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Airline Baggage Claims: A Tour Through the Legal Minefield

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AIRLINE BAGGAGE CLAIMS: A TOUR THROUGH THE LEGAL MINEFIELD

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I. INTRODUCTION

Identification and application of the correct legal principles pertaining to a particular airline baggage claim is a process similar to passage through a minefield. One mis-step may result in dire consequences.

The purpose of this article is to increase awareness that the *simple* airline baggage claim is anything but that, to provide an overview of the analysis which should be applied to airline baggage claims, and to provide the reigning judicial authority with a reference tool for many of the issues which arise in airline baggage claims.

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II. Is the Warsaw Convention Applicable?

In analyzing an airline baggage claim, the first determination to be made is whether the Warsaw Convention[1] (hereinafter Convention) is applicable to the claim.

The Convention is a multilateral treaty which the United States adhered to in 1934.[2] It was intended to act as an international uniform law. Its purpose was 1) to create uniform rules relating to air transportation documents, and 2) to limit a carrier's liability. In limiting the carrier's liability, the Convention exacts a *quid pro quo* by establishing a presumption of the carrier's liability, thereby shifting the burden of proof from the passenger to the carrier.[3]

As a treaty, the Convention is the supreme law of the land and pre-empts local law where it applies.[4] Where it does not apply, it leaves liability to be established according to traditional common law rules.[5] Furthermore, the Convention has withstood attacks upon its constitutionality alleging violations of equal protection and due process.[6]

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1. Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 1502 (1976).

2. *See* 73d Congress, 2d Sess., 78 Cong. Rec. 11,582, June 15, 1934; 49 Stat. 3000, 3013; *see also* Chan v. Korean Airlines, 490 U.S. 122 (1989); Air France v. Saks, 470 U.S. 392 (1985); Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, *reh'g denied*, 467 U.S. 1231 (1984). The governing text of the Convention is in the French language. *See Air France*, 470 U.S. at 397.

3. *Trans World Airlines*, 466 U.S. at 247; *In re* Aircrash in Bali, Indonesia, 684 F.2d 1301 (9th Cir. 1982); Reed v. Wiser, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); Block v. Compagnie Nationale Air France, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 95 (1968).

4. U.S. Const. art. VI; United States v. Pink, 315 U.S. 203, 230-31 (1941); Husserl v. Swiss Air Transport, 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd on opinion below*, 485 F.2d 1240 (2d Cir. 1973); Burnett v. Trans World Airlines, 368 F. Supp. 1152, 1155 (D. N.M. 1973); Hepp v. United Airlines, 36 Colo. App. 350, 540 P.2d 1141 (1975); Garcia v. Pan Am. Airways, 269 A.D. 287, 55 N.Y.S.2d 317 (1945); Wyman & Bartlett v. Pan Am. World Airways, 181 Misc. 963, 43 N.Y.S.2d 420 (N.Y. Sup. Ct.), *aff'd without opinion*, 267 A.D. 947, 48 N.Y.S.2d 459, *aff'd mem.*, 293 N.Y. 878, 59 N.E.2d 785 (1944), *cert. denied*, 324 U.S. 882 (1945).

5. Abramson v. Japan Airlines Co., 739 F.2d 130 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985); Hernandez v. Air France, 545 F.2d 279 (1st Cir. 1976); *Husserl*, 351 F. Supp. at 706; Mertz v. K.L.M. Royal Dutch Airlines, 15 Avi. (CCH) ¶ 17,843 (D. Mass. 1979); Fischer v. Northwest Airlines, 623 F. Supp. 1064 (N.D. Ill. 1985); North Trust Co. v. American Airlines, 142 Ill. App. 3d 21, 491 N.E.2d 417 (1985).

6. *In re* Aircrash in Bali, Indonesia, 684 F.2d at 1308; Lee v. China Airlines, Ltd., 669 F. Supp. 979 (C.D. Cal. 1987); Indemnity Ins. Co. v. Pan Am. Airways, 58 F. Supp. 338 (S.D.N.Y. 1944); People *Ex Rel* Compagnie Nationale v. Gilberto, 74 Ill. 2d 90, 383 N.E.2d 977 (1978), *cert. denied*, 441 U.S. 932 (1979); Duff v. Varig Airlines, 185 Ill. App. 3d 992, 542 N.E.2d 69 (1989).

