New York Federal Court Holds That the Montreal Convention Does Not Allow a Party to Recover Inspection Costs Where Cargo Suffers No Physical Damage

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In *Indemnity Ins. Co. of N. Am. v. Agility Logistics Corp.*, 2018 U.S. Dist. LEXIS 104179 (S.D.N.Y.), the United States District Court for the Southern District of New York considered the "novel question" of whether the Montreal Convention allows recovery of inspection costs when there is no physical damage to the cargo at issue. Although acknowledging that its holding was, arguably, absurd, the court held that, based on the plain language of Article 18 of the Montreal Convention, the subrogating insurer could not recover the inspection costs its insured incurred.

As set forth in *Indemnity Ins.*, GE Capital Aviation Services (GE Capital) sent an engine shipment request to Agility Logistics Corporation (Agility), asking that Agility arrange for the shipping of a refurbished engine from LCI, a Florida company, to Lufthansa Technic (Lufthansa), a company located in Alzey, Germany. Although the air waybill noted that all ground transportation would be "full air ride," the tractor of the tractor-trailer that Agility's German affiliate loaded the engine onto at the Frankfort airport did not have air-ride suspension. Thus, when Lufthansa received the engine it took the engine apart to inspect it for transportation-related defects. Although there was no evidence that the improper transportation method caused damage to the engine, Lufthansa billed GE Capital $177,450 for the cost of the inspection. Indemnity Insurance Company of North America (Indemnity) paid GE Capital $127,450.07 of the inspection costs and sued Agility to recover its payment.

In response to Agility's motion for summary judgment, the court addressed, among other things, whether: 1) the Montreal Convention claim gave the court subject matter jurisdiction, and 2) in the absence of physical damage, the plaintiff could rely on the terms of the Montreal Convention to recover the inspection costs it paid.

Article 18 of the Montreal Convention imposes liability on air carriers for damage sustained during carriage by air "in the event of the destruction or loss of, or damage to" cargo. In the Second Circuit, the phrase "carriage by air" includes things that happen inside the airport's borders. Thus, although the claim at issue, arguably, relates to improper *truck* transportation, the court held that, because Agility's German affiliate loaded the engine onto a truck within the airport's borders, the court had jurisdiction over Indemnity's Montreal Convention-based claim.

Discussing whether the Montreal Convention covers inspection costs in the absence of actual harm, the court, applying the plain language of Article 18, held that the Montreal Convention does not allow recovery if the sole harm at issue is the cost of inspecting cargo that was not destroyed, lost or damaged. Although recognizing that its holding was "discomfiting" because Agility did not transport the engine properly, the court determined that it could not work around "the Convention's clear text." Thus, the court granted summary judgment in Agility's favor.

The court's analysis shows that, when analyzing the impact of a statute, subrogation professionals should be aware that courts will, when clear, follow and apply the statute's plain text. Courts, generally, will apply a statute's plain text even if the result is not satisfying to the court. In this case, although the court followed what it found to be the Montreal Convention's "clear text," it noted that its application of the text, arguably, leads to an absurd result: if an inspection reveals no damage, the carrier would owe nothing, but if an

inspection reveals "one loose screw, the carrier might be liable for the entire inspection bill."

Given the court's dissatisfaction with respect to its ruling, it is not surprising that Indemnity appealed the decision to the Second Circuit. *See Indemnity Ins. of N. Am. v. Agility Logistics Corp.*, No. 18-2131 (2nd Cir.) The Second Circuit will apply a *de novo* review to determine, for itself, how to apply the language of Article 18 of the Montreal Convention.