BARELY ALOFT: THE LEGAL REGIME OF THE THIRD PARTY PROVIDER IN AIR CARRIAGE

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Air Freight Forwarders

There are two types of air freight forwarders, those which serve air carriers in domestic transportation, and air freight forwarders which engage in the forwarding of property overseas or in foreign air transportation. A freight forwarder may act in both capacities.

Air freight forwarders may act as the agent for the air carrier and issue the direct air carrier's bill of lading upon receipt of the shipment. To the extent that their activities are authorized as agent for the direct air carrier and within the scope of the authority of the direct air carrier, the liability of an air freight forwarder is generally the same as the direct air carrier for loss or damage to the cargo.

Air freight forwarders may issue their own bill of lading to the shipper and upon delivery of the cargo to the actual or direct air carrier will receive an air waybill showing the forwarder as the shipper and the direct air carrier as the carrier. In such event the forwarder would be liable to the shipper or consignee shown on the air waybill issued by the forwarder for loss, damage or delay in transit and the forwarder could sue the direct carrier.[1]

Domestic (interstate) air freight forwarders and international air freight forwarders who contractually undertake responsibility for safe delivery are "indirect air carriers."[2] DOT regulations make the international air freight forwarder responsible for the transportation of the property from point of receipt to point of destination.[3] Under such a definition, the international air freight forwarder would seem to fall into the category of the common carrier subject to common carrier liability as defined by the United States Supreme Court.[4] To the extent that the international air freight forwarder acts as agent for the carrier, however, it may be entitled to the same limitations and exemptions from liability as a direct air carrier. An air freight forwarder who accepts responsibility for the transportation of cargo has been held to be a carrier under the Warsaw Convention.[5]

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[1] See Split End, Ltd. v. Dimerco Express (Phils) Inc., 19 Av. Cas. (CCH) 18,364 (S.D.N.Y. 1986).

[2] 49 U.S.C. § 1301(3) " 'air carrier' means any citizen of the United States who undertakes whether directly or indirectly to engage in air transportation."

Direct air carriers operate aircraft. Indirect air carriers offer air transportation services to public but use direct air carriers to perform the actual transportation. Forwarders who assume responsibility for the carriage and employ direct air carriers to transport the goods are indirect air carriers. DHL Corp. v. Civil Aeronautics Board, 584 F.2d 914, 915 (9th Cir. 1978); Royal Ins. v. Amerford Air Cargo, 654 F. Supp. 679, 682 (S.D.N.Y. 1987); Factors in determining whether a forwarder is an indirect air carrier are the obligations undertaken in the contract, the history of the relationship between the forwarder and the shipper, and the manner in which the forwarder made its profit from the transaction. Royal Ins. v. Amerford Air Cargo, supra (citing Zima Corp. v. M.V. Roman Pazinski, 493 F. Supp. 268, 273 (S.D.N.Y. 1980)).

See 14 C.F.R. § 297.3(d) for definition of "foreign indirect air carrier."

[3] 14 C.F.R. § 297.3(a) (1987).

[4] Chicago, Milwaukee, St. Paul & Pac. R.Co. v. Acme Fast Freight, Inc., 336 U.S. 465, 484, 69 S.Ct. 692, 93 L.Ed. 817 (1949).

[5] Pan American World Airways, Inc. v. C.F. Airfreight, Inc., 23 Avi. (CCH) ¶ 17,189 (S.D.N.Y. 1990).

The air freight forwarder industry has been deregulated. The definition of "freight forwarders" in the ICC Termination Act of 1995 provides, "The term does not include a person using transportation of an air carrier subject to part A of Subtitle VII."[6]

Direct and Indirect Air Carriers

Air Cargo Transport is performed by direct and indirect air carriers.:

> Federal aviation law historically has recognized two classes of carriers, direct and indirect. See DHL Corp. v. C.A.B., 584 F.2d 914, 915 (9th Cir. 1978); C.A.B. v. Carefree Travel, Inc., 513 F.2d 375, 387 (2d Cir. 1975); Monarch Travel Services, Inc. v. Associated Cultural Clubs, Inc., 466 F.2d 552, 554 (9th Cir. 1972); Railway Exp. Agency, Inc. v. C.A.B., 345 F.2d 445, 448-450 (D.C. Cir. 1965); see also C.A.B. v. Aeromatic Travel Corp., 489 F.2d 251 (2d Cir. 1973) (distinguishing generally between direct and indirect carriers). Ordinarily, direct carriers have custody of the cargo during transportation, while indirect carriers contractually promise safe delivery and/or provide supportive services, including procuring and assembling cargo for shipment, consolidating multiple shipments into a single shipment for carriage, and arranging transportation with the direct carrier. See DHL Corp., 584 F.2d at 915.
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> Courts have borrowed the concept of indirect and direct carrier classes from domestic federal aviation law and incorporated it into the realm of the Warsaw Convention. In Royal Insurance this court determined that an air freight forwarder was an indirect carrier and, therefore, could invoke the same limited liability protection afforded under the Warsaw Convention to direct air carriers. See Royal Insurance, 654 F.Supp. At 682; see also Confeccos Texteis de Vouzela, Lda. V. Space Tech Systems Inc., 972 F.2d 1338, No. 91-35047, 1992 WL 170964, at * 2-3 (9th Cir. July 22, 1992) (holding that freight forwarder that had arranged air transportation of cargo aboard actual air carrier was indirect carrier under Warsaw Convention); Hitachi Data Systems Corp. v. Nippon Cargo Airlines Co., Ltd., No. C-93-2456, 1995 WL 16923, at * 5-6 (N.D. Cal. Jan. 6, 1995) (same); Pan American World Airways, Inc. v. C.F. Airfreight, Inc., No. 89 Civ. 4182, 1990 WL 240947, at * 1 (S.D.N.Y. Dec. 28, 1990) (Griesa, J.) (concluding that air

[6] 49 U.S.C. § 13102(8)(c) (1995).

freight forwarder was a carrier within the meaning of the Convention). Cf Sega of America, Inc. v. A.M. Exp. Freight, Inc., Nos. 92 Civ. 5838, 92 Civ. 8382, 1995 WL 577784, at * 3 (S.D.N.Y. Sept. 29, 1995) (Martin, J.) (observing that agents of freight forwarders may qualify for liability limitations under Warsaw Convention).[7]

Air Freight Forwarders as Indirect Carriers

An air freight forwarder, whether domestic (interstate) or international that issues its own "house" air-bill is an indirect air carrier and hence is liable as a common carrier. An air freight forwarder who accepts responsibility for the transportation of cargo in some other fashion has also been held to be a carrier under the Warsaw Convention. The liability of the air freight forwarder may depend upon the type of air-bill issued by it upon receipt of the goods. Thus, an air freight forwarder, like forwarders who use other modes of carriage, does not own or operate the vehicles of transportation, the airplanes. The air forwarder may if authorized issue the bill of lading of the airline performing the transportation as agent of the airline, or it may issue its own air waybill. If the forwarder issues, its liability will be determined in the same manner as applicable to direct air carriers.[8]

However, an air freight forwarder may perform other tasks such as arranging for carriage. The forwarder may prepare the documentation such as bills of lading, drafts, etc., as agents for the shipper. If the documents are improperly prepared the forwarder may incur liability to a shipper but not necessarily as an indirect carrier.