It is not uncommon to see passengers and air carriers taking opposite positions on the application of the Convention in particular cases based upon the benefit to be gained.[7] Most frequently in baggage claims, it is the air carrier who seeks application of the Convention in order to gain the protection of its limitation of liability or its jurisdictional and time limitations.

The Convention applies to "all international transportation of . . . baggage . . . performed by aircraft for hire."[8] The first issue to be addressed in determining the application of the Convention to a baggage claim is whether the contract of transportation was one for "international transportation."

The term "international transportation" is defined in Article 1, paragraph 2, of the Convention to be

> any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there is a break in the transportation or a transshipment, are situated either within the territory of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate, or authority of another power, even though that power is not a party to this convention.

The term "High Contracting Party" refers to nations which are either signatories of the Convention or nations which have adhered to it.[9]

The applicability of the Convention is unquestionably premised upon a contract.[10] It is recognized that where the contract provides

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7. *See, e.g.*, Hernandez v. Aeronaves de Mexico, 583 F. Supp. 331 (N.D. Cal. 1984) (passenger seeking to apply Convention so as to obtain benefit of presumption of liability); Adamsons v. American Airlines, 16 Avi. (CCH) ¶ 17,195 (N.Y. Sup Ct. 1980), *aff'd*, 89 A.D.2d 785, 449 N.Y.S.2d 487 (1982) (carrier seeking Convention application to obtain protection of monetary limitation on recovery).

8. Convention, art. 1, ¶ 1, 49 Stat. 3000, 3001, official American translation at 3014. The Convention applies to charter flights which otherwise come within the definition of "international transportation," *Block*, 386 F.2d. at 353.

The Convention applies to international transportation of passengers and goods as well but this article is limited in scope to a discussion of its application to baggage.

9. Convention, arts. 37 & 38, 49 Stat. 3000, 3008-3009, official American translation at 3022.

10. Block v. Compagnie Nationale Air France, 386 F.2d 323 (8th Cir. 1967), *cert. denied*, 392 U.S. 95 (1968); P.T. Airfast Serv., Indonesia v. Superior Court of Siskiyou County, 139 Cal. App. 3d 162, 188 Cal. Rptr. 628 (1983).

In the context of baggage the uniform document required is identified in art. 4 as a "baggage check." Baggage is accepted for transportation only in conjunction with and incidental to the

for transportation between certain designated terminals, the Convention applies to the transportation.[11]

Application of the Convention is frequently placed in issue in circumstances where the allegation is made that the loss of, damage to, or delay of baggage occurred on a *domestic* flight which either preceded or followed the actual international flight between two countries. The argument against Convention application in such circumstances is typically either that any international transportation was performed pursuant to a contract of transportation separate from the *domestic* flight on which the loss, damage, or delay occurred, or that the departure and *destination* of the flight on which the loss, damage, or delay occurred was *domestic*.

Article 1, paragraph 3, of the Convention states that

> transportation to be performed by several successive air carriers shall be deemed, for the purpose of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party.

The Convention is applicable to domestic portions of a contract for international transportation *if* the transportation was "regarded by the parties as a single operation." Both parties must regard the domes-

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carriage of passengers. Cantor v. Piedmont Aviation, 474 A.2d 839 (D.C. 1984); Cohen v. Varig Airlines, 85 Misc. 2d 653, 380 N.Y.S.2d 450 (N.Y. City Ct. 1975), *aff'd as modified*, 88 Misc. 2d 998, 390 N.Y.S.2d 515 (App. Term 1976), *aff'd as modified*, 62 A.D.2d 324, 405 N.Y.S.2d 44 (1978). Modern day ticket stock now satisfies the requirement of a passenger ticket (art. 3) and a baggage check (art. 4) by combining the two into one document which although commonly referred to as the passenger's ticket is labeled "Passenger Ticket & Baggage Check." *See* Wexler v. Eastern Airlines, 18 Avi. (CCH) ¶ 17,155 (D.C. Super. Ct. 1982); Hill v. Eastern Airlines, 103 Misc. 2d 306, 425 N.Y.S.2d 715 (N.Y. City Ct. 1980); Collins v. British Airways Bd., [1982] 2 W.L.R. 165 (C.A.). A distinction must be made between this document, which is intended to comply with the Convention, and the *claim check* which is the numbered check or stub issued to facilitate identification and return of checked baggage. This *claim check* typically bears the statement, "This is not the baggage check described in Article 4 of the Warsaw Convention."

