AIR LAW, REGULATION AND COMPLIANCE MANAGEMENT

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AIR CARRIER LIABILITY FOR LOSS AND DAMAGE OF AIR CARGO

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INTRODUCTION

Some facts about air cargo:

- $50 billion per year business
- 35% of the value of all goods traded internationally is carried by air cargo
- Traditional annual growth of 7% worldwide, dampened by financial crisis fallout to ca. 5%
- 104 mio. tonnes in 2014, forecast to grow by 2050 to 400 mio. tonnes
- Highest growth in Asia-Pacific region
INTRODUCTION

- Lion’s share of international air cargo carried under Warsaw/Montreal ‘99 regime
- Warsaw has 152 States parties
- Montreal ‘99 has now 108 States parties incl. U.S., E.U. States, China, Japan, India, Brazil, Australia
- Industry standards (IATA, FIATA) have adapted to Montreal ‘99 regime (AWB)
AIR CARRIER LIABILITY FOR LOSS OR DAMAGE TO CARGO

- Art. 4 MC: AWB shall be delivered, or can be substituted by e-AWB record
  (WC: “handed over”): hardcopy AWB required
  cost of hardcopy AWB: $ 4.50 - $ 6.00.

- Art.11 MC: AWB or e-AWB is prima facie evidence of contract of carriage
  WC: in the absence of AWB particulars, carrier is strictly liable, no defences
AIR CARRIER LIABILITY FOR LOSS OR DAMAGE TO CARGO

Art. 5 & 7 MC: simplified contents when compared to Art. 8 WC

departure, destination, stopping places and weight of cargo.

Other 15 items of WC no longer required.

Art. 18 MC: Carrier is liable for loss or damage to cargo (strict liability)

Carrier has defences, Art. 18 (2): inherent defect, defective packing, act of war, act of public authority (confiscation)
AIR CARRIER LIABILITY FOR LOSS OR DAMAGE TO CARGO

- Art. 22 MC: Limitation of liability – 17 SDR per kg, increased in 2010 to 19 SDR

- Breaking the limit possible under MC:
  - Consignor declaration of value, Art. 22 (3) MC
  - Carrier stipulation of higher limit, Art. 25 MC
  - Carrier waiver of limit, Art. 25 MC
INCREASE IN LIABILITY LIMIT AND THE NEW AWB

- Escalator clause of Art. 24 MC: provides for periodic review and adjustment of liability limits by ICAO, incl. cargo limit
- First such review in 2009, 5 years after entry into force
- Accumulated inflation of 13.5%, consequent adjustment from 17 SDR to 19 SDR per kg of cargo. Pax limits also adjusted.
INCREASE IN LIABILITY LIMIT AND THE NEW AWB

- Increased limit of 19 SDR effective as from 1 January 2010
- IATA/FIATA Standard AWB: 17 SDR
- IATA Conditions of Carriage (Cargo) subject to amendment by IATA Cargo Services Conf.
- IATA Conf. met in April 2010 and approved new IATA AWB with effect from 1 July 2010.
INCREASE IN LIABILITY LIMIT AND THE NEW AWB

- New AWB provides for 19 SDR limit
- A few old AWB’s still in use; commercial practice of using up existing stock of AWB’s
- Despite continued use of old AWB, higher limit of 19 SDR applies to all MC carriage
- Cargo carriers performing MC carriage should therefore adjust their third party liability insurance accordingly
RECENT DECISION IN “ELI LILLY” CASE ON CONTRACTUAL WAIVER OF LIMITS

- *Eli Lilly Co. vs. Air Express Int. Inc.*, U.S. Court of Appeals, 11th Cir., 23 August 2010
- Large shipment of insulin from France to Indianapolis via Munich, value $10 mio.
- Insulin exposed to sub-zero temperatures during transshipment in Munich
- Whether carrier had contractually waived MC limit of liability under Art. 25 MC
RECENT DECISION IN “ELI LILLY” CASE ON CONTRACTUAL WAIVER OF LIMITS

