

Welcome to the latest edition of TT Talk, number 22 in the series.

Contents

1. Schenker v Siemens - Appeal Court Decision
2. Conclusion

1. Schenker v Siemens - Appeal Court Decision

In this edition we report on only one item which will be of particular interest to the Club's air freight forwarder Members. It relates to the successful outcome of proceedings before the Court of Appeal of New South Wales, Australia, in a case concerning Schenker, who were insured by the Club for cargo liabilities at the time.

Assuming that the decision stands, it is a landmark for the air freight forwarding industry - and its insurers! It establishes that operators contracting on the approved IATA form of air waybill for carriage before the airport of departure or after the airport of arrival, have the right to limit their liability to US\$20 per kilo for loss or damage occurring outside the airport to airport segment of the journey.

The case concerned a major claim brought by the Australian subsidiary of the German electronics company, Siemens, against the Schenker interests in both Australia and Germany, for damage to a consignment of electronic equipment. The damage occurred during transport by road from the airport of destination, Melbourne, to the Schenker bonded warehouse, some four kilometres away, at which the cargo was to be delivered to the consignees.

The key issue in the case was the application of clause 4 of the House Air Waybill, which was in standard IATA form. It read in material part:

"...in carriage to which the Warsaw Convention does not apply, carrier's liability shall not exceed US\$20... per kilogramme of goods lost, damaged or delayed."

At first instance, the judge held that Schenker could not take advantage of this limitation provision, on the grounds that the Warsaw Convention did apply, at least so far as the air leg from Berlin to Melbourne was concerned. That meant that the provisions of clause 4 did not operate. It was a case of 'all or nothing' - once the Convention was found to apply, clause 4 was redundant.

The net result was that, as the Warsaw Convention did not apply, by its own terms, to the on-carriage by road from airport to warehouse, Schenker were liable as bailees for the full damage claimed, about Aus\$1.7 million, without the benefit of any contractual limitation.

On appeal, the three appeal judges unanimously overturned the decision at first instance and held that the true meaning of clause 4 of the HAWB was that it applied to those segments of the carriage to which the Convention itself did not apply. Thus it applied to the segment from airport of destination to warehouse of delivery and Schenker's could therefore limit their responsibility for the damage to US\$20 per kilo, as provided by clause 4, for a total of approx. US\$74,700.

In the leading judgment, Meagher JA confessed that he was quite unable to understand the 'all or nothing' approach of the trial judge. In his view, the Schenker companies were transferring cargo under two regimes, one covering the route from Berlin airport to Melbourne airport and the other the route from Siemens' Berlin factory to Schenker's Melbourne bondstore. "If the latter, contractual, regime is different from the former, statutory, one", he said, "it still operates to the extent it can. It thus covers the short trip from Melbourne airport to the bondstore."

In his supporting judgment, Sheller JA made extensive reference to the recent decision of the English Court of Appeal in the case of Quantum Corporation v Plane Trucking and Air France, in which the Court decided that the CMR Convention applied to the road leg of a combined air/road transport. The overall

characterisation of the transport as 'carriage by air' - the approach adopted by the judge at first instance - was overruled.

The Schenker appeal judgment was delivered on Tuesday last, 11 June. The cargo interests have 28 days in which to seek leave to appeal.

A fuller note of the Court of Appeal judgment can be accessed at:

http://www.onlinedmc.co.uk/schenkers_appeal.htm

A note on the decision at first instance can be found at:

<http://www.onlinedmc.co.uk/siemens.htm>

A note on the decision in Quantum v. Plane Trucking and Air France can be found at

http://www.onlinedmc.co.uk/quantum_v_air_france_cofa.htm

2. Conclusion

We hope that you have found the above item interesting. If you would like to have further information on the case, 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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