11. Duff v. Varig Airlines, 185 Ill. App. 3d 992, 542 N.E.2d 69 (1989); Varkonyi v. S.A. Empress de Viacao Airea Rio Grandense, 71 Misc. 2d 607, 336 N.Y.S.2d 193 (N.Y. Sup. Ct. 1972).

tic flight as part of a single international trip.[12] The term *destination* as used in Article 1, paragraph 2, of the Convention is not the destination of a particular flight that comprises part of the contract of carriage, but is the *ultimate* destination when viewing the contract as a whole.[13]

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12. Lemly v. Trans World Airlines, 807 F.2d 26 (2d Cir. 1986) (No contract for international transportation was formed. Separate tickets were purchased on separate days in separate transactions. The international leg was on a different airline from the domestic flight and there was a day between arrival of the domestic flight and departure on the international leg. Trans World Airlines, serving as the domestic carrier, had no knowledge of the plaintiff's international travel plans.); Petrire v. Spantax, S.A., 756 F.2d 263 (2d Cir. 1985), *aff'g*, 577 F. Supp. 1013 (E.D.N.Y.) (There was a single contract for international transportation where two ticket booklets were issued sequentially at the same time and the same place for round trip travel to be interrupted for no more than a five-day stop over. Determining the matter on the basis of when and where the booklets were issued and the nature of the journey contemplated accords with the scheme of the Treaty.), *cert. denied*, 474 U.S. 846 (1985); Hernandez v. Aeronaves de Mexico, 583 F. Supp. 331 (N.D. Cal. 1984) (There was no single contract where two separate round trip tickets purchased from two separate airlines, one for travel in U.S. and one for travel in Mexico. Actual crossing of border was by motor vehicle.); Vergara v. Aeroflot "Soviet Airlines," 390 F. Supp. 1266 (D. Neb. 1975) (There was a single contract for international transportation even though there were six ticket booklets for a round the world trip with various stopovers. The tickets were issued at the same time and place.); *P.T. Airfast Serv., Indonesia*, 139 Cal. App. 3d at 169, 188 Cal. Rptr. at 633-34 (No contract for international transportation where passenger obtains contract for transportation from the territory of a High Contracting Party to the territory of a non-contracting party even though passenger held unilateral expectation that he would later purchase a return contract — which would then bring the transportation within the definition of art. 1, ¶ 2.); Duff v. Trans World Airlines, 173 Ill. App. 3d 266, 527 N.E.2d 498 (1988) (domestic flight governed by Convention notwithstanding plaintiff's denial of intent); Egan v. Kollsman Instrument Corp., 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967) (The passenger had a round trip ticket from New York to Vancouver back to New York with Northwest Airlines. Return flight cancelled due to weather. Passenger took bus to Seattle, flew from Seattle to Chicago on Northwest and from New York on American Airlines. Plane crashed on landing in New York. Return travel was performed under original contract and was governed by Warsaw.), *cert. denied*, 390 U.S. 1039 (1968); Stratton v. Trans Canada Airlines, 27 D.L.R. 2d 670 (Brit. Col. Sup. Ct. 1961), *appeal dismissed*, 32 D.L.R. 2d 736 (Brit. Col. Sup. Ct. 1962) (There was no contract for international transportation where a second ticket booklet was purchased six weeks after the first, at a different city, and for travel to a different destination than that contemplated when the first booklet was issued.). *See also* Nahm v. SCAC Transport, 167 Ill. App. 3rd 971, 522 N.E.2d 581 (1987).

