

COUNSEL FOR THE ROAD AHEAD®

InterConnect

A PUBLICATION OF BENESCH FRIEDLANDER COPLAN & ARONOFF LLP'S TRANSPORTATION & LOGISTICS GROUP

Update on Cargo Liability for International Air Freight

International air freight limitations of liability under the Montreal Convention increase, effective December 30, 2009.

Liability of air carriers for cargo lost or damaged during transit has been limited since the dawn of air transportation. For instance, the original Warsaw Convention limited liability to 250 French gold Francs per kilogram. The Montreal Protocol to the Warsaw Convention set the limitation at 17 Special Drawing Rights (SDRs).¹ However, on December 30, 2009, the limitation of liability for cargo that is lost or damaged during international air transportation between countries who are signatories to the Montreal Convention increased from 17 SDRs to 19 SDRs per kilogram, based on the weight of the package lost or damaged. As of January 28, 2010, the value of one SDR was \$1.55419, thus increasing the limitation of liability from \$26.42 per kilogram to \$29.53 per kilogram.²

Which shipments are affected?

The Montreal Convention (the "Convention") governs all international carriage of persons, baggage, or cargo performed by aircraft for reward between or within member countries. It also governs gratuitous carriage by aircraft performed by an air transport undertaking. The Convention replaces the Warsaw Convention, the Hague Protocol, the Guadalajara Convention, the Guatemala City Protocol, and the Montreal Protocols in regards to air transportation.

Who has responsibility for preparing air waybills and what if they do it wrong?

Under the Convention, the consignor (not the carrier) is required to prepare an air waybill or cargo receipt showing: (1) the places of departure and destination; (2) at least one stopping place (if departure and destination are within the same country, but carriage includes a stopping place in another country); and (3) the weight of the shipment.

The consignor, when necessary, must comply with the requirements of customs, the police and similar public authorities regarding documentation. No duty, obligation or liability on the part of the carrier is created by this Article of the Convention.

The consignor is required to create three original parts of the air waybill. The first part must be marked "for the carrier" and be signed by the consignor. The second part must be marked "for the consignee" and signed by the consignor and the carrier. The third part must be signed by the carrier who shall hand it to the consignor after the cargo has been accepted by the carrier.

What is the carrier liable for? The carrier is liable for loss or damage to the cargo if the loss or damage took place during the carriage by air. Carrier defenses to liability are: (1) inherent defect, quality or vice of that cargo; (2) defective packing of that cargo performed by a person other than the carrier or its servants or agents;

(3) an act of war or an armed conflict; or (4) an act of public authority carried out in connection with the entry, exit or transit of the cargo.

The carrier is exonerated in whole or in part if it can prove the damage was caused or contributed to by the claimant.

Exactly what are the limits of liability and why have they changed?

The Convention maintained the limitation of liability for cargo of 17 SDRs per kilogram as was contained in Montreal Protocol No. 4, subject to the same proviso, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the

continued on page 2

IN THIS ISSUE:

Update on Cargo Liability for International Air Freight

Budgeting for Customs Compliance

OMG! Texting Banned Recent Events

Overseas Carriage of Goods into India: An Overview

On the Horizon

Update on Cargo Liability for International Air Freight

continued from page 1

sum is greater than the consignor's actual interest in delivery at destination.

The Convention requires that the limitations of liability be reviewed at five-year intervals, taking into account the rate of inflation. A review will also take place any time one-third of the parties request a review and the rate of inflation has exceeded 30 percent since the previous revision.

The first review of limits of liability conducted by the International Civil Aviation Organization (ICAO) in accordance with Article 24, revised limits of liability, effective December 30, 2009. For cargo loss or damage, the minimum limitation of liability is 19 SDRs per kilogram.

In determining the limits of liability, the weight to be taken into consideration is the total weight of the package or packages concerned, not the total weight of the shipment, unless the loss or damage affects the value of other packages in the shipment.

A carrier may agree to higher limits of liability or to no limits whatsoever. However, any provision attempting to set a lower limit shall be null and void.

