

## **FORWARDERLAW E-NEWS October 1, 2004**

### An NVOCC's Tale: Fine Print pays off!

Claimants whose cargo is damaged during transport arranged by a forwarder often say: "I relied upon you. You chose the carrier, so you have to be responsible! Good luck in collecting the damages from the carrier."

Well, it shouldn't work that way. And it won't if forwarders find ways to protect themselves against the unrealistic expectations of their customers!

One way is to define clearly the forwarder's role as agent, responsible for reasonable care in the selection of carriers but not responsible for the actual carriage. A second way is to assume the NVOCC role, but make sure that the forwarder's transport documents limit exposure catastrophic results that sometimes happen in international transport. One well-known NVOCC did just that. Read on.

### Understanding your lawyer's role.

The reasons for the decision in this case includes a passage that has a message for lawyers and will help explain to clients why lawyers must sometimes seem less than 100% on the side of the client.

The judge bases his conclusions on a previous case (Sompo Japan Insurance v. Union Pacific Railroad) involving the same issue decided by a different judge in the US Federal Court, Southern District of New York approximately a year earlier.

The judge commented:

"It is worth noting that the plaintiff in Sompo was represented by the same counsel that represents plaintiff in this case. Plaintiff's counsel now attempts to make the same argument that it unsuccessfully advanced before the same court in Sompo, yet plaintiff omitted any reference to the Sompo decision in its Memorandum. Where a lawyer knows of controlling legal authority directly adverse to the position of the client, the lawyer should inform the tribunal of its existence unless the adversary has done so."

We don't know the other side of the story, so we cannot comment on the conduct of counsel for the insurer in this case.

Still the judge's statement is correct: a lawyer must always present to a judge all relevant case authority, although it is against his client, and even if the lawyer

considers that it is wrongly decided. It is unprofessional not to do so, even if the client objects.

A lawyer's duty in dealing with opposing lawyers is similar: a lawyer should always fairly summarize the effect of a law to an opposing lawyer. For instance, to claim that national law limits liability to \$500 per package (which favours the client), and not to state that there is an alternative limitation of 2 SDR (which doesn't favour the client) would be improper.

Siemens v. Schenker

No single case has created such a stir in the Forwarding industry over the past decade as Siemens v Schenker. The Press Release for the FIATA Congress at Sun City demonstrates that FIATA and IATA recognize the need for action:

“Thomas Gutruf, Managing Director of Nacora Ltd in Switzerland, and Robert Donald, Attorney and Aviation Consultant from Canada, made a presentation highlighting the differences between the Warsaw and Montreal Convention 1999. It was recognized that changes in the conditions of contract on the Air Waybill were necessary to clarify the applicable liability when other modes of transport are used to perform a transport beyond the airport of destination covered by the Air Waybill. Robert Donald also reported to the Advisory Body Legal Matters (on the effect of the “Siemens case” and of major changes which will be brought about by the Montreal Protocol 4 and the need to consider possible wording changes to Airway bill terms.”

Forwarderlaw previously reported the views of Peter McQueen in [“Take Home Lessons from Siemens v. Schenker”](#) In September there was a further commentary from John O'Reilly that supported the need for action. He gave his remarks a succinct caption:

**IATA/FIATA AIR WAYBILL WILL NOT PROTECT CARRIERS OUTSIDE AIRPORT!!**

**AIR CARRIERS & FREIGHT FORWARDERS WILL NOT BE ABLE TO RELY ON THEIR IATA/FIATA AIR WAYBILL TO LIMIT LIABILITY TO US\$20 PER KILO.**

Lessons to be learned from a recent case English case, Frans Maas v. Samsung Electronics.

Cell phones disappear from a secure warehouse. Clearly there is complicity on the part someone on the inside. Probably that someone is an employee who

conspired with criminal elements to effect a “disappearance” that could not be traced. Millions could be at stake.

No employee is hired to steal goods in the possession of the employer. Theft involving the complicity of employees happens even when the best security measures are in place. Still, forwarders and warehousemen must be liable simply because it would be opening for great abuse if it were not so.

What language must these parties to limit their liability effectively? As the FIATA Legal Handbook on Forwarding explains (3d at p. 17),- even with Standard Trading Conditions there are questions of interpretation that come up in deciding cases where a defence is based upon standard trading conditions. Paul Bugden, the Forwarderlaw National Editor for the United Kingdom explores the issues that came up in the case. Read his comments.

### Contract Administration

The term “Contract Administration” makes the process of negotiating a contract seem a matter of bureaucratic action. In truth these negotiations are a dynamic exchange between two parties, even when the framework is well established. Use of the term has the object of making forwarders aware of the importance of “execution”. Even if the framework is in place, there are steps that must be taken to engage that framework for the specific activities undertaken.

The Frans Maas case demonstrates how if staff do not properly follow through on contract administration lawyers can present very plausible arguments supporting a forwarder’s liability. Read this further commentary on this interesting case.

### The Effect of a Signature on a Document

The very formal documents that are still used for certain types of transactions conclude with the words "Executed this day under my hand and seal". With such formalities a party to the documents could not escape the liabilities that the document imposed.

The seal was a wafer glued to the document, but centuries before that the seal was an impression in hot wax dripped on to the document.

The phrase "under my hand" referred to the party's signature. And it still is a factor in holding a recalcitrant defendant to terms of a contract. Forwarderlaw appreciates the contribution from [Frazer Hunt](#), of [Piper, Alderman](#), that explains why a signature still has a role in contract administration.

When is a forwarder liable to a carrier for freight?

This issue is a bread and butter issue for both forwarders and carriers. The lawyers get a chance to argue the case before judges, and those judges make decisions. Are those decisions a fair reflection of what the parties themselves

intend. And what are the considerations that should influence the court, but didn't get into the case? Read the comments of Chris Gillespie, Chair of the FIATA Multimodal Transport Institute.

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