- Eli Lilly claim of $10 mio. against Air Express Intl., dba. DHL
- DHL relied on 17 SDR limitation of liability
- U.S. District Court (Fla.) awarded full amount of $10 mio. to plaintiff, incl. certain level of profit ("intercompany transfer price")
- Held that liability limit was waived by long-term service Agreement between parties
- On appeal, U.S. Court of Appeal reversed
DECISION IN “ELI LILLY” CASE ON CONTRACTUAL WAIVER OF LIMITS

- Held by Court of Appeals:
  - Long-term service Agreement had not waived, increased or otherwise affected MC limits
  - An Agreement between the parties to increase or waive MC limits may be valid, even if not stipulated in AWB (e.g. Service Agreement)
  - However, parties did not intend to waive limits; Agreement did not reference MC
  - At the time of conclusion of Agreement, WC did not permit such waiver
DECISION IN “ELI LILLY” CASE ON CONTRACTUAL WAIVER OF LIMITS

Significance of Case:

- Long-term Service Agreements for shipment of cargo can in principle waive or increase the MC limit
- However, they would need to expressly reference the MC limit
- Agreements concluded before November 2003 (entry into force of MC) would normally not qualify as valid waiver
DECISION IN “CHUBB” CASE ON INDEMNIFICATION CLAIMS

Chubb Insurance v. Menlo Worldwide Forwarding, and UPS v. Quantas Airways, U.S. Court of Appeals 9th Cir., 10 February 2011

- Shipment of aircraft turbine engine from NZ to US; shipment damaged
- Chubb insurance covered damage - Whether two-year period for bringing action is applicable to indemnification claims
DECISION IN “CHUBB” CASE ON INDEMNIFICATION CLAIMS

- Plaintiff Chubb Insurance compensated consignor and sought recourse from Menlo and UPS which had taken over Menlo
- UPS settled with Chubb and cross-claimed against Quantas Airways
- Quantas invoked Art. 35 MC two-year period
- U.S. District Court held that the indemnity claim was subject to Art.35 and therefore time-barred
DECISION IN "CHUBB" CASE ON INDEMNIFICATION CLAIMS

- On appeal, U.S. Court of Appeal reversed
- Held that two-year period in Art.35 MC does not affect recourse claims and actions for indemnification and contribution
- Art. 35 extinguishes only claims and actions of the consignor against the carrier
DECISION IN “CHUBB” CASE ON INDEMNIFICATION CLAIMS

- Significance of “Chubb” Case:
  - Clarification of narrow scope of Art. 35 MC
  - Applies only to claims by consignor/owner against the carrier under Arts. 18 and 19 MC for loss, damage or delay of cargo
  - Does not apply to other claims, in particular recourse and indemnification claims by insurance or other successors-in-interest
CONCLUSIONS AND EVALUATION

IATA AWB (since 1 July 2010) has adapted to MC’99 regime and caters for any of the following limits, as applicable:

- 250 Goldfrancs under unamended Warsaw (approx. $ 20 per kg)
- 17 SDR under Warsaw amended by MP 4 (approx. $ 27 per kg)
- 19 SDR under MC’99 after 1 Jan.2010 and to/from the U.S. (approx. $ 30 per kg)
CONCLUSIONS AND EVALUATION

- Limit under new MC’99 regime 50% higher than under Warsaw
- New IATA AWB can be used in hardcopy or electronic format
- AWB Conditions of carriage cater for the three applicable regimes (unamended Warsaw, Warsaw amended by MP4, MC’99)
- MC’99 has thus been fully integrated into cargo regime
CONCLUSIONS AND EVALUATION

- MC’99 regime clarified by recent decisions on two specific points:
  - Eli Lilly Case: Long-term Service Agreements for shipment of cargo can in principle waive or increase the MC limit
  - Chubb Case: Two year time limit applies only to claims by consignor/owner against the carrier under Arts. 18 and 19 MC, not to indemnification claims.
CONCLUSION

THANK YOU

Questions?