What are the time limits for filing cargo claims? Complaints must be filed in writing and sent to the carrier within the following time limits. In the case of damage, the person entitled to delivery must complain to the carrier within fourteen days of receipt. In the case of delay, the complaint must be made within twenty-one days from the date the cargo is delivered.

What are the time limits for filing suits? Any legal action must be brought within two years from the date of arrival

at destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

My stock of international air waybills or the ones the carrier gives me say

“[L]imitation of liability for cargo that is lost or damaged during international air transportation between countries who are signatories to the Montreal Convention increased from 17 SDRs to 19 SDRs per kilogram....”

liability is limited to “17 SDRs per kilogram.” How does the 19 SDRs per kilogram become effective?

Although the Convention requires the consignor to issue an air waybill with certain provisions, failure to do so does not

change the applicability of the Rules of the Convention, including the limitation of liability. So the 19 SDRs per kilogram limitation of liability applies, even if there is a flaw in the air waybill.

The standard air waybill used for international air transportation was developed and is maintained by Cargo Services Conference (CSC), which is made up of representatives of International Air Transport Association (IATA). New IATA Air Waybill Conditions of Contract became effective December 30, 2009. The new language recognizes the increase in liability under the Convention for the countries who are parties to the Convention, as well as acknowledging those countries that are not.

The revised Air Waybill contains the following notice:

If the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention or the Montreal Convention may be applicable and in most cases limit the liability of the Carrier in respect of loss of, damage or delay to cargo. Depending on the

applicable regime, and unless a higher value is declared, liability of the Carrier may be limited to 19 Special Drawing Rights per kilogram under the Montreal Convention, 17 Special Drawing Rights per kilogram under the Warsaw Convention as amended by Montreal Protocol No. 4, or 250 French gold francs per kilogram under the Warsaw Convention (unamended by Montreal Protocol No. 4), converted into national currency under applicable law, unless a greater amount is specified in the Carrier's conditions of carriage.

What if I am given an old air waybill without the new provisions? IATA members and carriers party to the “IATA Multilateral Interline Traffic Agreement – Cargo” are required by IATA to notify any persons holding the old air waybills that there has been a change in the limitations of liability. That notification may be by a posting on a carrier's website.

The limitation of liability of 19 SDRs per kilogram applies, even if outdated air waybills are used and whether or not the new limitation is posted on the carrier's website. Be aware of this when you file a claim with an air carrier or air freight forwarder for cargo loss or damage.

¹ An SDR is a basket of currencies consisting of the Euro, Japanese yen, pound sterling, and U.S. dollar. The U.S. dollar-value of the SDR is posted daily on the IMF's website. It is calculated as the sum of specific amounts of the four currencies valued in U.S. dollars, on the basis of exchange rates quoted at noon each day in the London market.

² International Monetary Fund http://www.imf.org/external/np/fin/data/rms_sdrv.aspx

For more information contact Martha Payne at mpayne@beneschlaw.com or (541) 764-2859.

Budgeting for Customs Compliance

Does your company have an established budget for Customs Compliance projects? Or do compliance issues tend to be more of an ad-hoc budgeting situation? Or somewhere in between?

Proactive customs compliance budgeting can be a valuable and important business management function.

Here are some examples of compliance budget line items that can save time and dollars for active importers:

