

**AN ADMIRALTY LAWYER'S COMMENTS ON RECENT DEVELOPMENTS  
CONCERNING THE MONTREAL CONVENTION AND AIR  
FREIGHT FORWARDERS SEEKING  
INDEMNIFICATION FROM AIR CARRIERS**

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Air cargo is a \$50 billion business that transports 35% of the value of goods traded internationally and is a critical part of the airline business.<sup>1</sup> One of the key players in the air cargo industry is the freight forwarder. An air freight forwarder in international transportation is considered an indirect carrier that receives freight from a cargo shipper under its own tariff, consolidates the shipment, and then tenders the shipment to a direct airline carrier for carriage.

The case of *Chubb Insurance Company of Europe S.A. vs. Menlo Worldwide Forwarding, Inc.*,<sup>2</sup> appealed from the United States District Court for the Central District of California to the Ninth Circuit, raises a frequently occurring issue of importance to those engaged as freight forwarders in air cargo shipments to and from the United States. Is Article 35 of the Montreal Convention<sup>3</sup> (providing that the rights to damages shall be extinguished if an action is not brought within a period of two years) applicable to indemnity actions by air freight forwarder defendants against third-party air carriers? If the answer is yes, it could cause a potential time bar problem for forwarders when pursuing indemnity actions against third-party defendants. On February 10, 2011, the United States Court of Appeals for the Ninth Circuit eliminated this potential problem for the freight forwarding industry by declaring that the plain language of the Montreal

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<sup>1</sup> [www.iata.org/whatwedo/cargo](http://www.iata.org/whatwedo/cargo)

<sup>2</sup> 2011 U.S. App. Lexis 2492

<sup>3</sup> S. Treaty Doc. No. 106-45, 1999 WL 33292734

Convention makes clear that actions for indemnification are not subject to Article 35's two year statute of limitations.

The ramifications of this opinion may extend beyond the Ninth Circuit and perhaps even beyond the borders of the United States. To appreciate the complexity and importance of the potential time bar problem facing the air freight forwarding industry, it is necessary to examine the background of the Montreal Convention as well as the specific facts of the *Chubb* case.

### **THE MONTREAL CONVENTION**

The Montreal Convention is an outgrowth of the Warsaw Convention<sup>4</sup> and is designed to establish worldwide uniformity in liability rules governing air carriage of persons, baggage and cargo for compensation between two countries which are parties to it. The United States became subject to the Convention on November 4, 2003.

In 1929, when commercial aviation was in its infancy, delegates from thirty three nations met in Warsaw, Poland to establish uniform laws for claims arising out of international aviation accidents and to limit the liability of the emerging airline industry. Warsaw limited air carrier liability for cargo damage to \$9.07 per pound, or \$20.00 per kilo. These limitations could be voided if the airline's willful misconduct caused the loss.

The time limit for filing suit under Article 29 of the Warsaw Convention is two years. Over the years, the Warsaw Convention was amended or supplemented by seven subsequent conventions and protocols. However, not all signatories to the original Warsaw Convention ratified all amendments. Furthermore, some of the protocols were not widely adopted. This created a complicated system for determining which version of the Warsaw Convention should apply when assessing air carrier liability.

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<sup>4</sup> 49 Stat. 3000, T.S. No. 876, (1934)

In May of 1999, the contracting states of the International Civil Aviation Organization met in Montreal to consider a new convention intended to modernize and replace the various liability regimes then existing under the Warsaw system. The Montreal Convention introduced a number of improvements to the Warsaw Convention. The improvements included: increasing liability limits; modernizing transportation documents; authorizing indemnity actions against third-parties; mandating adequate insurance coverage; and clarifying rules on the respective liability of contractual carriers (air freight forwarders) and actual carriers (airlines).

However, the Montreal Convention uses some of the same language as the Warsaw Convention. For example, Article 35 of the Montreal Convention states in relevant part:

The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

Article 35 is nearly identical to the two year suit time limitation provided in Article 29 of the Warsaw Convention. Case law on the Montreal Convention is limited. However, the majority of lower court cases that have addressed the two year period of limitation under the Warsaw Convention hold that time limitation constitutes a condition precedent which acts as an absolute bar to bringing suit, including third-party actions for indemnity that are not commenced within two years.