13. Burdell v. Canadian Pac. Airways, 11 Avi. (CCH) ¶ 17,351 (Ill. Cir. Ct. 1969) (destination determined not by a leg of the trip but by the entire contract of carriage); Grien v. Imperial Airways, [1937] 1 K.B. 50 (C.A.) (Every contract of carriage has one place of departure and one place of destination. Reference is made to journeys, not to flights, and not to parts of journeys, but to carriage performed under one, or in cases covered by art. 1, ¶ 3, more than one contract of carriage. The contract, or under art. 1, ¶ 3, the series of contracts, is so to speak, the unit to which attention is to be paid in considering whether the carriage to be performed under it is international or not.); *see also* United Int'l Stables v. Pacific W. Airlines, 68 W.W.R. 317 (Sup. Ct. Brit. Col. 1969).

The second issue addressed in determining the application of the Convention to a baggage claim is whether the nature of the claim is, in reality, one for loss of, damage to, or delay of baggage. Article 18, paragraph 1, of the Convention states "the carrier shall be liable for damage sustained in the event of the destruction or loss of, or the damage to, any checked baggage . . . if the occurrence which caused the damage so sustained took place during the transportation by air."[14] Article 19 of the Convention states that "the carrier shall be liable for damage occasioned by delay in the transportation by air of . . . baggage."[15] Articles 18 and 19 of the Convention create causes of action and, where applicable, are the exclusive remedies for loss of, damage to, or delay of baggage.[16] The Convention is inapplicable to a baggage claim, however, unless the nature of the damages sought is within the scope of loss, damage, or delay of baggage in the transportation by air.[17]

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14. Art. 18, ¶ 1, of the Convention applies to "checked baggage." The Convention also recognizes the existence of "small personal objects of which the passenger takes charge himself." *See* art. 4, ¶ 4, and art. 22, ¶ 3. There are no reported decisions dealing with the precise manner in which the Convention's rules would apply in an action for the loss of, damage to, or delay of this category of object. *See* Reukema, *Hand Luggage — Passengers Love It, The Airlines Hate It, and the Warsaw Convention Is Not Clear on How to Handle It*, 12 ANNALS OF AIR & SPACE LAW 119 (1987).

15. Delay is a breach of the contractual obligation as to the date of delivery. That obligation may be express or it may be the implied obligation to deliver within a reasonable time. Blaw-Knox Constr. Equip. Co. v. Alia: The Royal Jordanian Airline, 21 Avi. (CCH) ¶ 17,450 (N.D. Ill. 1988) (where contract does not set a specific time for completion, the court will imply a reasonable time); Panalpina Int'l Transp. v. Densil Underwear, [1981] 1 Lloyds Rep. 187 (16-day delay in shipment of goods was a breach of the obligation to deliver within a reasonable time); *see also* Jahanger v. Purolator Sky Courier, 615 F. Supp. 29 (E.D. Pa. 1985) (one-day weather caused delay in delivery of goods was not "delay" for which liability could be imposed under art. 19).

Current ticket stock obligates the carrier to use its "best efforts" to carry the passenger and baggage with "reasonable dispatch." The carrier does not guarantee timetables, schedules or connections. Wilensky v. Olympic Airways S.A., 73 F.R.D. 473 (E.D. Pa. 1977). *See also Jahanger*, 615 F. Supp. at 32.

16. Boehringer-Mannheim Diagnostics v. Pan Am. World Airways, 737 F.2d 456 (5th Cir. 1984), *cert. denied*, 469 U.S. 1186 (1985) (art. 18); Enayati v. Lufthansa German Airlines, 714 F.2d 75 (9th Cir. 1983) (art. 18); Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 114 (1979) (art. 18); Insurance Co. of North Am. v. Pan Am. World Airways, 20 Avi. (CCH) ¶ 17,245 (E.D. Ill. 1986) (art. 18); Dorizas v. K.L.M. Royal Dutch Airlines, 606 F. Supp. 97 (N.D. Ill. 1984) (art. 18); Harpalani v. Air India, 622 F. Supp. 69 (N.D. Ill. 1985) (art. 19); Newsome v. Trans Int'l Airlines, 492 So. 2d 592 (Ala. 1986) (art. 19).