- 1. Internal audit:** Schedule an annual internal audit by a third party.
- 2. Documentation:** Prepare appropriate documentation for participation in Customs Trade Partnership Against Terrorism (C-TPAT), Import Security Filing (ISF), and Importer Self-Assessment (ISA).
- 3. Standardized compliance programs:** Maintain up-to-date compliance and C-TPAT procedure manuals and consider converting to a global trade management software program and digital recordkeeping.
- 4. Import counsel:** Build a relationship with a trusted adviser. Transactions like First Sale, new products, or country of origin qualification for Free Trade programs can succeed with informed advice. The trade community needs to be clearly and completely informed of its legal obligations by consulting with a customs "expert" (e.g., lawyer, customs broker, or customs consultant).
- 5. Compliance interface:** Communicate with Marketing and Product Development at the start of the development process. Compliance can assist on the front side with input on considerations such as duty, tariff engineering, other government agency (OGA) requirements and sourcing from a country with trade agreements. Better to know the issues in advance rather than learn them when Customs and Border Protection (CBP) is holding your freight captive.
- 6. Training:** Implement an internal training program for all associates who are involved in customs business.
- 7. Binding rulings:** Binding rulings will confirm key entry information prior to importation. CBP will issue rulings on the appropriate Harmonized Tariff Schedule United States (HTSUS) classification, rate of duty, and other issues such as valuation, country or origin marking, and eligibility in trade preference programs.

How can you maximize your compliance dollars? By developing and maintaining a proactive compliance program. Lowering landed costs and improving speed-to-market are valuable benefits that can be realized by utilizing these and other tips. Worthy benefits for any business.

For more information contact Mary Bianchi at mbianchi@beneschlaw.com or (239) 985-9776.

Get to Know Teresa E. Purtiman



Teresa is of counsel in the firm's Transportation & Logistics Practice Group. She comes to Benesch after serving as in-house transportation counsel for YRC Worldwide Inc., one of the largest less-than-truckload motor carriers in North America. Teresa assists transportation companies with contract drafting, review and negotiation; shipping solutions; real estate transactions, including leases, environmental releases, liens, construction and design agreements, easements, and oil, gas and mineral rights leasing; and HR issues. She is experienced in serving as legal counsel in transportation, contractual, real estate, telecommunications/cable matters, litigation and employment matters. Additionally, Teresa has a growing practice in the entertainment industry representing independent filmmakers, drafting and negotiating agreements for all aspects of film production. Teresa received her B.A. summa cum laude from The Ohio State University, and her J.D. magna cum laude from the University of Akron School of Law.

Mary L. Bianchi



Mary is a paralegal and licensed customs broker (not practicing) in the firm's Transportation & Logistics and International Trade & Supply Chain Management Practice Groups. She comes to Benesch from GEAR for Sports, Inc. where she worked as Director of Global Logistics and Customs. Prior to working at GEAR for Sports, Inc., Mary worked at Chico's FAS, Inc. where she specialized in customs and import issues relating to wearing apparel. Mary is experienced in all phases of customs compliance, import/export and global supply chain management for specialty retailers, manufacturers and wholesalers. Mary received her B.S. cum laude from Hodges University.

OMG! Texting Banned

On January 26, 2010, U.S. Transportation Secretary Ray LaHood announced the federal ban on texting by interstate drivers of large commercial vehicles, including large trucks and buses. Although some states and several cities across the U.S. have already banned texting for all drivers, this is the first attempt by the federal government to crack down on the use of electronic devices while driving. Drivers of commercial vehicles caught texting may be subject to civil or criminal penalties of up to \$2,750.

Specifically, the new rules are aimed at all interstate drivers of commercial motor vehicles (CMVs) subject to the Federal Motor Carrier Safety Regulations. CMVs are defined as any self-propelled or towed motor vehicle used on a highway in interstate commerce to transport passengers or property when the vehicle:

1. Has a gross vehicle weight rating or gross combination weight rating, or gross vehicle weight or gross combination weight, of 4,536 kg (10,001 pounds) or more, whichever is greater;
2. Is designed or used to transport more than 8 passengers (including the driver) for compensation;

3. Is designed or used to transport more than 15 passengers, including the driver, and is not used to transport passengers for compensation; or
4. Is used in transporting material found by the Secretary of Transportation to be hazardous under 49 U.S.C. 5103 and transported in a quantity requiring placarding under regulations prescribed by the Secretary under 49 CFR, subtitle B, chapter I, subchapter C. 49 C.F.R. § 390.5.

