

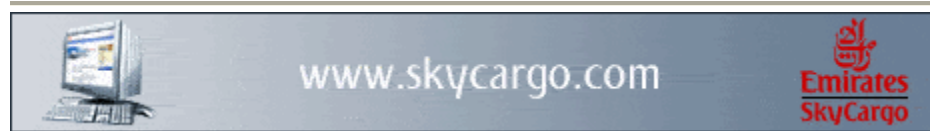


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Drug Heist Forces Definition Of International Liability

By Michael Holland

In the international transportation of goods by air, it is commonly recognized that, until the Montreal Convention came into effect in the United States in November of 2003, the Warsaw Convention was the exclusive remedy for shippers or consignees suing for the value of lost, damaged or delayed goods.

The Montreal Convention is a replacement for the Warsaw Convention, although some of the substantive law provisions relating to cargo in the Warsaw Convention and Montreal Convention are similar.

One well known exception to the application of the Warsaw Convention is when the loss, damage or delay to the goods occurs outside the premises of an airport.

In *Victoria Sales Corp. v. Emery Air Freight, Inc.*, 917 F.2d 705 (2d Cir. 1990), the Second Circuit Court of Appeals held that an air carrier could not limit its liability when the theft of the goods occurred outside the airport premises.

The same theme of non-applicability of the Warsaw Convention to international transportation was discussed in a recent decision from the United States for the Southern District of New York in *Eli Lilly v. Federal Express Corporation*, ___ F. Supp. 2d ___, Docket 04 Civ. 5285 (S.D.N.Y. Sept. 21, 2005).

Eli Lilly sued FedEx when a shipment of its pharmaceuticals was stolen en route to a customer in Japan from Eli Lilly's factory in Sao Paulo, Brazil. The truck containing the cargo was hijacked while en route to Sao Paulo airport.

The District Court found that, based on *Victoria Sales*, the Warsaw Convention was inapplicable since the loss occurred outside the airport premises.

The issue then became what law was applicable, with FedEx arguing that federal common law should apply and Eli Lilly arguing that Brazilian law was applicable.

The answer to that question determined the liability of FedEx for the lost shipment: if federal common law applied, the carrier's liability was limited to \$20.00 per kilo pursuant to the conditions of contract printed on the reverse side of the air waybill.

If Brazilian law, which prohibited a limitation of liability in a case where the carrier was found liable for gross negligence, was applicable, FedEx faced potential responsibility for approximately \$800,000 in damages.

The FedEx air waybill provided that if the Warsaw Convention was not applicable, then the airline's liability was limited to \$20.00 per kilo for goods lost, damaged or delayed unless a higher value had been declared.

All parties conceded that the limitation provision of the air waybill was enforceable, thus making Eli Lilly's liability limit \$28,863.

In examining both Brazilian and United States law, the court found that the policies of both the United States and Brazil would be furthered by the application of their respective rules on liability.

The interest of the United States in permitting federally certified air carriers like FedEx to limit their liability for lost goods is a strong one, but it was equally evident that Brazil had an interest in regulating the liability of the carriers transporting goods within the borders of Brazil.

Applying federal common law would cut directly against that Brazilian interest.

Adding credence to the belief that Brazilian law was applicable were the facts of the case: the contract was executed in Brazil and the critical portion of FedEx's performance giving rise to the dispute, i.e., the land transportation between Eli Lilly's factory and the airport, took place entirely within Brazil, where the loss occurred.

However, weighing the interest of these two jurisdictions, the court found that the overall principles of Section 6 of the Restatement (2d) of the Conflict of Laws (1971) mandated application of United States federal common law. In cases where there is a conflict between the laws of two countries in determining which law should be applied, the courts looked at several factors in determining what law was applicable.

These included: the needs of the interstate and international systems, the relevant policies of the forum, the relevant policies of other interested states and the relative interest of those states in the determination of the particular issue, the protection of justified expectations, the basic policies underlying the particular field of law, certainty, predictability and uniformity of result and ease in the determination and application of the law to be applied. Weighing these factors, the court found that the Section 6 principles favored application of United States law because that law vindicated the parties' expectation as expressed in the contract of carriage entered into between the parties, i.e., the air waybill, that federal common law would be applicable to claims against air carriers for lost or damaged goods transported internationally.

The court found that the application of United States law would enforce the contract between the parties as written and this in turn vindicated the other Section 6 principles such as certainty, predictability, uniformity of result and ease in determining the law to be applied.

Accordingly, the court held that federal common law was applicable and limited FedEx' liability pursuant to the terms of the air waybill.

In short, one more attempt to avoid an application of the limit of the carrier's liability was rebuffed by the court's application of federal common law.

These legal issues, while interesting, will largely be eliminated for all claims arising after November 4, 2003, the effective date of the Montreal Convention in the United States.

The Montreal Convention provides that the airline's liability is limited to 17 SDRs per kilo for lost, damaged or delayed cargo (approximately \$25.00 per kilogram at today's conversion rates).

Since this liability limitation is unbreakable, it is anticipated that there will be less, rather than more, litigation given the adaptation of the Montreal Convention by some sixty-seven countries throughout the world.

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