17. Wogel v. Mexicana Airlines, 821 F.2d 442 (7th Cir. 1987) (Cause of action for discriminatory bumping is not within the scope of "delay in the transportation by air" and is not governed by the Convention.); Reiser v. Meloi World Travel Serv., 18 Avi. (CCH) ¶ 17,208 (S.D.N.Y. 1983) (although labeled fraud by plaintiff, cause of action was covered by art. 19);

The third issue addressed in determining the application of the Convention to a baggage claim is whether the loss of, damage to, or delay of baggage occurred during "transportation by air" as that term is used in Articles 18 and 19 of the Convention. The term "transportation by air" appearing in Article 18, paragraph 1, is defined by Article 18, paragraph 2, to be that period "during which the carrier . . . [is] in charge of the baggage, whether in an airport or on board an aircraft or, in the case of a landing outside an airport, in any place whatsoever."[18] As used in Article 18, paragraph 1, "transportation by air" includes periods of custody or storage prior to or subsequent to the time during which the baggage is on board the aircraft in flight so long as the carrier is "in charge of the baggage . . . in an airport."[19]

In summary, before the Convention will be applicable to a baggage claim, the proponent of Convention application must establish 1) that there was a contract for "international transportation" by an aircraft transportation enterprise, 2) that the nature of the damages is loss of, damage to, or delay of baggage, and 3) that the occurrence which caused the loss, damage, or delay of baggage occurred during "transportation by air."

Hill v. United Airlines, 500 F. Supp. 1048 (D. Kan. 1982) (cause of action for misrepresentation is not within the scope of art. 18 or 19 and therefore is not goverened by the Convention); Brunwasser v. Trans World Airlines, 541 F. Supp. 1338 (W.D. Pa. 1982) (unilateral rescheduling of flight by air carrier which was remote in time and place to actual flight was not within the scope of "delay in the transportation by air." Cause of action based upon art. 19 was dismissed, and plaintiff was left to local law for remedy); Duff v. Trans World Airlines, 173 Ill. App. 3d 266, 527 N.E.2d 498 (1988) (case was covered by art. 19); Rullman v. Pan Am. World Airways, 84 A.D.2d 517, 443 N.Y.S.2d 377 (1981), *reversing*, 15 Avi. (CCH) ¶ 18,522 (N.Y. Sup Ct. 1980) (gravamen of action was not embraceable with delay in transportation by air).

18. Although art. 19 does not specifically define "transportation by air" as used in its text, as does art. 18, there seems no reason to vary the definition applied in art. 19 from that applied in art. 18. *Brunwasser*, 541 F. Supp. at 1344. Also noteworthy is the fact that art. 19 does not restrict its application to "checked" baggage.

19. *See*, Berman v. Trans World Airlines, 101 Misc. 2d 511, 421 N.Y.S.2d 291 (N.Y. Civ. Ct. 1979) in which the court weighed location, control, and activity to determine when the "transportation by air" of the baggage had terminated; *Brunwasser*, 541 F. Supp. at 1344, where same rationale was applied to allegation of delay of passenger. *See also* Hartford Ins. Co. v. Dominicana 23 Avi. (CCH) ¶ 17,155 (D.C. E.D.N.Y. 1990).

See also Victoria Sales Corp. v. Emery Air Freight, 917 F.2d 705 (2d Cir. 1990); Jaycees Patou v. Pier Air Int'l, 714 F. Supp. 81 (S.D.N.Y 1989); Bennett Importing Co. v. Continental Airlines, 21 Avi. (CCH) ¶ 17,917 (D. Mass. 1988); Quantime Corp. v. W.J. Donovan, 21 Avi. (CCH) ¶ 17,367 (D. Mass. 1988); Royal Ins. Co. v. Amerford Air Cargo, 654 F. Supp. 679 (S.D.N.Y. 1987); Magnus Elecs. v. Royal Bank of Canada, 611 F. Supp. 436 (N.D. Ill. 1985); R.R. Salvage v. Japan Freight Consolidators, 556 F. Supp. 124 (E.D.N.Y. 1983); Schmoldt Importing Co. v. Pan Am. World Airways, 767 P.2d 411 (Okla. 1989); Eve Boutique Imports v. Seaboard World Airlines, 10 Avi. (CCH) ¶ 17,703 (N.Y. Sup. Ct. 1968) (for decisions interpreting "transportation by air" with respect to goods).