### **THE CHUBB CASE**

In *Chubb Ins. Co. of Europe S.A. v. Menlo Worldwide Forwarding, Inc.*,<sup>5</sup> a New Zealand turbine engine owner contracted with an air freight forwarder, Menlo Worldwide

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<sup>5</sup> D.C. No. CV-06-07267-DSF

Forwarding Inc. (“Menlo”), to ship an engine from New Zealand to the United States. The forwarder, in turn, contracted with an air carrier, Qantas Airways, Ltd. (the “air carrier”), to perform the actual carriage of the engine to destination. The engine arrived at Los Angeles in damaged condition. The engine’s owner subsequently filed a claim with its insurer, Chubb, for the resulting loss. Chubb then paid the engine owner \$119,666 on its insurance claim.

Two years from the date of the shipment, Chubb brought a subrogation suit under the Montreal Convention in a California federal district court against Menlo’s successor-in-interest, UPS Supply Chain Solutions, Inc., (the “forwarder”); seeking to recover the money it had paid to the engine owner. The parties eventually reached a settlement wherein the forwarder agreed to pay Chubb \$80,000 on its subrogation claim.

### **THE THIRD – PARTY ACTION**

Almost a year later, the forwarder filed a third-party complaint against the air carrier, seeking indemnification<sup>6</sup> for the \$80,000 it had paid Chubb. The forwarder claimed that it was not way responsible for the damages alleged in Chubb’s action. Rather, the forwarder maintained that the engine was damaged as a direct result of the negligence of the air carrier. The air carrier then moved to dismiss the forwarder’s third-party indemnity action as being time-barred under the two-year limitation period<sup>7</sup> in the Montreal Convention.

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<sup>6</sup> Indemnification is the shifting of the entire loss from one party to another and applies generally when one party, by virtue of its relationship with the injured person, has to answer in damages for wrong doing which is the fault of another.

<sup>7</sup> Under federal common law in the United States, a statute of limitation usually will not commence to run against a defendant (third-party plaintiff) in favor of the third-party defendant until a judgment had been entered against the defendant or the defendant has paid the judgment.

The forwarder argued that applying the two-year limitation to indemnity actions can lead to inequitable results, where only one defendant is sued just before or on the last day of the two-year limitation period. In such a case, the original defendant loses its ability to seek indemnity from a potentially liable second defendant.

The federal district court rejected the argument and stated in relevant part:

This may be true, but it was the intent of the drafters of the language now incorporated in Article 35 to promote uniformity over individual equity.

The court then dismissed the third-party complaint, reasoning that under Article 35 of the Montreal Convention, the forwarder's claims against the air carrier were timely only if brought within two years of the time when the damaged engine arrived at destination. Because the claims were not brought within that period, the federal district court held that they were barred and dismissed the forwarder's third-party complaint with prejudice. Thereafter, the forwarder timely appealed.

### **THE APPEAL**

The parties filed their respective appellate briefs and the matter was argued and submitted to the Ninth Circuit Court of Appeals on September 2, 2010 under the caption *UPS Supply Chain Solutions v. Quantas Airlines Ltd.* Three weeks later, the appellate court, in a most unusual move, issued an order inviting briefs from *Amici Curiae* (friends of the court) to address, among other things, the broad question of whether Article 35 of the Montreal Convention (providing that the right to damages shall be extinguished if any action is not brought within a period of two years) is applicable to indemnity actions brought by freight forwarder defendants against third-party air carriers.

*Amici* briefs were timely filed by prominent practitioners and aviation law scholars, as well as by airline industry trade associations, from places as diverse as

Argentina, New Zealand and China. Suffice it to say, the Article 35 issue was well briefed by all concerned.

One of the arguments advanced by the freight forwarder against the inequity accepted by the lower federal district court was to apply admiralty law concepts to the Montreal Convention. This had been done in the past to cure similar inequities that had occurred in the international transportation of goods by sea.

The maritime equivalent of the Montreal Convention for ocean transport is the International Convention of Unification of Certain Rules of Law Relating to Bills of Lading, dated from 1924. This convention was modified and enacted domestically in the United States as the Carriage of Goods by Sea Act (“COGSA”) in 1936.<sup>8</sup> COGSA, unlike the Montreal Convention, has a limitation period of one year for bringing suit instead of two. The United States Constitution mandates admiralty jurisdiction for most maritime matters and provides for its administration. For example, the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions apply to maritime attachment and garnishment remedies, as well as actions in rem. The same is not true for aviation law, which is considered a matter of international law subject to international treaties.