While texting is not specifically mentioned in the rules, it is being regulated under 49 C.F.R. § 390.17, which states: “[n]othing in this chapter shall be construed to prohibit the use of addition equipment and accessories, not inconsistent with or prohibited by this subchapter, *provided such equipment and accessories do not decrease the safety of operation of the commercial motor vehicles on which they are used.*”

So what exactly is texting? The federal regulatory guidelines define texting as:

“The review of, or preparation and transmission of, typed messages through any such device or the engagement in any form of electronic data retrieval or electronic data communication through any such device.”

However, according to the federal regulatory guidelines, the texting ban does not forbid the utilization of electronic dispatching tools and fleet management systems, but “[t]o the extent that there are fleets that require drivers to type and read messages while they are driving, the Agency will consider appropriate regulatory action to address this problem.”

Moreover, the regulatory guidance “should also not be construed to prohibit the use of cell phones for purposes other than text messaging.” In other words, drivers are no longer allowed to transmit or receive text messages in transit, but are still allowed to talk on their cell phones while driving. In addition, it appears that the Department of Transportation will issue guidelines regulating the use of electronic dispatching tools and fleet management systems if, and when, it perceives the use of these technologies as a distraction to drivers.

For more information regarding the federal regulatory guidelines, see Federal Register Vol. 75, No. 17.

For more information contact Thomas Kern at tkern@beneschlaw.com or (614) 223-9369.

Recent Events

Marc Blubaugh presented *Having a Winning Deposition Strategy* at the **Ohio Trucking Association’s Safety Council Monthly Meeting** in Columbus, OH on November 12, 2009.

Bob Spira presented *Carrier Qualification is for Everyone* at the **Transportation Intermediaries Association Fall Meeting** in Anaheim, CA on November 15, 2009.

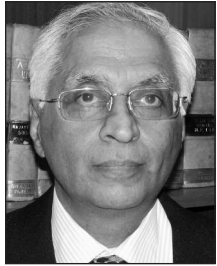
Eric Zalud and Martha Payne attended the **Conference of Freight Counsel Meeting** in Austin, TX, on January 10-11, 2010.

Marc Blubaugh, Bob Spira, Thomas Kern and Teresa Purtiman attended the **Chicago Regional Conference of the Transportation Lawyers Association** in Chicago, IL, on January 21-22, 2010.

Eric Zalud attended the **DRI Trucking Law Seminar** in Las Vegas, NV, on February 4–5, 2010.

Eric Zalud attended the **Trucking Industry Defense Association Advanced Seminar** in Miami, FL, on February 10–11, 2010.

Overseas Carriage of Goods into India: An Overview



Sunil Kumar, Partner
Singhania & Partners LLP*

Indian Logistics Industry

Sound economic growth in India is increasingly supported by robust industrial growth.

One of the comparatively lesser known but important sectors

that support almost all industrial activities is the *logistics sector*. Keeping pace with the demands of the economic progress, the sector has arranged and consolidated itself as a highly professional and competitive industry supported by foreign investment.

Regulation of Carriage of Goods

Primarily, the overseas carriage of goods is governed as between the consignor and the carrier by way of *Contract of Carriage of Goods*. It is a contract of bailment for reward. However, the contract of bailment is modified by the different statutes governing carriage of goods by land, sea or air.

In India, the laws governing carriage of goods into Indian territory are:

1. In case of carriage of goods by land:
 - The Carriers Act, 1865.
2. In case of carriage of goods by sea:
 - The (Indian) Bills of Lading Act, 1856.
3. In case of carriage of goods by air:
 - The Carriage by Air Act, 1972.

However, The Carriers Act, 1865 is uniformly applicable to all the modes of carriage.

In case no provision in the specific regulations is provided, then the Indian courts refer to the principles of English Common Law.

Procedures to be Followed by the Carrier

The logistics companies/carriers involved in transporting goods do not require any

special permission, license or permit for bringing goods into India. However, any vessel/aircraft or any other carrier carrying goods destined to Indian ports would need to comply with specific requirements under various enactments governing vessels and aircrafts entering Indian ports.