Domestic

A domestic air freight forwarder performs the same services in connection with transportation by air as surface freight forwarders would in connection with the transportation by motor vehicle or by railroad. Domestic air freight forwarders are deregulated.

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[7] Martin Marietta Corp. v. The Harper Group, 950 F Supp. 1250, (S.D.N.Y. 1997) Martin Marietta held that an indirect air carrier, a freight forwarder, who issued an air waybill to a shipper, could be a "first carrier" under Art. 8(e) of the Warsaw Convention although it never actually transported the cargo. Although not in issue, the court opined that an indirect air carrier could be a first carrier under Art. 30(3) of the Convention.

See also American Home Assurance Co. v. Jacky Maeder (Hong Kong) Ltd., 969 F.Supp. 184, 190 n 5 (S.D.N.Y. 1997), and cases cited therein. American Home Assurance Co. noted that none of the citations relied upon in Royal Ins. Co. v. Amerford Air Cargo, 654 F.Supp. 679 (S.D.N.Y. 1987), relate to the Warsaw Convention, an international treaty.

Southern Elecs. Distribs., Inc. v. Air Express Int'l Corp., 994 F.Supp. 1472, 1477 (N.D. Ga. 1998).

[8] Schiff v. Emery Air Freight Corp., 332 F.Supp. 1057 (D.Mass. 1971) There is occasionally some confusion by the courts between the various types of freight forwarders and the applicability of the Carmack Amendment. See, e.g. Cassidy v. Airborne Freight Corp., 565 P.2d 360 (Okla. 1977) Hopper Furs, Inc. v. Emery Air Freight Corp., 749 F.2d 1261 (8th Cir. 1984) (the court relied on the Carmack Amendment 49 U.S.C. § 20(11) in determining the liability of an air freight forwarder. The Carmack Amendment provisions 49 U.S.C. § 11707 (prior to Jan. 1, 1996) (see 49 U.S.C. § 14706 (1995), are not applicable to air freight forwarders. Furthermore, although the case involved a shipment in 1982, after recodification of the transportation law, the opinion referred to the former statute, 49 U.S.C. § 20(11).

The ICC Termination Act of 1995, in defining a "freight forwarder," provides that "the term does not include a person using transportation of an air carrier subject to part A of subtitle VII."

Insofar as domestic intermodal movements involving air carriers are concerned, the movements generally involve motor carriers rather than rail carriers or carriers by water or sea. If the shipment is arranged through an air freight forwarder, the forwarder may or may not issue a bill of lading. The forwarder's bill of lading; often contains the same limitations of liability as the custodial (direct) air carrier. However, the forwarder may issue no bill of lading, and the motor carrier picking up the shipment may issue a receipt or bill of lading which may contain the motor carrier released valuation. Usually, the air-motor multimodal shipments are not palletized (ULD) shipments and the cargo is assembled later by a consolidator or the direct air carrier.

The effect of deregulation is that the courts no longer will give a forwarder or air carrier's tariff the force of law under the primary jurisdiction doctrine, but will determine initially the reasonableness of notice and choice of rates and limits, including the validity of incorporated tariff provisions by the application of federal common law.[9]

State law and, consequently, the Uniform Commercial Code are not applicable to determine the liability of an interstate air carrier after deregulation. Congress has not relinquished control. Consequently, federal common law remains applicable.[10]

In transactions involving air carriers, the airbill serves as a contract of carriage.[11] The tariff of the air carrier has been held to be the contract between the air carrier and the passenger. If the carrier materially breaches a provision in its own tariff, this may warrant a recission by the passenger and the carrier may be estopped from enforcing another provision in the contract which it violated.[12]

Although air carriers no longer file tariffs with an administrative agency they maintain tariff conditions which they keep on file and make available to a shipper on request. These tariff conditions are usually incorporated by reference into the air waybill.

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[9] First Pennsylvania Bank N.A. v. Eastern Airlines, Inc., 731 F 2d 1113 (3d Cir 1984). Federal common law, not state law, is applicable after deregulation Ragsdale v. Airborne Freight Corp., 173 Ga App 48, 325 S E.2d 428, 430 (1984); Federal Express v. Paris Business Forms, Inc., 46 Pa D & C 3d 262 (1988); s a. 14 CFR 221 1 et seq. re carrier's tariff requirements

[10] Arkweight-Boston Mfrs. Mut. Ins.Co. V. Great Western Airlines, 767 F 2d 425 (8th Cir 1985). Sam L. Majors Jewelers v. ABX, Inc., 117 F 3d 922 (5th Cir 1997)

Air waybill, which provided that the agreement shall be interpreted and enforced according to the laws of the State of Georgia, was held to be unenforceable. Federal common law was held to be applicable. Matrka v. Delta Airlines, Inc., 116 Ohio App 3d 678, 688 N E 2d 1130 1133 (1997); see 14 CFR § 253 5 (1991) "Notice of Incorporated Terms."

[11] 117 F 3d at 930

[12] Coughlin v. Trans World Airlines, Inc., 847 F 2d 1432 (9th Cir 1988)

In Twentieth Century Delivery Service, Inc. v. St. Paul Fire and Marine Insurance Co.,[13] Trans World Airlines (TWA) issued an air waybill for a coffee vending machine which it agreed to carry from St. Louis, Mo. to a named street address in Los Angeles, Cal. The air waybill, in addition to the air carriage charge, provided for a pickup and delivery charge, and also contained a released value clause, all in accordance with the carrier's tariff filed with the C.A.B. TWA had an agreement with Twentieth Century, an independent trucker, for local delivery in Los Angeles. During the delivery by Twentieth Century the machine dropped to the sidewalk causing damage. The tariff provided that the airbill and tariffs were applicable to pick up and delivery services rendered by or for the carrier. In a suit against Twentieth Century the court held that the motor carrier's liability was limited by the airbill to fifty cents per pound. The fact that Twentieth Century, the motor carrier, was not a formal party to the bill of lading was deemed of no importance. The intent of the carrier's contract and tariff, stated the court, was that the conditions and limitations applicable to carriage by air should apply without variation to a shipment from beginning to end, and in this case from "the consignor's door to the consignee's street address."