III. THE "WARSAW" BAGGAGE CLAIM

If it is determined that a baggage claim is for loss of, damage to, or delay of baggage which occurred during international transportation by air and therefore is governed by the Convention, the search for the substantive provisions which govern the claim does not end with the text of the Convention.

A. *Governing Regulation and Contractual Terms*

Although the Convention, when applied, provides the exclusive remedy for loss of, damage to, or delay of baggage in the transportation by air, it is not the exclusive source of regulation.[20] In the United States, the rights and liabilities of parties to a baggage claim to which the Convention is applicable are governed by the Convention, and to the extent not in conflict with the Convention, in order of primacy, by Acts of Congress,[21] federal regulation promulgated pursuant to Acts of Congress,[22] and the contract of transportation.[23]

The Convention is not, itself, a contract. In the context of the Convention, the contract is whatever the courts of the signatory nations have construed that contract to be in their respective nations. In the United States that contract consists of the "Passenger Ticket and Baggage Check" and *filed* tariffs.[24] For example, oral agreements

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20. Convention, art. 33, 49 Stat. 3000, 3008, official American translation at 3022. Article 33 specifically recognizes the right of a carrier to make regulations which do not conflict with the Convention. *See also Brunwasser*, 541 F. Supp. at 1341.

21. Federal Aviation Act of 1958, 72 Stat. 731 (codified as amended at 49 U.S.C. § 1301 (1982 & Supp V 1987)).

22. *See* 14 C.F.R.; *see also* Deutsche Lufthansa Aktiengesellschaft v. Civil Aeronautics Bd., 479 F.2d 912 (D.C. Cir. 1973) (14 C.F.R. § 221.176(b) pertaining to notice of baggage liability limitations, not only did not conflict with the Convention but gave substance to its provisions).

23. *See Brunwasser*, 541 F. Supp. at 1341; Eastern Airlines v. Williamson, 211 So. 2d 912 (Ala. 1968). Even if the Convention's status as a treaty were not sufficient to give it supremacy, the "Conditions of Contract" printed on standard ticket forms typically expressly state that the Convention takes precedence over such conditions and any tariffs. *See* Cohen v. Varig Airlines, 85 Misc. 2d 653, 380 N.Y.S.2d 450 (N.Y. Civ. Ct. 1975), *aff'd as modified*, 88 Misc. 2d 998, 390 N.Y.S.2d 515 (App. Term 1976), *aff'd as modified*, 62 A.D.2d 324, 405 N.Y.S.2d 44 (1978); *see also* Cenci v. Mall Airways, 140 Misc. 2d 907, 531 N.Y.S.2d 743 (N.Y. City Ct. 1988); McMurrary v. Capitol Int'l Airways, 102 Misc. 2d 720, 424 N.Y.S.2d 88 (N.Y. Civ. Ct. 1980).

24. Air carriers performing "foreign air transportation," which includes among other things air transportation coming within the definition of "international transportation," are required to file with the Department of Transportation "tariffs" showing all rates, fares, and charges for air transportation between points served. The tariffs must also show all classifications, rules, regulations, practices, and services in connection with such air transportation. *See* 49 U.S.C. § 1373(a); 14 C.F.R. § 221.3(a). Airline deregulation did not affect the requirement of air carriers

or representations by a carrier's agent are unenforceable if inconsistent with tariffs on file with the Department of Transportation.[25] Furthermore, the scope and meaning of the Convention's provisions are matters of federal law and federal treaty interpretation. While decisions of state courts may be persuasive, they are not binding on federal courts.[26]

B. *The Proper Plaintiff and the Proper Defendant*

The Convention has no specific article identifying or limiting the persons who may bring an action for loss of, damage to, or delay of baggage.[27] Article 4 requires delivery of a baggage check to the "passenger." Article 22, paragraph 2, limits the carrier's liability for loss, damage, or delay of baggage unless the "consignor" has made out a special declaration of value. Article 22, paragraph 3, limits the liability of the carrier for objects in the charge of the "passenger" to a certain sum "per passenger." Article 26, paragraph 1, requires that written notice of damage or delay of baggage be given to the carrier by "the person entitled to delivery" of the baggage. Article 30, paragraph 3, states that, in regards to baggage in the case of successive carriers, the "passenger" shall have a right of action against the first carrier and the "passenger . . . who is entitled to delivery" shall have a right