Unlike the Montreal Convention, COGSA is silent on the issue of indemnity actions. However, admiralty law decisions interpreting COGSA consistently do not apply its one year statute of limitation provision to third-party actions. In admiralty law, indemnity does not arise until the indemnitee has to make payment for the loss. When

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<sup>8</sup> 46 U.S.C. § 30701.

this happens, the maritime doctrine of laches<sup>9</sup> applies and governs the proper time for bringing suit.

In the instant case, the freight forwarder argued the admiralty principle that the claim over does not come into being until judgment is entered or payment is made in the underlying action.<sup>10</sup> Not surprisingly, the air carrier argued that the forwarder's attempt to rely on precedent established under COGSA was unpersuasive and should be rejected. In its view, COGSA had no applicability or relevance to cases arising out of carriage by air, which fall exclusively within the scope of the Montreal Convention. Furthermore, COGSA was wholly inapplicable because the international treaty underlying COGSA was specifically modified by Congress to favor shippers over ship owners in the context of ocean cargo shipments to and from the United States.

#### **THE OPINION**

In rendering its opinion on February 10, 2011, the Ninth Circuit thoroughly analyzed the Montreal Convention and stressed that the interpretation of a treaty begins with its text, and where the text is clear, a court has no power to insert an amendment to same. By its terms, the appeals court found Article 35 extinguishes only a single right - the "right to damages." Thus, unless the forwarder's claims against the air carrier assert such a right, they are not affected by Article 35.

It was plain to the court that the engine owner's claim against the forwarder asserted a right for damages. However, it was equally clear that the forwarder's third-

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<sup>9</sup> Unlike the absolute time bar provisions in statutes of limitation, the application of laches to maritime non-statutory claims requires considering the prejudice to defendants resulting from inexcusable delays by plaintiffs for not bringing suits more promptly.

<sup>10</sup> Under Rule 14 (c) of the Federal Rules of Civil Procedure, if a plaintiff asserts an admiralty or maritime claim, the defendant may, as a third-party plaintiff, bring in a third-party defendant who may be wholly or partly liable—either to the plaintiff or to the third-party plaintiff—for remedy over, contribution, or otherwise on account of the same transaction or occurrence.

party action against air carrier did not. The forwarder was not seeking compensation for damages sustained to the engine; rather, it sought indemnification from the air carrier for compensation it had already paid to the engine owner.

While the Montreal Convention does not create a cause of action for indemnification among carriers, it does not preclude such actions as may be available under local law. The Convention refers to these local law causes of action for indemnification as a “right of recourse,” not a “right of damages.”

Article 37 of the Convention, entitled “right of recourse against third-parties,” provides:

Nothing in this convention shall prejudice whether a person liable for damages in accordance with its provisions has a right of recourse against any other person.

In other words, because an action between carriers for indemnification is premised on the “right of recourse,” rather than the “right of damages,” Article 35’s two year time bar statute does not apply.

The appeals court also rejected the air carrier’s argument that because Article 35 of the Montreal Convention is substantially identical to Article 29 of the Warsaw Convention the court must follow pre-Montreal Convention U.S. case law interpreting Article 29. Instead, the Ninth Circuit was guided by a 1978 Ontario Supreme Court of Canada’s ruling in *Connaught Laboratories Ltd. v. Air Canada*<sup>11</sup> that held Article 29 of the Warsaw Convention does not apply to suits brought by one air carrier against another. The Ninth Circuit then overturned the federal district court’s decision and remanded the case for trial.

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<sup>11</sup> 23 O.R. 2d 176 (Can. Ont. Sup. Ct. J.)

It is interesting to note that the Ninth Circuit never mentioned admiralty law in its opinion. Did the admiralty law principles argued by the air freight forwarder have any bearing on the court's decision? It is impossible to answer this question. However, the Ninth Circuit has definitely evened the playing field for air freight forwarders when it comes to third-party indemnity claims. Aviation law is now on an even keel with admiralty law in this area.