The Convention provides that if land or water transportation takes place in the performance of the contract for transportation by air then for the purposes of loading, delivery or transshipment there is a rebuttable presumption that any damage to the goods took place during the transportation by air.[14] It has been said that the Convention applies to the local ground handling of baggage as well as to actual air transportation.[15] Local pickup and delivery carriers often issue air waybills incorporating the Warsaw Convention limitation. Where such a bill is issued, and the goods are lost on the ground en route to the airport, the shipper's recovery may be limited to the amount set forth in the Convention.[16] Transportation by motor vehicle, incidental to transportation by aircraft, is exempt from the jurisdiction of the Interstate Commerce

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[13] 242 F.2d 292 (9th Cir. 1957). See Yves St. Laurent v. Air Freight Transportation Corp. of New Jersey, N.Y. Sup. Ct., Sp. Term I (Greenfield, J.), N.Y.L.J., Oct. 24, 1980, P. 8, Col. 3, rev'd., 86 A.D.2d 511 (1st Dept. 1982) for a case which considered whether a limitation of liability to $50 per shipment could be established by proof of course of dealing and conduct or custom and usage

See Republic Elevator Co., Inc. v. Braniff International Airlines, n 57 supra

Agents of airlines, such as delivery carriers, benefit from the airline tariff provisions and their liability is similarly limited. Lucien Picard Watch Corp. v. American Airlines, Inc., 68 Misc. 664, 328 N.Y.S.2d 74 (1972); Boyar v. Trans World Airlines, Inc., N.Y.C. Civil Ct., N.Y.L.J., May 10, 1982, at 17, col. 3

[14] Warsaw Convention, art. 18(5).

When an air freight forwarder in Japan issues air waybills for cargo which airbills stated that they were subject to the Warsaw Convention, and upon arrival at J.F.K. in New York, the cargo was delivered to the forwarder's U.S. break bulk agent who then delivered the cargo to the buyer's designated trucker from whose custody the property disappeared, the Court held that the break bulk agent's liability was not limited by the Warsaw Convention since under Art. 18(1) of the Convention because the period of transportation by air had ended upon delivery to the trucker. The Court failed to refer to Art. 18(3) of the Convention. Railroad Salvage of Conn. Inc. v. Japan Freight Consolidatators (U.S.A.) Inc., 556 F. Supp. 124 (E.D.N.Y. 1983)

[15] Sabena Belgian World Air Lines v. United Airlines, 773 F. Supp. 1117, 1119 (N.D. Ill. 1991) (citing Magnus Electronics, Inc. v. Royal Bank of Canada, 611 F. Supp. 436, 439-40 (N.D. Ill. 1985))

[16] Pick v. Lufthansa German Airlines, 48 Misc.2d 442, 265 N.Y.S.2d 63 (N.Y. Civ. Ct. 1965); Railroad Salvage of Conn. Inc. v. Japan Freight Consolidators (U.S.A.) Inc., 556 F.Supp. 124 (E.D.N.Y. 1983), aff'd., 779 F.2d 38 (2d Cir. 1985).

Commission.[17]

International

Foreign air freight forwarders are usually treated as foreign indirect air carriers[18] who in the ordinary and usual course of their business assemble and consolidate property for unit load devices (ULDs) perform or provide break bulk and distributing operations with respect to consolidated shipments; who typically undertake to be responsible for the transportation of such property from point of receipt to point of destination; who utilize services of a direct air carrier, or its agent, other air freight forwarders as well as truckers and distribution centers.[19]

International air freight forwarders may act as either agent of the shipper or agent for the direct air carrier that has authorized such agency if it expressly reserves the option to do so at the time it accepts the shipment.[20] However, an air freight forwarder who accepts responsibility for safely transporting the cargo will be treated as a carrier under the Warsaw Convention.[21] Some international freight forwarders operate their own trucks and vehicles for motor carriage and others use common, contract or private carriers to pick up the shipments from the shippers place of business and carry it to the forwarder's dock or to deliver the shipment to the consignee at destination. The international air freight forwarder, similar to the ocean freight forwarder, often also acts as a customs house broker and performs the same services in that regard in relation to aircraft carriage as the ocean freight forwarder performs in relation to import and export shipments by sea.

The U.S. Department of Transportation provides for alternative notice of tariff terms of a foreign air carrier, usually incorporated by reference into a ticket or air waybill, which regulations would apply to an indirect air carrier as well.[22]

The Interstate Commerce Act exempts motor vehicle transportation within terminal areas and commercial zones.[23] Where cargo shipped from Paris to J.F.K. Airport in New York was received by plaintiff's forwarder, who hired a motor carrier to transport the cargo to a warehouse

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[17] 49 U.S.C. § 1350(a)(8) [2000].

[18] 14 C.F.R. § 297.2 (1992)

[19] 14 C.F.R. § 297.3(a) (1992)

[20] 14 C.F.R. § 297.5 (1992).
See St. Laurent v. Air Freight Transp. Corp. of New Jersey, 86 A.D.2d 511, 445 N.Y.S.2d 745 (1st Dept. 1982)

[21] Pan American World Airways, Inc. v. C.F. Airfreight, Inc., 23 Av. Cas. (CCH) ¶ 17,189 (S.D.N.Y. 1990).

