". Compare sections 64, 66 and 76 of and Rule 13 of the Rules of Construction in the First Schedule to the Marine Insurance Act 1906 and the statement of Lord Esher M.R. in ***Price & Co. v. A.l Ships' Small Damage Insurance Association*** (1889) 22 Q.B.D. 580 at 584 that: *"'Average' [in the context of marine insurance] .... has a well established mercantile significance. It means a partial as distinguished from a total loss."*

113. On the other hand "partial loss" is a possible meaning of the word "avarie" in the context of maritime law, and I have already mentioned that maritime law is a source of much modern air law. Your Lordships were referred to a number of decisions of foreign courts. The industry of counsel and of the appellants' solicitors brought to the attention of your Lordships' House many such cases which had not been referred to in the courts below. Like other of your Lordships, I find little help in them for they are, naturally enough, not always consistent with each other and on occasions each learned counsel claimed a particular decision to be in his favour. On the other hand like my noble and learned friends, I find the writings of the distinguished writers to whose works we were referred both in original and in translation most persuasive. Those writings are detailed in the speeches of my noble and learned friends, Lord Wilberforce and Lord Fraser of Tullybelton, and I shall not repeat what they have quoted. I think, like my noble and learned friends, that those writings point strongly to the conclusion which all your Lordships have reached, that "avarie" in this context includes "partial loss". Either therefore "damage" in the English text must be construed so as to include " partial loss ", or there is an inconsistency and the French text as I would interpret it in the light of those writings must prevail. I do not think it matters by which route that conclusion is reached.

114. Clearly, therefore, Mr. Fothergill should have lodged his claim within seven days. He did not do so.

115. This conclusion, as my noble and learned friend Lord Wilberforce has pointed out, makes it unnecessary to deal with the question of *travaux preparatoires*. But like all your Lordships I think this is a matter upon which your Lordships' House should now express a view in the light of the full arguments to which your Lordships have listened. The question is dealt with at length in their speeches by my noble and learned friends, Lord Wilberforce and Lord Diplock and Lord Scarman. I agree with them and only add a word on one point since my noble and learned friend Lord Fraser of Tullybelton takes a different view from that taken by the majority of your Lordships. I see, if I may respectfully say so, the force of my noble and learned friend's observation with the difficulties into which the use of *travaux preparatoires* may put the private citizen who wishes to bring an action in relation to such matters as those involved in the present case and who has not got and perhaps may not be able to get easy access to such highly specialised knowledge as will be contained in the documents which your Lordships are considering. But in practice I venture to question whether these disputes are likely to arise save between bodies such as cargo underwriters, airlines and the like, who will have been represented at the negotiations leading to a particular Convention and who will be fully equipped with the necessary information. That is certainly the position in the present case.

116. Mr. Fothergill did not give the relevant notice within seven days. I think in agreement with Kerr J. that his claim must fail because of that failure for the reasons which the learned judge gave, which I respectfully and entirely adopt. I regret that I cannot agree with the learned Master of the Rolls on this issue, nor with his use of the 1979 Act in order to construe the 1961 Act. I would therefore allow the appellants' appeal and order judgment to be entered to the defendants.