

To: Transport Industry Operators

Amended Warsaw Convention Article 8(c)

What is the importance of the Amended Warsaw Convention Article 8(c) to carriers' liability under air waybills? Judge Christopher Clarke of the English High Court explained this in his Judgment of 9 November 2005.

By a House Air Waybill HAWB MEH031350 dated 12 September 2001 ("the HAWB") a forwarder acknowledged the shipment of a consignment of 2,178 kg of hard disk drives which were to be carried by air from Manila in the Philippines to Glasgow. Fujitsu Computer was the shipper and Fujitsu Europe was the consignee. The contract of carriage was governed by the Warsaw Convention with the amendments made by the Hague Protocol ("Amended Warsaw Convention"), which is set out in schedule 1 to the Carriage by Air Act 1961. The forwarder subcontracted the carriage to Emirates, the airline. The consignment was stolen. The claimants said that the theft was either an "inside job" or that the security was so lax that the loss could be said to result from an act or omission of the carrier, its servants or agents, done with intent to cause loss, or recklessly and with knowledge that damage would probably result. If so, by virtue of article 25 of the Convention, the forwarder would not be entitled to limit its liability under article 22(2), and, subject to proof of quantum and title to sue, the claim was worth about US\$320,000. If not, the question, which was the preliminary issue that the Judge had to decide, was whether the HAWB:

failed to comply with the notice requirements of article 8(c) of the Amended Warsaw Convention so that by virtue of article 9 the forwarder was unable to rely on the limitation provisions of article 22.

If the forwarder was entitled to limit its liability the claim was only worth about US\$20,000.

The Amended Warsaw Convention provides as follows:

Article 8

The air waybill shall contain

- (a) an indication of the places of departure and destination;
- (b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;
- (c) a notice to the consignor to the effect that, if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers in respect of loss of or damage to cargo.

Article 9

If, with the consent of the carrier, cargo is loaded on board the aircraft without an air waybill having been made out, or if the air waybill does not include the notice required by article 8, para (c), the carrier shall not be entitled to avail himself of the provisions of article 22, para (2).

The claimants contended that the HAWB did not contain a notice to the effect specified in article 8(c). They said that what was needed was a self-contained and free standing section of the air waybill setting out the information required. The forwarder said that it was sufficient that the information required by article 8(c) was contained somewhere within the HAWB, so that anyone who cared to read it was given notice of it, and that such information was, in the present case, contained in the conditions on the reverse of the HAWB, taken with these words on the face of the bill:

It is agreed that the goods herein are accepted in good order and condition (except as noted) subject to the conditions of contract on the reverse hereof. The shipper's attention is drawn to the notice concerning carrier's limitation of liability. Shipper may increase such limitation of liability by declaring a higher value for carriage and paying a supplemental charge if required.

The claimants said that, even if the forwarder was right about what sufficed for a notice, the wording of the HAWB did not contain the requisite information. The issue for determination thus raised two sub-issues:

- (a) whether the air waybill contained a notice;
- (b) whether, if it did, the notice was to the effect specified in article 8(c).

Fujitsu are a very large organisation. The Judge had little doubt that they and, if they were concerned, their insurers, were well aware that air carriers were, under the Convention, usually entitled to limit their liability save in exceptional circumstances, unless a special declaration of interest was made. The claimants accepted that they had

not been in any way prejudiced by the form of the waybill, or lured into a contract that they would not otherwise have made. Nevertheless, if the requisite notice had not been given in the waybill, it was no answer that the recipient knew what the notice would have told him if it had been there.

IATA has a recommended form of waybill. On the reverse of the waybill, at the top, immediately above the conditions of contract are the following words:

NOTICE CONCERNING CARRIER'S LIMITATION OF LIABILITY

If the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of the carrier in respect of loss, damage or delay to cargo to 250 French gold francs per kilogram, unless a higher value is declared in advance by the shipper and a supplementary charge paid if required. The liability limit of 250 French gold francs per kilogram is approximately US\$ 20.00 per kilogram on the basis of US\$42.22 per ounce of gold.