[22] 14 C.F.R. § 221 et seq. (Sept. 1996); 14 CFR § 292.21 "Incorporation of Contract Terms by Performance" (9/1999)

[23] 49 U.S.C. § 13503 (2000); 49 C.F.R. pt. 372, subpt. B. The regulations of the former I.C.C. continue in effect until modified or revoked, pursuant to the "Savings Provision" of the ICC Termination Act of 1995

in New Jersey within an I.C.C. exempt commercial zone, pursuant to pick up orders which authorized a limitation of liability of fifty cents per pound with a maximum of $50 per shipment unless a higher value is declared, and the shipment was hijacked en route to New Jersey, the carrier's liability was limited to $50. The fact that the motor carrier had I.C.C. authorization and had filed a tariff containing rates different from the rate charged within the commercial zone was found to be not inconsistent with the limitation of $50.[24]

Surface Carriage to and from the Airport

The transportation of property (including baggage) by motor vehicle as part of a continuous air movement or which has been or will be transported by an air carrier has been deregulated and is exempt from the jurisdiction of the D.O.T. Transportation by motor vehicle in lieu of transportation by aircraft because of adverse weather, mechanical failure of the aircraft or circumstances beyond the control of the carrier or shipper is also exempt.[25] Intermodal cargo services by foreign air carriers remain subject to regulation by the Department of Transportation.[26] Freight forwarder transportation in the terminal area is DOT exempt.[27]

Domestic air carriers have been deregulated. Direct foreign air carriers remain subject to regulation by the Department of Transportation, and may only provide or control the surface portion of intermodal cargo services within a zone of 35 miles from the boundary of the airport or city it is authorized to serve unless it receives a greater authority from the Department of Transportation (D.O.T.) [28]

Transportation of Air Cargo by Motor Vehicle

The Motor Carrier Act of 1980 exempted from regulation the transportation of property by motor vehicle as part of a "continuous movement" which, prior or subsequent to such part of the continuous movement, has been or will be transported by an air carrier or, upon requisite approval, by a foreign air carrier. The ICC Termination Act of 1995 includes the same exemption.

With the deregulation of domestic air cargo services in 1977, U.S. air carriers received the freedom to offer this service without any regulatory oversight, with the exception of safety.

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[24] 555 F 2d 1079 (2d Cir. 1977), cert. denied, 434 U.S. 922 (1977)

[25] 49 U.S.C. § 13506(a)(8)(B) and (C) (2000)

[26] 14 C.F.R. pt. 222 (1987)

[27] 49 U.S.C. § 13503

[28] 14 C.F.R. § 222.2 [1992]

In this environment case law is often focused on "substitute trucking" (where, for a variety of reasons, a truck movement could be substituted for an air movement, even at the air cargo rate). For example, if a flight was late inbound, and the connecting flight had already left, rather than wait a full day for the next flight, the freight could be immediately trucked to its destination, as a desired substitute for an all-air movement. Substitute trucking was also permitted to authorized points where airlines did not provide daily service or where they had suspended service. This concept provided considerable flexibility to move air cargo via surface modes, utilized today in both domestic and international markets.

In 1981, with the recodification of Part 222 CFR (Code of Federal Regulations), unlimited intermodal authority was granted to foreign air carriers for unlimited trucking in the United States, under certain circumstances. A further accommodation permitted trucking to be performed with a through air rate (with custom trucking at the air rate) authorized by a single air waybill of lading. The regulation of trucking regulation by the former ICC at that time was a factor in the compromise on the joint jurisdiction issue. Several foreign carriers have been issued a Statement of Authorization or Exception under Part 222 CFR.

Statements of Authorization have been granted generally through formal negotiations, where a determination has been made that full reciprocity in trucking exists and that comparable benefits will accrue to the United States in an overall exchange of rights that may include passenger air transportation. Examples of foreign carriers with intermodal exemptions or formal Statements of Authorization are Lufthansa, KLM, China Airlines, El Al, Quantas, and Lan Chile.

Internationally the United States government has the ability to grant foreign air freight operators intermodal rights if their countries reciprocate. Following regulatory determinations, reciprocal rights can be exchanged pursuant to bilateral air services agreements.[29]

Domestic

The liability of air freight forwarders who issue a bill of lading and undertake the obligations of a carrier will probably be determined in the same manner as a domestic air carrier. Liability should be based upon the common law.

Air freight forwarders sometimes engage in motor carrier transportation and sometimes ship via motor carrier. This can arise in various situations. The usual situation is for the air freight forwarder to provide or arrange to provide for motor carrier transportation between the airport and the shipper's or consignee's place of business.

If the air freight forwarder has also registered with the Surface Transportation Board, or previously received authority to act as a freight forwarder – previously called a surface freight

[29] An Analysis of the United States International Air Cargo Market 1975-1986, Vol 1, at 93-94. The Joint Study contains the text of the model U S intermodal article for bilateral agreements

forwarder, then the forwarder may ship goods via motor carrier in interstate and foreign commerce. If it is not so registered or has not been previously authorized by the former I.C.C., then the air freight forwarder may transport goods in interstate commerce by motor vehicle if the transportation has been declared exempt.

The two cargo exemptions directly connected with air transportation at 49 U.S.C. § 13506(8) are

> B. transportation of property (including baggage) by motor vehicle as part of a continuous movement which, prior or subsequent to such part of the continuous movement, has been or will be transported by an air carrier (or approved foreign air carrier);
>
> and
>
> C transportation of property by motor vehicle in lieu of transportation by aircraft because of adverse weather conditions or mechanical failure of the aircraft or other causes due to circumstances beyond the control of the carrier or the shipper.

Problems arise when an air freight forwarder is not registered as a freight forwarder with the Surface Transportation Board, the shipment is transported interstate by motor carrier, and the carriage does not fall within either exemption. Then, the air freight forwarder may be liable for full value if the cargo is lost or damaged pursuant to the Carmack Amendment. Contract provisions for limitation of liability of the air freight forwarder, time for suit, and notice of claim, which are not in conformity with the requirements of the Carmack Amendment, may be void.[30]

A transportation broker and a freight forwarder who had no authority from the Interstate Commerce Commission had been held not to be entitled to the benefit of a released rate and value contained in the tariff of a related company, a motor carrier with authority from the I.C.C. whose bill of lading had been issued. The statute, stated the court, allows only carriers defined in the Act to limit their liability.[31]

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[30] Phoenix Assurance Co. v. K-Mart Corp., n 4 4 supra. In the Phoenix case, AFC Express, an air freight forwarder, agreed to transport goods from Kansas to New Jersey. A shipping schedule indicated the cargo would be transported by air carrier and provided for limitation of liability in the amount of $ 50 per pound. The contract with shipper reserved the right to transport the shipment by surface when air transport is not feasible; that every carrier shall have the right in the event of physical necessity to forward the shipment by any carrier or route; and that the shipment is deemed to have a declared value of $50 00. The shipment was delivered to motor carriers. A loss occurred.

The court found that AFC Express may be a freight forwarder subject to registration under the Interstate Commerce Act and subject to the Carmack Amendment. The case was referred to the Secretary of Transportation for determination of whether the air freight forwarder exception is applicable.

[31] Acro Automation Servs., Inc. v. Iscont Shipping Ltd., 706 F. Supp. 413, 419 (D. Md. 1989).

