

Arbitration of International Cargo Claims

For reasons that are unclear, international airlines have not chosen to include an arbitration provision in their cargo contracts of carriage (air waybills). This option was available in the Warsaw Convention and continues to be available in the Montreal Convention. Both of these Conventions govern international cargo claims.

Article 32 of the Warsaw Convention provides that “for the carriage of goods arbitration clauses shall be allowed, subject to this [Warsaw] Convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of Article 28”¹

Article 34 of the Montreal Convention similarly provides:

1. Subject to the provisions of this article, the parties to the contract of carriage for cargo may stipulate that any dispute relating to the liability of the carrier under this [Montreal] Convention shall be settled by arbitration. Such agreement shall be in writing.
2. The arbitration proceedings shall, at the option of the claimant, take place within one of the jurisdictions referred to in Article 33.²
3. The arbitrator or arbitration tribunal shall apply the provisions of this Convention.

¹ The forums in Article 28 which have jurisdiction over Convention cargo claims are the domicile of the carrier, the principal place of business of the carrier, the place of destination according to the contract and the place of the carrier’s business through which the contract of carriage was made. Article 33(1).

² The jurisdictions available for cargo claims governed by the Montreal Convention are the same as those provided in Article 28 of the Warsaw Convention. See Footnote 1, above.

4. The provisions of paragraph 2 and 3 of this Article shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.”

An arbitration provision in an air waybill need not be restricted to Convention transportation. However, in those instances where a Convention applies, the forum will be controlled by the Convention as mentioned above. In general, either Convention will apply if, according to the agreement (air waybill) of the parties, the transportation is between two countries which are parties to the same Convention, even if there is a break in the carriage or a transshipment.³ Both Conventions contain limits of liability for cargo delay, loss or damage, unless the parties agree to a higher value. Under the Montreal Convention, the limitation of liability is 17 SDRs per kilo or about \$25.50 U.S. per kilo.

Litigation of cargo claims generally involves discovery, motions, live testimony from airline employees and shippers, all of which are expensive in legal costs for airlines and their insurers.

Arbitration may not be a suitable method of dispute resolution where complicated legal and factual issues need to be decided at various stages of the proceeding and extensive discovery needs to be conducted. However, arbitration, in the opinion of the writer, is the most suitable cost effective mechanism to resolve what are the usual issues involved in a cargo claim: amount of the damage, weight of the shipment, contributory fault on the part of the shipper. Disputes on

³ The convention applies if “the place of departure [on the air waybill] and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another State, even if that State is not a High Contracting Party. Warsaw Convention Art. 1(2); Montreal Convention Art. 1(2).

weight and value of the loss are fairly uncomplicated issues which should be able to be resolved by an arbitrator knowledgeable both about assessing the loss and about applying the terms of the Convention. Arbitration of cargo claims will almost certainly reduce attorney fees, permit the use of in-house legal staff and limit the amount of discovery (which is controlled by the arbitrator). The procedures are simplified and somewhat informal. The admissibility of evidence is more relaxed. For example, an adjuster's report can be considered without the need of his live testimony. There is a greater likelihood of a better business resolution in arbitration. To the extent it is important in any cargo claim, the proceeding and its resolution can be kept confidential, while it is being conducted and after the dispute is resolved.

The parties can designate an arbitrator informed about the provisions of the Convention and about the industry. In litigation, the parties will be dealing with a Judge who may not know much about the air cargo industry or either of the Conventions. In addition, based upon years of litigation experience in the airline industry, U.S. federal judges don't like these routine cargo cases and don't understand why the parties do not settle them. Arbitration in general gives the parties an inexpensive hearing and usually a swift resolution.

There are some disadvantages to arbitration. There is customarily no appeal, but it is possible under either Convention that a losing party can appeal, claiming the arbitrator did not apply the Convention. There is no injunctive relief, for example, preventing disposal of cargo not picked up. The filing fees, plus the costs of the arbitrator, can be significant. There are filing fees in litigation, but no fees to the Judges. The resolution of a particular claim will have no

precedential value. Judicial precedents interpreting and applying the Montreal and Warsaw Conventions have been a valuable by-product of litigated cases and informative to the industry.

Text writers and commentators of Warsaw Article 32 and Montreal Article 34 have uncovered no cases or decisions which have involved the arbitration of Warsaw or Montreal cargo disputes. IATA's Cargo Services Conferences which have guided its member carriers for years have not recommended arbitration in their resolutions dealing with cargo transportation. The Conference has provided for arbitration to resolve disputes between carriers, but apparently saw no reason to recommend arbitration binding on shippers and airlines.

It is difficult to understand why arbitration with shippers is not preferred by IATA or the carriers themselves. It could be that carriers have more confidence in Courts than in arbitrators, or are concerned about the general lack of appealability. They also may question the desirability of having all cargo claims decided by arbitration if there is a provision in the Conditions of Contract requiring the arbitration of all claims. One respected legal expert has offered the view that for cargo cases, involving a limited amount of damages, say, claims of \$10,000 or less arbitrator's fees could be \$5,000 or more at the outset. Accordingly, he sees no advantage in arbitrating such claims if the costs of arbitration will exceed \$5,000. However, in the view of the writer, litigation costs in the United States are likely to exceed \$5,000 at a very early stage when interrogatories and depositions take place. Nevertheless, it is no doubt correct that arbitration of claims under \$10,000 offer little economic advantage.

It has been generally believed that arbitration is less expensive than litigation, especially in disputes involving claims over \$200,000, but in recent years arbitration has become expensive, especially with three arbitrators and with the trend toward greater discovery in arbitration. Nevertheless, for international commercial disputes, arbitration has been the favored method of dispute resolution and arbitration is mandated under several claims treaties.

All things considered, arbitration of all international cargo claims, in the opinion of the writer, will prove cost effective and beneficial to carriers and shippers alike, if arbitration is limited to one arbitrator and arbitrators are selected from an industry list of persons knowledgeable about the Conventions with a standard fee structure. The list should contain arbitrators nominated by any sector of the industry, and arbitration rules should be established calling for expedited handling.

Arbitration clauses in a carrier's conditions of carriage for cargo, carefully drafted to conform with the Conventions is a change which will benefit carriers. IATA carrier members are restricted from modifying changes in the air waybill itself which in essence constitutes the Conditions of Contract. However, a carrier, including IATA members, can provide for arbitration in its Conditions of Carriage, which, as long as this condition is in writing, will be incorporated into the Carrier's Conditions of Contract. Such inclusion will satisfy the requirements of the Conventions. It is likely that some IATA carriers will opt for arbitration and some will not. If there are concerns, the industry is well advised to start a pilot program of arbitrating cargo claims.

Thomas J. Whalen