The forwarder did not use the IATA form. On the reverse of the Bill there was nothing that was described as a notice. What were set out were conditions of contract which read, so far as relevant as follows:

1. As used in this contract "Convention" means the Convention for Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw, 12 October 1929, or that Convention as amended by the Hague Protocol, 1955 whichever may be applicable to the carriage hereunder . . .

2. (a) Carriage hereunder is subject to the rules relating to liability established by the Convention, unless such carriage is not "international carriage" as defined by the Convention. (See Carrier's tariffs and conditions of carriage for such definition.)

(b) To the extent not in conflict with the foregoing, carriage hereunder and other services performed by each Carrier are subject to (i) applicable laws (including national laws implementing the Convention), government regulations, order and requirement; (ii) provisions herein set forth, and applicable tariffs, rules, conditions of carriage, regulations and timetables (but not the times of departure and arrival therein) of such carrier, which are made part hereof and which may be inspected at any of its offices and airports from which it operates regular services.

(c) For the purpose of the Convention, the agreed stopping places (which may be altered by Carrier in case of necessity) are those places, except the place of departure and the place of destination, set forth on the face hereof or shown in Carrier's timetables as scheduled stopping places for the route.

(d) In the case of carriage subject to the Convention, the shipper acknowledges that he has been given an opportunity to make a special declaration of the value of the goods at delivery and that the sum entered on the face of the air waybill as "Shipper's/Consignor's Declared Value - For Carriage", if in excess of US\$20.00 currency per kilo, constitutes such special declaration of value.

. . .
4. Except as the Convention or other applicable law may otherwise require:

(a) Carrier is not liable to the shipper or to any other person for any damage, delay or loss of whatsoever nature (herein collectively referred to as "damage") arising out of or in connection with the carriage of the goods unless such damaged [sic] is proved to have been caused by the negligence or wilful fault of Carrier and there has been no contributory negligence of the shipper, consignee or other claimant;

. . .
(c) The charges for carriage having been based upon the value declared by the shipper, it is agreed that any liability shall in no event exceed the shipper's declared value for carriage stated on the face hereof, and in the absence of such declaration by shipper, liability of Carrier shall not exceed US\$20.00 Currency per kilo of goods destroyed, lost, damaged or delayed, all claims shall be subject to proof of value.

The forwarder submitted that the basic purpose of article 8(c) was to ensure that the shipper should be aware that the Warsaw Convention might apply if the carriage was international and that, in such a case, the carrier would generally be able to limit its liability for loss of or damage to cargo. The words "a notice" should be construed so as to give effect to that purpose, and not so as to impose any further more specific requirement. The forwarder pointed out that there was nothing in article 8(c) which required a notice (i) to employ any form of words; (ii) to be headed "Notice"; (iii) to be in any particular format; (iv) to be separate from any other text; or (v) not to have any other material with it as well. In those circumstances it was sufficient if the conditions, read together with what appeared on the face of the waybill, gave the reader notification of the matters specified in the sub-paragraph. It did not matter whether the information appeared in a single condition (or whereabouts that condition was to be found) or in several conditions. In the present case, as the forwarder pointed out, the HAWB purported, on its face, to contain a notice ("The Shipper's attention is drawn to the Notice concerning Carrier's limitation of liability") and the notice was to be found in the conditions on the back.

In the Judge's judgment the Amended Warsaw Convention required there to be what was recognisable as "a notice", ie a discrete form of words warning the reader of the potential applicability of the Convention and its effect, namely to govern and limit liability. The expression "a notice" was not the same as "a statement", an "indication", "notification" or even "notice". It suggested something more defined than these. The words "a notice" were words of ordinary language and should be given the meaning that they would convey to the ordinary reader. The obvious purpose of article 8(c) is to provide a warning to consignors that the Convention may apply, and govern and limit liability. A warning as to the potential effect of the Convention (which, if it applies, takes effect regardless of the

conditions of carriage) was something different from the conditions themselves, to which the Convention makes separate reference in article 11 in this way:

The air waybill is prima facie evidence of the conclusion of the contract, of the receipt of the cargo, and of the conditions of carriage.