In Hartford Fire Insurance Co., Plaintiff v. LTD Air Cargo, Inc., et al.[32], the problem arose when an indirect air carrier issued a house airbill for what was intended to be a surface movement. The AWB had a $.50 lb. limit of liability "prominently displayed." The court, on cross-motions for summary judgment held the defendant to be an interstate carrier subject to the ICA. Hassett's initial argument was that it was unregulated air carrier not subject to the Carmack Amendment.

The court responded:

"For purposes of the Carmack Amendment, Congress defines a "freight forwarder" as a "person holding itself out to the general public . . . to provide transportation of property for compensation," but specifically states that "such term does not include a person using transportation of an air carrier . . ." 49 U.S.C. § 10102 (1995). [The indirect carrier] seizes upon this and argues that it is not subject to the Carmack Amendment, as it is an "air freight forwarder" that issued an "air waybill" to CTC. Unfortunately for [defendant], it is not able to elude liability on these grounds, as it makes no allegations that it either used the services, or intended to use the services of an air carrier in arranging for the transportation of the goods. MAF was a ground shipper, not an air shipper, and did in fact ship the phones from California to Dallas, where it hired LTD to ship the goods the rest of the journey. At no time did the pallets of phones leave terra firma."

"Nor can Hassett avail itself of § 10526(8)(B) and (C), which exempt from Carmack liability a shipment "by motor vehicle as part of a continuous movement which . . . has been or will be transported by an air carrier, as well as a shipment "by motor vehicle in lieu of transportation by aircraft because of adverse weather conditions or mechanical failure of the aircraft or other causes due to circumstances beyond the control of the carrier or shipper," respectively. Finally, Hassett can take little comfort by the fact that the bills were entitled "air waybills" rather than "bills of lading." A bill of lading by any other name is a bill of lading. A company may not evade the strict liability imposed by Carmack by calling its contract form an "air waybill," then arranging for shipment by ground transportation."

The court ultimately ruled against the defendant because the Carmack Amendment requirements of signed writing, notice, choice and tariff incorporation had not been met and the carriage did not come within the exceptions of 49 U.S.C. 13506(a)(8)(B)(C)[2000].

The District court in Massachusetts came down in quite the opposite fashion in Kemper Insurance Companies Inc. v. Federal Express Corporation (DC Ma 2000 U.S. Dist. LEXIS 14114) wherein the court found that the notice provisions regarding limitation of liability were adequate notwithstanding a surface move of cargo originally intended for interstate air carriage in part because the court believed the requirements of notice and choice under Carmack and federal

[32] Hartford v. LTD Air Cargo, 1999 Fed Carrier Cases 59,279; over booking and space shortage is not a circumstance beyond the carrier's control Phoenix Assurance v. K-Mart, 977 F Supp 319 1997).

common law were very much the same. "In either circumstance, federal law applies, and the released value doctrine, or its functional equivalent, controls." (Kemper, supra).

International

Some air freight forwarders will ship goods by motor carrier when the forwarder believes the shipment will arrive at destination at approximately the time it would have arrived if shipped by air and when the cost of motor carrier transport is less than the cost of air transport.

An international air freight forwarder as an indirect air carrier, has been held entitled to claim the benefits of the limitation of liability provisions contained in the Warsaw Convention.[33]

Where an action for indemnity is brought in New York by an air freight forwarder against an international air carrier more than two years from the date of arrival, the court, noting that the two year limitation in the Warsaw Convention was considered a condition precedent rather than a statute of limitations and that Article 24(1) of the Convention provides that in cases covered by Articles 18 and 19, concerning loss, damage or delay to baggage and goods, an action for damages, "however founded" must be brought subject to the conditions and limits set out in the Convention, held that the action for indemnity was barred by the two year limitation period.[34]

The limitation has been held to be inapplicable to third party actions for indemnity brought by an air carrier against its non-carrier agent, since the courts are primarily concerned with preventing shippers and passengers from circumventing the Convention's two year time limit.[35] It has also been held to be inapplicable to a suit by one air carrier against another.[36]

Break Bulk Agents

An international air freight forwarder may perform other duties as a break bulk agent for another foreign air freight forwarder. This additional function may include receipt of paperwork on a consolidated shipment, breaking down the documentation for each of the separate shipments within the consolidated shipment to be distributed to the individual consignees, notifying the consignees of the arrival of the cargo, preparing necessary documents and acting as a collection agent for the foreign forwarder. Upon failure of the consignee to pay sums due the foreign forwarder, it has been held that in the absence of an assignment of the cause of action, the break

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[33] Royal Ins. v. Amerford Air Cargo, 654 F Supp 679, 683 (S D N Y 1987)

[34] L.B. Smith, Inc. v. Circle Air Freight, Inc., 128 Misc 2d 12 (N Y. Sup Ct 1985) The court cited Swiss Bank Corp. v. First Nat'l City Bank, 15 Avi 17,631 (S D N Y 1979) holding that the limitation is applicable to actions for contributions as well as direct actions

[35] Mitchell Shackleton & Co., Ltd. v. Air Express International, Inc., 704 F Supp 524 (S D N Y 1989) Sabena Delgian World Air Lines v. United Airlines, 773 F Supp 1117 (N D Ill 1991)

[36] Connaught Laboratories, Ltd. v. Air Canada, et al., 15 Avi Cas (CCH) ¶ 17, 705 (Ontario High Court of Justice 1978)

bulk and collection agent is not the real party in interest and has no standing to sue.[37]

In the current deregulated environment, shipments are often arranged by motor carrier brokers, shippers agents and other third party intermediaries. The third party intermediaries frequently enter into volume contracts with the custodial carriers pursuant to which the intermediary, for a lower volume rate, agrees to ship agreed minimum over a stated period. The intermediary then resells to individual shippers at a greater rate, profiting from the difference. While a surface freight forwarder has carrier liability to its customer, at least one court has held that a motor carrier broker or agent does not.[38] The third party intermediary has generally been held to be the shipper's agent. Consequently, where the custodial carrier provides for released values and rates in an exempt circular but also offers full value liability at higher rates pursuant to its tariff and the information concerning such opportunity is available, or actually known to the broker or where such knowledge is implied by law the knowledge is chargeable or imputed to the shipper.[39] Knowledge of the agent or third party intermediary imputable to the cargo interests has been found based on the experience and transportation sophistication of the agent resulting from a history of numerous shipments over a period of years, and from the carrier's pick-up record which contained the release value.[40]

Whether a person purportedly acting for a shipper is an agent of the shipper with authority to execute a bill of lading containing a released value provision has been held to be an issue of fact for the jury to determine. The burden of proof of the agent's authority has been said to be upon the carrier.[41]

Travel Agents

Whether a travel agent or other third party can claim the benefit of the limitation of action provision in the Warsaw Convention may depend upon whether the travel agent or other purported third party beneficiary was engaged by the air carrier to actively perform a portion of the contract of carriage.[42]

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[37] Martin Strauss Airfreight Corp. v. Webcor Electronics, Inc., N.Y. Sup.Ct., Nassau County, N.Y.L.J., Mar. 4, 1986, at 15 col 2

[38] Travelers Indemnity Company v. Alliance Shippers, Inc., 654 F.Supp. 840 (N.D. Cal. 1986).