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performing foreign air transportation to file tariffs. American Airlines v. Platinum World Travel, 717 F. Supp. 1454 (D. Utah 1989). A *filed* tariff has the force and effect of a statute and binds both the carrier and the passenger regardless of a passenger's actual lack of knowledge or assent. St. Paul Ins. Co. v. Venezuelan Int'l Airways, 807 F.2d 1543 (11th Cir. 1987); North Am. Phillips Corp. v. Emery Air Freight Corp., 579 F.2d 229 (2d Cir. 1978); Schiff v. Emery Air Freight Corp., 332 F. Supp. 1057 (D. Mass. 1971); Mustard v. Eastern Airlines, 338 Mass. 674 (1959). The *ticket* evidences the contract. Block v. Compagnie Nationale Air France, 386 F.2d 323, 336 (5th Cir. 1967), *cert. denied*, 392 U.S. 95 (1968); *Brunwasser*, 541 F. Supp. at 1341; Tolson V. Pan Am. World Airways, 399 F. Supp. 335 (S.D. Tex. 1975); Duff v. Varig Airlines, 185 Ill. App. 3d 992, 542 N.E.2d 69 (1989). The provisions of a *filed* tariff take precedence over any terms appearing on the transportation document. *St. Paul Ins. Co.*, 807 F.2d at 1547; Pick v. Lufthansa German Airlines, 48 Misc. 2d 442, 265 N.Y.S.2d 63 (N.Y. Civ. Ct. 1965).

25. Clemente v. Phillippine Airlines, 614 F. Supp. 1196 (S.D.N.Y. 1985); Jonas v. Braniff Int'l Airways, 11 Avi. (CCH) ¶ 17,801 (E.D.N.Y. 1970); Wittenberg v. Eastern Airlines, 126 F. Supp. 459 (E.D.S.C. 1954); Goodman v. National Airlines, 201 A.2d 877 (D.C. 1964); Trinidad & Tobago United Cultural Ass'n v. Vista Travel Serv., 53 Misc. 2d 1015, 280 N.Y.S.2d 337 (N.Y. App. Term. 1967).

26. *St. Paul Ins. Co.*, 807 F.2d at 1549; Ricotta v. Iberia Lineas Aereas De Espana, 482 F. Supp. 497 (E.D.N.Y. 1979), *aff'd on opinion below*, 633 F.2d 206 (Cir. 2d 1980).

27. As to goods, see art. 14 limiting the right of action to the "consignor or consignee." *See also* Bennett Importing Co. v. Continental Airlines, 21 Avi. (CCH) ¶ 17,917 (D. Mass. 1988).

of action against the last carrier. The "Passenger Ticket and Baggage Check" typically states that checked baggage will be delivered to the bearer of the baggage check.

A stranger to the particular contract of transportation under which the baggage was transported may not bring an action against the carrier for loss of, damage to, or delay of the baggage.[28] The plaintiff-passenger may bring an action for loss of, damage to, or delay of baggage against the "carrier" and, if more than one carrier is involved, against the first or the last carrier.[29]

The term "carrier" as used in Article 18, paragraph 1, means an airline that actually transported passengers and baggage. It does not include an airline that merely issues a ticket for carriage on another airline as an agent.[30] For the purpose of applying the Convention's limitations of liability and time limitations, the term "carrier" has been interpreted to include employees of the carrier,[31] as well as agents and independent contractors of the carrier.[32]

C. *Jurisdiction and Venue*

There are two independent jurisdictional requirements which must be satisfied by the plaintiff in an action governed by the Convention: treaty jurisdiction and domestic jurisdiction.[33]

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28. *See* Kohli v. British Airways, 14 Avi. (CCH) ¶ 18,311 (Mass. Super. Ct. 1977).

29. Convention, art. 30, 49 Stat. 300, 3007, official American translation at 3021; Seth v. British Overseas Airways, 329 F.2d 302 (1st Cir.), *cert. denied*, 379 U.S. 858 (1964); Saiyed v. Transmediterranean Airways, 569 F. Supp. 1167 (W.D. Mich. 1981).