The burden of complying with the abovementioned requirements would fall on the *person-in-charge* of the vessel, aircraft, etc.

Broadly, he shall be responsible for the following:

1. Submitting the Import Manifest.
2. To ensure that the conveyance comes through the approved route and lands at the approved place only.
3. To ensure that goods are unloaded after written order at the proper place.
4. To ensure that the conveyance shall not leave without written order of the custom authorities.

Liabilities of the Carriers

The liability of the logistics companies are discussed under various enactments in the form of the liabilities of the *carriers*. The burden of such obligations and liabilities would further depend upon the terms of the *Contract of Carriage* or any such agreement between the parties involved.

A logistics company may get exposed to liabilities in the following cases:

- a. Any loss caused due to his own negligence or criminal act of his servant or agent wherein, it is not necessary for the claimant to establish negligence.
- b. On failure to properly manage the load of shipments, they are liable for their negligence.
- c. Liability exposure to their customer for negligence in failing to timely and appropriately file the necessary proof of claim while acting as an intermediary for resolving any loss.

- d. Liability exposure for negligent management of those facilities and warehouses, including hiring incompetent laborers, mostly in cases of goods of high value.

Under common law primarily there are four obligations imposed on the carrier, which are as follows:

1. The carrier must deliver the goods in the same condition as when they were shipped and such duty cannot be delegated.
2. It is the absolute duty of the carrier to provide a seaworthy ship.
3. The carrier is expected to undertake to proceed on the voyage without unjustifiable deviation.
4. The carrier must complete the voyage without any delay and it is subject to liability in case of damages for any loss caused by the delay.

Limitation on Liability

The absolute liability of a logistics company/carrier is subject to the following exceptions, namely:

1. Act of God.
2. Special Contract, i.e. on waiver of any such liability under the contract between the parties concerned.
3. In addition to the above, the liability would be governed by the exceptions given under the various enactments mentioned above.

Briefly, while considering the liability of the carrier for loss of damage to goods in one's custody, the terms of the contract, effect of statutory provisions and the common law must be referred.

*Singhania & Partners LLP is a full service national law firm with a successful international law practice out of its offices at New Delhi, Noida, Bangalore, Hyderabad and Mumbai with a team of over 70 attorneys including lawyers with dual qualification of Chartered Accountancy or Company Secretaryship supported by paralegals. Singhania is Benesch's Terralex affiliate in India. The two firms partner together to service clients with bilateral interests in the U.S. and India.

On the Horizon

Jim Hill, Eric Zalud and Marc Blubaugh will be attending the **2010 Truckload Carriers Association's Annual Convention** in Las Vegas, NV on February 28–March 3, 2010.

Marc Blubaugh and Eric Zalud will be attending the **International Warehouse Logistics Association 2010 Annual Convention and Expo** in San Diego, CA on March 7–9, 2010.

Martha Payne and Eric Zalud will be attending the **Air Cargo Conference** in Orlando, FL on March 14–15, 2010.

Marc Blubaugh will be presenting a **Webinar for the Transportation Lawyers Association** on *Bulletproof or Brittle? A Primer Regarding Motor Carrier Limitations of Liability* in Columbus, OH on March 26, 2010.

Bob Spira will be presenting *Legally Speaking* and Eric Zalud will be presenting on *Lessons for CEO's in the Logistics Industry* at the **Transportation Intermediaries Association (TIA) Conference** in Tucson, AZ on April 8–10, 2010. Martha Payne will also be attending this conference.

Mary Bianchi will be attending the **National Customs Brokers & Forwarders Association's 36th Annual Conference** in San Antonio, TX on April 11–14, 2010.

Marc Blubaugh will be moderating a panel on *Loss and Damage Claims – Best Practices*, Eric Zalud will be speaking on *Food Imports/The Bioterrorism Act* and Martha Payne will be on the panel: *Transportation & Logistics Contracts Best Practices* at the **Transportation & Logistics Council's 36th Annual Conference** in San Diego, CA on April 18–21, 2010.