[39] Fabulous Fur Corp. v. United Parcel Service, 664 F.Supp 694 (E.D.N.Y. 1987); Plough, Inc. v. Southern Pacific Transportation Co., U.S.D.C., W.D. Tenn., Docket #82-2974-M, Robert M. McRae, Jr., D.J. filed June 20, 1984

[40] Id

[41] Robinson v. Ralph G. Smith, Inc., 735 F.2d 186 (6th Cir. 1984)

[42] DeMarco v. Pan American Airways, Inc., 117 Misc 2d 1071, 459 N.Y.S 2d 655 (Sup Ct. 1982); Chutter v. KLM Royal Dutch Airlines, 132 F.Supp. 611 (S.D.N.Y. 1955). See also Wanderer v. Sabena, 1949 U.S. Av. Rep. 25 (N.Y. Sup. Ct. 1949)
The problem is part of a larger issue concerning who can claim the benefits of the Warsaw Convention. The Convention is applicable to suits by passengers and shippers against air carriers and employees, agents or servants of air carriers, Reed v. Wiser, 555 F.2d 1079 (2d. Cir. 1979), cert. denied, 434 U.S. 929 (1977); and suits by a passenger against a ground baggage handler employed by the airline, Baker v. Lansdell Protective Agency, Inc., 590 F.Supp. 165 (S.D.N.Y. 1984)

Travel agents, tour operators and the like often arrange all-inclusive tours which include transportation provided by independent carriers. While the promotional materials generally indicate that baggage handling is included as part of the travel package, the contract and brochures usually contain a disclaimer of liability for services performed by carriers and independent contractors. Where, in connection with a tour package to the Soviet Union via Pan American from New York to Frankfurt and Aeroflot from Frankfurt to Moscow, plaintiff's baggage was not delivered until the ninth day of a 14-day trip, the court held that the travel agent's disclaimer, which the plaintiff had acknowledged reading, precluded the agent's liability. In a dictum the court indicated that the defenses under the Warsaw Convention would not be applicable to the travel agent's benefit because there was no indication that the travel agent had been engaged by the air carrier to perform any part of the contract of carriage.[43]

Even if there is no disclaimer a travel agent cannot normally be held liable for or to the custodial carrier.[44]

Transportation Brokers

A transportation broker is a person that arranges transportation for compensation.

A provision in the contract between a party held to be a broker and not a forwarder and the broker's customer, where the broker procured transportation, that the broker's liability is limited to fifty ($50.00) dollars has been upheld.[45]

As in other branches of the transportation industry, there are third-party intermediaries involved in the air freight business, but because the number of airlines is small compared with the number of carriers involved in other modes of transportation, the industry is able to exercise greater control. Air cargo agents perform duties for shippers similar to those performed by travel

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In Jaycees Patov, Inv. V. Pier Air International, Ltd., 714 F.Supp 81 (S D N.Y. 1989), 1989 Av.Cas (CCH) ¶ 18,496, a single air waybill for carriage from France to plaintiffs place of business in Manhattan, Ne w York City was made out by TTA, apparently an air freight forwarder in France TTA delivered the cargo to TWA for carriage who transported it to JFK New York and delivered the cargo to J & J Container station for deconsolidation and customs inspection. After customs clearance J & J delivered the cargo to Pier Air who delivered the goods to consignee in Manhattan on July 16, 1985 Suit for damage against J & J, Pier Air, and TWA was commenced September 11, 1987 There was no evidence as to the location where the damage occurred The court citing Magnus Electronics, n 9 supra, held that so long as the goods remain in the carrier's actual or constructive possession the period of transportation by air does not end, held that the single air waybill serves to extend the presumptive liability period of "transportation by air through delivery to consignees premises in Manhattan " Hence the Warsaw Convention applied The action was dismissed as untimely not only against the air carrier, TWA, but also against Pier Air who had moved for summary judgment If Pier Air and J & J were agents of TWA, the air carrier, the agents would be covered by the Warsaw Convention, stated the court, citing Royal Insurance v. Amerford Air Cargo, 21 Av Cas (CCH) ¶ 17,482 654 F Supp 679, 682 (S.D N Y 1947).

[43] DeMarco v. Pan American World Airways, Inc., 117 Misc 2d 1071, 459 N Y S 2d 655 (Sup N Y. 1982).

[44] Macintosh v. Interface Group Moss Com., 26 Avi 16,256 (Mass Sup Ct 1999); Cathy Pacific Airways v. Fly & See Travel, 26 Avi 15,659 (SDNY 1998).

[45] 49 USC § 13102; Byrton Dairy Prods., Inc. v. Harborside Refrigerated Servs., Inc., 991 F Supp 977 (N.D Ill 1997) (Hart, J) (action was for cargo damage) Commercial Union Ins. Co. v. Forward Air, 50 F. Supp 2d 255 (1999)

agents for passengers. For international air carriage the air cargo agents arrange transportation pursuant to a cargo agency agreement with the International Air Transport Association (IATA), a trade association which includes almost all international airlines. The agent is paid a commission by the carrier.

Air Carrier Agents, Employees, Sub-Agents and Third Party Beneficiaries

The Convention's limitations have been applied to actions against the carrier's agents by shippers and passengers to prevent the circumvention of the Convention by suing a carrier's agents or servants.[46]

The limitation of liability provisions are applicable not only to parties to the air waybill and the consignees, but also to those who may claim to be third-party beneficiaries of the contract of carriage or air waybill.[47] Federal common law and not state law is applicable to determine the validity of an interstate air carrier's limitation of liaiblity.[48] The body of federal law previously applied to determine the reasonableness of the rules of interstate air carriers of property remains applicable. Where the limitation of liability was found to be virtually identical to those limitations upheld prior to deregulation such limitation was upheld after deregulation.

