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Siemens Ltd v Schenker International (Australia) Pty Ltd

We are pleased to draw your attention to a significant legal decision dealing with the liabilities of air carriers and air forwarders if cargo is lost or damaged off-airport. It was handed down by the Australian High Court - the highest court in Australia - in the case of Siemens Ltd v Schenker International (Australia) Pty Ltd, on 9th March 2004. The TT Club has been involved in this case from the outset as Schenker Australia's liability insurer, and the successful outcome of this case is very good news for our members and the wider airfreight industry.

The background:
The German Schenker and Siemens companies have been trading together for well over one hundred years: the original contract dates back to the late nineteenth century. There is an "umbrella" contract under which Schenker Germany agrees to transport cargo to Australia for Siemens. In December 1996, Siemens Australia bought some telecommunications equipment valued at AUD 1.6 million (about USD 1.2m/EUR 967,000) from Siemens Germany on FCA Berlin-Tegel terms. The German Schenker company issued a house air waybill for the consignment, and it was flown from Berlin to Melbourne via Frankfurt and Singapore. Schenker received a master AWB from the actual carrier, Singapore Airlines. After arriving at Melbourne (Tullamarine), the airline handed the consignment over to Schenker Australia, who trucked it approximately 4 km to their warehouse outside the airport perimeter. During this short transit, but after the vehicle had left the airport itself, one of the packages fell off the lorry and was seriously damaged. Siemens, via their subrogated insurers, claimed AUD 1.6 million compensation from Schenker Australia. Schenker contended that its liability was limited by reference to the conditions printed on the reverse of the AWB, and in particular clauses 2.1 and 4 of the standard IATA/FIATA model air waybill, to an amount of USD 20.00 per kg.

The judgments:
At first instance in the Supreme Court of New South Wales, an argument was raised by Schenker seeking to apply the Warsaw convention limits to the journey from the airport to its off-airport bonded store. The judge rejected that. Argument then centered around the words in clause 4 "in carriage to which the Warsaw convention does not apply". Schenker contended that the delivery leg was an integral part of the through movement, but - because it was off -airport - it was a part of the carriage to which the Warsaw convention did not apply and therefore the provisions of Article 4 would be triggered. The judge disagreed, holding that the actual air transport had been subject to Warsaw since both sending (Germany) and destination (Australia) states were high contracting parties. Therefore, he held, clause 4 did not apply at all. The judge said:

"The clear assumption ... is that the carriage as a whole will or will not be within the convention's definition of 'international carriage' and that the carriage as a whole will or will not be carriage to which the convention applies. No half measures are contemplated. The carriage is not regarded as consisting of segments, with some being 'international carriage' for the purposes of the convention and others not, with the convention applying to some but not to others. It is all or nothing".

On this basis (which flew in the face of the reality of modern through-freight operations), he held that Schenker could not limit its liability. Schenker appealed. The appeal court of New South Wales allowed the appeal, saying that it had difficulty in following the lower court judge's reasoning. It agreed that the "carriage by air" under Warsaw finished at the airport but that clause 4 of the AWB then applied to the road transport to the bonded warehouse. In the leading judgment Mr. Justice Sheller commented that Siemens were precluded from taking delivery of the cargo under the air waybill at the airport, firstly because ground handling facilities did not allow it and secondly because the cargo was still under bond. To have given delivery at the airport would have been in breach of the Customs Act.

Applying these practical considerations to the other clauses in the air waybill (for example clause 11) which clearly contemplate that the contracted carriage would extend to activity outside the airport, the court agreed that Schenker could rely on clause 4 to limit liability. The lower court judgment was set aside, and Schenker was held liable for the limitation amount of USD 74,680 (EUR 61,000).

Siemens appealed to the Australian High Court. The majority (three judges) upheld the appeal court decision. They agreed that the delivery to the Schenker warehouse was an integral part of the carriage as agreed in the contract. The warehouse was where the customs clearance was to take place, and Schenker could not release the cargo to Siemens until the clearance had been completed. The judges said that their conclusion did not render the air waybill inconsistent with the Warsaw convention. Article 18.3 of the convention acknowledged that carriage by air might also involve movement by land outside the geographic confines of the airport of destination. "In those circumstances the convention rules relating to liability do not apply, but those [printed on] the air waybill will be engaged until the ... time at which delivery may be effected to the consignee in accordance with the rules in force in the country of destination."

The court therefore confirmed the common-sense view that an air waybill may be evidence of a contract of carriage that begins and/or ends outside an airport. Once the consignment arrives at the airport of departure, the Warsaw convention rules apply until the cargo leaves the airport of destination. However, the carrier can rely on clause 4 of the AWB to limit liability in the event of damage occurring during delivery by road (or any other means of surface transport) to or from the airports.

It is interesting that it has taken nine eminent judges in three separate courts to determine what exactly was the meaning of a simple phrase that is in use in virtually every one of the thousands of air waybills issued every day around the world.

The 1999 Montreal convention ("MC99"), already in force in a number of countries (and which we hope will be applied throughout the current fifteen member states of the EU later this year), extends the definition of "carriage by air" to the period during which the cargo is in the care of the carrier. It is hoped that this will remove all uncertainty in other jurisdictions about the validity of clause 4. In any event, IATA is undertaking a review of its AWB conditions at a meeting this month, to take into account the effect of MC99.

We hope that you will have found the above item interesting. If you would like to have further information on it, or have any comments you would like to make, then e-mail the Editor at tt.talk@ttclub.com. We look forward to hearing from you.

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