If the Judge was wrong on this, and the conditions, or some part of them, taken with the words on the face of the bill, were to be regarded as the notice called for under article 8(c) the next question was whether the provisions relied on satisfied the requirements of the sub-article. The first matter of which the notice must give notification is that, if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable. As to that, it was apparent on the face of the air waybill that the carriage was to be from one country, the Philippines, to another, the United Kingdom. The provision in condition 2(a) that carriage was subject to the rules relating to liability established by the Convention, unless such carriage was not "international carriage" as defined by the Convention, was, in the Judge's judgment, to the effect that the Warsaw Convention might be applicable. The face and the reverse of the air waybill, taken together, indicated that if goods were being carried from Manila to Glasgow (in which case the ultimate destination was a country other than the country of departure) the Amended Warsaw Convention might apply. The second matter that requires to be notified is that the Amended Warsaw Convention governs the liability of the carrier. Since clause 2(a) stated that the carriage was subject to the rules relating to liability in the Unamended Warsaw or Amended Warsaw Conventions, it amounted to saying that those Conventions governed the liability of the carrier.

The third matter to be included in the notice is that the Convention "in most cases" limits the liability of carriers. It seemed to the Judge that what the notice was required to convey was that the way in which the Convention worked was to establish a regime whereby limitation was the norm in the absence of exceptions. That left the question whether the words on the face, taken with the conditions, did state that the Convention limited the liability of carriers. But the conditions of the HAWB did not, in fact, state that that was the Convention's effect. The words on the face of the bill incorporated into the contract of carriage the conditions of contract on the reverse and drew attention to "the notice" concerning carrier's limitation of liability. Nothing in those words indicated that the limitation was derived from the Convention rather than the conditions imposed by the carrier. On the reverse condition 2(a) referred to the Convention rules relating to liability, but said nothing about limitation. Condition 2(d) informed the consignor that where the Convention applied the shipper acknowledged that he had been given an opportunity to make a special declaration, and that, if the sum entered on the face of the bill exceeded US\$20 per kilo, that sum was to be treated as the special declaration. Condition 4(c) then indicated that liability of the carrier should not exceed US\$20 per kilo unless there had been a declaration in which case liability should not exceed the amount of the declared value. But the conditions did not state that the Convention contained any limit on recovery. In the absence of further explanation the reference on the face of the air waybill to the "carrier's limitation of liability" meant the limitation of liability imposed by the carrier under the conditions to which the contract of carriage was subject. Nothing on the reverse said anything about the limits imposed by the Convention, which were not the same as those contained in condition 4(c). The notice on the face of the waybill seemed to the Judge, prima facie, to indicate that it was the carrier who had stipulated a limit of liability. The conditions did not state namely that the Amended Warsaw Convention imposed limitations on liability. Condition 2(a) did not state that the carriage was subject to the rules "and limitations" relating to liability in the Convention. No provisions stated, expressly or by obvious implication, that the Convention limited the liability of carriers.

Accordingly, the Judge answered the question posed by the preliminary issue: "Yes".

Please feel free to contact us if you have any questions or you would like to have a copy of the Judgment.

Simon Chan
Director
E-mail: simonchan@sun-mobility.com

Richard Chan
Director
E-mail: richardchan@sun-mobility.com

10/F., United Centre, Admiralty, Hong Kong. Tel: 2299 5566 Fax: 2866 7096
E-mail: gm@sun-mobility.com Website: www.sun-mobility.com
CIB A MEMBER OF THE HONG KONG CONFEDERATION OF INSURANCE BROKERS

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