An air waybill which referred on its face to the carrier's conditions of contract on the reverse side and called shipper's attention to the limitation of liability, and provided that shipper could declare a higher value for carriage by paying a supplemental charge if required, and declared the value to be 50 cents per pound or $50, unless a higher value is declared, has been held to be binding upon all parties including those who were not parties to the contract of carriage.[49]

There have been a number of cases in which parties other than air carriers have claimed benefit of the air waybill or tariff of the carrier, including the provisions limiting liability. Some of the cases have involved loss incurred at a security checkpoint. Where international air travel

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[46] Mitchell Shackleton & Co., Ltd. v. Air Express International, Inc., 704 F Supp 524, 526 (S D N Y 1989) (citing Reed v. Wiser, n 28 supra); Tokio Marine & Fire Ins. v. United Air Lines, 933 F Supp 1527 (C D Cal 1996)

[47] Apline Ocean Seismic Survey, Inc. v. F.W. Myers & Co., Inc., 23 F 3d 946, 948 (5th Cir 1994)

[48] First Pennsylvania Bank, N.A. v. Eastern Airlines, n 18 supra; Neal v. Republic Airlines, n 10 supra; Husman Constr. Co. v. Purolator Carrier Corp., 832 F.2d 459, 461 (8th Cir 1987) involving a late-delivered bid.

Federal Express v. Paris Business Forms, Inc., 46 D. & C 3d 262 (Pa 1988)

"Courts have repeatedly and specifically applied federal law after deregulation to determine the enforceability of declared value limitations in interstate air contracts of carriage " United States Gold Corp. v. Federal Express Corp., 719 F.Supp. 1217, 1224 (S.D N Y. 1989), appeal granted, motion denied, 1990 U S Dist LEXIS 772 (S D N Y 1990) T.B.I. Indus. Corp. v. Emmery Worldwide, 900 F Supp 687 693 (S D N Y 1995)

The same has been held true for a federally certificated air carrier engaged in intrastate commerce Tulsa Int'l, Inc. v. Federal Express Corp., Civil Action No 94-12617-RCL (D Mass Dec 29, 1995)

[49] Reece v. Delta Air Lines, Inc., 731 F Supp 1131 (D Me 1990). Distinguished and discussed in Hampton v. Federal Express Corp., n. 10 supra. See also Owens-Corning Fiberglass Corp. v. U.S. Air, 853 F Supp 656 (E.D N Y 1994). See also Tulsa Int'l Inc. v. Federal Express Corp., supra

was involved, a security agency's liability was limited to that of the air carrier under the Warsaw Convention.

Where a shipper delivered cargo worth approximately $100,000 to Federal Express pursuant to Federal Express airbills which limited the liability of Federal Express to $400.00 and Federal Express delivered the cargo to an air carrier pursuant to a Net Lease Agreement between Federal Express and the air carrier, the air carrier claimed the benefit of the Federal Express limitation of liability as an agent of Federal Express and as a connecting carrier. Although an officer of Federal Express testified that the parties intended that the air carrier have the benefit of the Federal Express air waybill there was nothing in the agreement between Federal Express and the air carrier concerning this. The court held that the air carrier could not limit its liability and was liable for full value.[50]

The application of a "Himalaya" clause in a bill of lading is sometimes dependent upon a grammatical interpretation. Thus, the omission or misplacement of a comma in the Himalaya Clause may affect the result. The same clause interpreted by two different courts may lead to opposite conclusions.[51]

Domestic

There have been a number of cases in which passenger baggage containing valuables has allegedly been stolen while being moved on conveyor belts for security checks at the airport. Some of these cases have involved interstate, rather than international, transportation.[52] The conduct of the security services on behalf of the air carrier is frequently performed by independent contractors hired by the air carrier. These contractors are sometimes considered to be agents of the carrier, although the case reports are not always clear as to the terms of the contract between the security service and the air carrier.

In a case involving interstate air transport rather than international, the court found that although the air carrier had employed the security service, the service was an independent contractor and not an agent of the air carrier; and that the carrier's tariff or ticket failed to mention the security service. Hence, the security service could not claim the benefit of the

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[50] Arkwright-Boston Manufacturers Mutual Ins. Co. v. Great Western Airlines, Inc., 767 F 2d 425 (8th Cir. 1985). The court relied on Robert C. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297 (1959), which held that an agent is liable for damaged caused by his negligence unless exonerated by statute or a contract binding on the person damaged. Contracts providing for limited liability are restricted to intended beneficiaries and must express the clear understanding of the contracting parties.

[51] Compare Jagenberg, Inc. v. Georgia Ports Auth., 882 F. Supp. 1065 (S.D. Ga. 1995), with Parker Hannifin Corp. v. Ceres Marine Terminals, 935 F. Supp. 632 (D. Md. 1996). In Parker Hannifin, the court noted that with or without the comma, the clause at issue is difficult to decipher initially, but that the missing comma did not obscure the parties' intent. The bill of lading was found to extend the limitation of liability to independent contractors including the defendant, a stevedore, and a marine terminal operator.

[52] Iremaoli v. Delta Airlines, 117 Misc. 2d 484, 458, N.Y.S. 2d 159; Gin v. Wackenhut Corp., 741 F. Supp. 1454 (D. Hawaii 1990); Wackenhut Corp. v. Lippert, 591 So. 2d 215 (Fla. Dist. Ct. App. 1991), rev'd, 609 So. 2d 1304 (Fla. 1992).

carrier's limitation of liability.[53]

In Arkwright-Boston Manufacturers Mutual Ins. Co. v. Great Western Airlines,[54] the air carrier had argued that as a result of deregulation of air carriers, State law and the UCC applied rather than federal law. The court noted that U.C.C. Section 7-302 extends its liability limitations to all persons performing part of the undertaking assumed by the issuer of the bill of lading, but it held that liability was to be determined pursuant to federal common law and that State law and the UCC were not applicable.

International

In Julius Young Jewelry Manufacturing Co., Inc. v. Delta Air Lines,[55] jewelry sample cases valued at $55,000 which had been checked as regular baggage on an international flight were lost during the course of transfer from a Delta Air Lines flight to an Eastern Air Lines flight be Allied Aviation Service Co., Inc., an independent contractor engaged by the airlines to perform inter-line baggage transfer services between connecting airlines at JFK in New York. The court held that Allied was entitled to the limitation of liability provided in the Warsaw Convention since it was performing services as an agent of the carriers in furtherance of the contract of carriage in place of the carriers. The court indicated that the Hague Protocol was more likely a clarification of the Warsaw Convention and hence the then current failure of the United States to adopt it was not conclusive.