Marc Blubaugh, who will be serving as the Educational Program Chair, and Eric Zalud, Bob Spira and Martha Payne will be attending the **Transportation Lawyers Association (TLA) Conference** in Hilton Head Island, SC on April 27–May 1, 2010. Eric Zalud will be attending the TLA Executive Committee Meeting there, and Yanping Wang, of Benesch's China office will be speaking on international transportation issues.

Mary Bianchi will be attending the **2010 American Apparel and Footwear Association Annual Sourcing, Customs, & Logistics Integration Conference** in Miami, FL on May 5–7, 2010.

Eric Zalud will be attending the **Terralex European Meeting** in Rome, Italy, on June 9–12, 2010.

For further information and registration, please contact Megan Thomas, Client Services Manager at mthomas@beneschlaw.com or (216) 363-4639.

For more information about the Transportation & Logistics Group, please contact one of the following:

Eric Zalud, *Chair* | (216) 363-4178
ezalud@beneschlaw.com

Mary Bianchi | (239) 985-9776
mbianchi@beneschlaw.com

Marc Blubaugh | (614) 223-9382
mblubaugh@beneschlaw.com

Mariann Butch | (216) 363-4198
mbutch@beneschlaw.com

Ryan Hatch | (614) 223-9347
rhatch@beneschlaw.com

Thomas Kern | (614) 223-9369
tkern@beneschlaw.com

Peter Kirsanow | (216) 363-4481
pkirsanow@beneschlaw.com

David Neumann | (216) 363-4584
dneumann@beneschlaw.com

Martha Payne | (541) 764-2859
mpayne@beneschlaw.com

Teresa Purtiman | (614) 223-9380
tpurtiman@beneschlaw.com

Nicole Schaefer | (216) 363-4593
nschaefer@beneschlaw.com

Robert Spira | (216) 363-4413
rspira@beneschlaw.com

Clare Taft | (216) 363-4435
ctaft@beneschlaw.com

Yanping Wang | (216) 363-4664
ywang@beneschlaw.com

Thomas Washbush | (614) 223-9317
twashbush@beneschlaw.com

E. Mark Young | (216) 363-4518
myoung@beneschlaw.com

Pass this copy of *InterConnect* on to a colleague, or e-mail Ellen Mellott at emellott@beneschlaw.com to add someone to the mailing list.

Help us do our part in protecting the environment.

If you would like to receive future issues of this newsletter electronically, please e-mail Sam Daher at sdaher@beneschlaw.com.

Cleveland

200 Public Square, Suite 2300
Cleveland, OH 44114-2378
Phone: (216) 363-4500
Fax: (216) 363-4588

Columbus

41 South High Street, Suite 2600
Columbus, OH 43215-6150
Phone: (614) 223-9300
Fax: (614) 223-9330

Philadelphia

One Liberty Place
1650 Market Street, 36th Floor
Philadelphia, PA 19103-7301
Phone: (267) 207-2947
Fax: (267) 207-2949

Shanghai

Kerry Centre Suite 1802
1515 W. Nanjing Road
Shanghai, P.R. China 200040
Phone: (86) 21-3222-0388
Fax: (86) 21-5298-5955

White Plains

White Plains Center
50 Main Street, Suite 1000
White Plains, NY 10606
Phone: (216) 363-4500
Fax: (216) 363-4588

Wilmington

222 Delaware Avenue, Suite 801
Wilmington, DE 19801-1611
Phone: (302) 442-7010
Fax: (302) 442-7012

www.beneschlaw.com

♻️ Printed on recycled paper.

The content of the Benesch, Friedlander, Coplan & Aronoff LLP *InterConnect* Newsletter is for general information purposes only. It does not constitute legal advice or create an attorney-client relationship. Any use of this newsletter is for personal use only. All other uses are prohibited. ©2010 Benesch, Friedlander, Coplan & Aronoff LLP. All rights reserved. To obtain permission to reprint articles contained within this newsletter, contact Ellen Mellott at (216) 363-4197.

BENESCH
Attorneys at Law