Where international transport subject to the Warsaw Convention is concerned, there are other considerations. First, there is the issue as to whether the transportation commences whey the carry-on objects are placed on the conveyor belt for a security check so that the Warsaw Convention becomes applicable. At least two cases have held that it does.[56] The courts determined that the course of "embarking or disembarking," as described in Article 17, had commenced;[57] and one court interpreted Article 18 to be applicable;[58] although neither Article 17 nor Article 18 refers to objects of which the passenger takes charge of himself. One court held that although the carrier had taken charge of the objects put on the conveyor belt, the carrier was

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[53] Gin v. Wackenhut Corp., 741 F Supp 1454 (D Hawaii 1990)

[54] 767 F 2d 425 (8th Cir 1985)

[55] 67 A D 2d 148, 414 N Y S 2d 528 (1979)

[56] Baker v. Lansdell Protective Agency, Inc., n 109 supra; Kabbani v. International Total Services, 805 F Supp 1033 (D D C 1992)

[57] Baker v. Lansdell Protective Agency, Inc., n 109 supra; Kabbani v. International Total Services, 805 F Supp 1033 (D D C 1992)

[58] See Kabbani, n 55 supra

not required to issue a baggage check pursuant to the requirements of Article 4.[59]

The second issue is whether the security company, operating the conveyor and X-ray system, is an agent of the air carrier entitled to the benefits of the Convention. Both cases answered this affirmatively, [60] although there were no inquiries into the nature of the contracts between the security companies and the air carriers. The courts' opinions were that since the security check was required by federal law, the precise nature of the parties' agreement was not material.[61]

The Hague Protocol, amending the Warsaw Convention and ratified by the U.S. Senate on September 28, 1998 when it ratified Montreal Protocol No. 4, provides as follows:

"Article 25"

"1. If in [sic] action is brought against a servant or agent of the carrier arising out of damage to which this Convention relates, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under Article 22. (H-Art. XIV).

"2. The aggregate of the amounts recoverable from the carrier, his servants and agents, in that case, shall not exceed the said limits. (H-Art. XIV).

"3. In the carriage of passengers and baggage, the provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result. (M4-Art. X)."

International transport cases were distinguished on the ground that Article 17 of the Warsaw Convention extends the limitation to losses incurred in the course of embarking or disembarking, which would include the period of time during which the baggage was in the possession of the security service.[62]

In a case involving the international carriage of goods by air to which the Warsaw

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[59] See Kabbani, n. 55 supra

[60] Baker v. Kabbani, n. 55

[61] Baker and Kabbani, n. 55 supra

[62] Gin v. Wackenhut Corp., 741 F. Supp. 1454 (D. Hawaii 1990). Although the court held that state law was applicable, it did not consider the effect of U.C.C. § 7-302. Comment: Article 17 appears to be limited to "death or wounding of a passenger or any other bodily injury suffered by a passenger."

Convention was not applicable,[63] the air waybill provided as follows:

> "Any exclusion or limitation of liability applicable to Carrier shall apply to and be for the benefit of Carrier's agents, servants and representatives and any person whose aircraft is used by Carrier for carriage and its agents, servants and representatives. ***"

Empressa Ecuatoriana, the air carrier, transported the cargo from Panama to JFK in New York, where American Airlines by contract acted as Ecuatoriana's ground handling agent to off-load cargo, transport it to a terminal, break down freight, clear Customs, and deliver the cargo to consignees. American sub-contracted part of this work to AMR to whose terminal American transported the freight.

Cargo was stolen from AMR's terminal. AMR was held to be a bailee and liable for the loss.

The air waybill and the filed tariff of Empressa Ecuatoriana provided for carrier's limited liability of $20 per kilogram of goods lost, damaged or delayed. Suit was brought against Empressa Ecuatoriana and AMR. The court held that the air carrier was entitled to the limitation of liability. While American Airlines would probably be entitled to the limitation as carrier's agent, under the wording of the air waybill and tariff, the limitation did not extend to an agent of an agent, AMR. AMR was held liable for the full value, $164,067.[64] The court noted that limitations of liability must be strictly construed. Agents must be express beneficiaries of the bill of lading.[65]

Montreal Protocol No. 4 adopted on September 28, 1998 extended the carrier's limits of liability to an agent or servant of the carrier acting within the scope of his employment.

It is noteworthy that the extension of the carrier's liability to agents and servants of the carrier is negated, as to baggage and passengers, for damage done with intent or recklessly with knowledge that damage would probably result, but the limitation is not so lost as to cargo.

Warehouseman

In certain instances after the termination of transportation where the carrier retains possession of the goods its status may change from carrier to warehouseman or bailee.

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[63] The air freight was transported from Panama to the United States. Panama was not a signatory to the Convention. See Treatises in Force, U.S. Dept. of State.

[64] Hartford Fire Ins. Co. v. Empressa Ecuatoriana De Aviacion, 945 F.Supp. 51 (S.D.N.Y. 1996).

[65] Hartford Fire Ins. Co. v. Empressa Ecuatoriana De Aviaction, 945 F.Supp. 51 (S.D.N.Y. 1996) (citing Robert C. Herd & Co. v. Krawill Mach. Corp., n 70 supra, and Arkwright Boston Mfrs. Mut. Ins. Co. v. Great Western Airlines, Inc., n 70 supra.

In such instances the carrier as warehouseman is liable only if negligent. (UCC § 7204), which liability may be limited by a properly issued receipt. Where a released rate is in effect during the transportation then the carrier, even if liable as a warehouseman may be liable only for the released value in the original bill [66]

United Nations Multimodal Convention

Article 15 of the Multimodal Convention makes the multimodal operator liable for the act and omissions of his servants or agents acting within the scope of employment.[67] Servants and agents or any other person whose services the multimodal operator makes use for the performance of the multimodal contract is entitled to the defenses and limits of liability of the multimodal operator if such other person proves he acted in performance of the contract.[68] Except for the intentional and knowledgeably reckless acts, the liability of the servants, agents or other persons performing the multimodal contract cannot exceed the limits of liability in the Convention.[69] There is no benefit of the Convention to such third parties if the loss, damage or delay in delivery results from the third party's intentional acts or knowledgeable recklessness.[70]

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[66] Cleveland, C.C. & St. L.R.R. Co. v. Dettleback, 239 U S 588, 36 S Ct 177, 179; Western Transit Co. v. A.C. Leslie & Co., 242 U S 448, 37 S Ct 133, 134

[67] The Multimodal Convention is not in force and has not been ratified by the United States.

[68] Multimodal Convention, Art. 20, para 2; see Appendix O infra

[69] Art 20, para. 3

[70] Art 21, para 2