30. Kapar v. Kuwait Airways, 845 F.2d 1100 (D.C. Cir. 1988); Block v. Compagnie Nationale Air France, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968); Stanford v. Kuwait Airlines Corp., 705 F. Supp. 142 (S.D.N.Y. 1989); Briscoe v. Compagnie Nationale Air France, 290 F. Supp. 863 (S.D.N.Y. 1968).

31. Reed v. Wiser, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); H.S. Strygler & Co. v. Pan Am. Airlines, 19 Avi. (CCH) ¶ 17,280 (S.D.N.Y. 1985).

32. Royal Ins. Co. v. Amerford Air Cargo, 654 F. Supp. 679 (S.D.N.Y. 1987); Baker v. Lansdell Protective Agency, 590 F. Supp. 165 (S.D.N.Y. 1984); Johnson v. Allied E. States Maintenance Corp., 488 A.2d 1341 (D.C. 1985); Julius Young Jewelry Mfg. Co. v. Delta Airlines, 67 A.D.2d 148, 414 N.Y.S.2d 528 (N.Y. App. Div. 1979); Garlitz v. Allied Aviation Serv. Int'l Corp., 17 Avi. (CCH) ¶ 17,238 (N.Y. Sup. Ct. 1972).

33. Gayda v. LOT Polish Airlines, 702 F.2d 424 (2d Cir. 1983); Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); Smith v. Canadian Pac. Airways, 452 F.2d 798 (2d Cir. 1971); *In re* Korean Airlines Disaster, 19 Avi. (CCH) ¶ 17,578 (D. D.C. 1985); Hill v. United Airlines, 550 F. Supp. 1048 (D. Kan. 1982); Butz v. British Airways, 421 F. Supp. 127, 129 (E.D. Pa. 1976), *aff'd without opinion*, 566 F.2d 1168 (D.C. Cir. 1977); Vergara v. Aeroflot "Soviet Airlines," 390 F. Supp. 1266 (D. Neb. 1975); Fabiano v. Alitalia Airlines, 380 F. Supp. 1400 (D. Mass. 1974).

Article 28, paragraph 1, of the Convention sets forth the requirements to satisfy "treaty jurisdiction."[34] It requires the plaintiff to bring his action, at his option,

> within the territory of one of the High Contracting Parties to the Convention either before the court of the domicile of the carrier or his principal place of business, or where he has a place of business through which the contract was made or before the court at the place of destination.

Article 28, paragraph 1, was written with reference to nation-states, not to areas and subdivisions within nation-states.[35] Its intent was to limit the forums in which damage actions could be brought in order to foreclose the possibility of suit in a nation that has no substantial contact with the accident or occurrence which caused the damage.[36]

A carrier may have only one "domicile" and that is the country in which it is incorporated.[37] A carrier may have only one principal place of business. Although a carrier may have significant contacts, business, or ticket agencies in a particular country, none are sufficient to satisfy Article 28, paragraph 1, if that country is not also its "principal" place

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34. The term "treaty jurisdiction" was coined by the Court in *Smith*, 452 F.2d at 800, "in order to draw a distinction from the 'power of a particular United States court, under federal statutes and practice, to hear a Warsaw Convention case — jurisdiction in the domestic law sense.'" Treaty jurisdiction is nothing more than a question of subject matter jurisdiction which cannot be waived by the court or the parties. People *Ex Rel* Compagnie Nationale Air France v. Gilberto, 74 Ill. 2d 90, 383 N.E.2d 977 (1978), *cert. denied*, 441 U.S. 932 (1979); Duff v. Varig Airlines, 185 Ill. App. 3d 992, 542 N.E.2d 69 (1989). Varkonyi v. S.A. Empress de Viacao Airea Rio Grandense, 71 Misc. 2d 607, 336 N.Y.S.2d 193 (N.Y. Sup. Ct. 1972).

35. Mertens v. Flying Tiger Line, 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965); Pardonnet v. Flying Tiger Line, 233 F. Supp. 683 (N.D. Ill. 1964); Pitman v. Pan Am. World Airways, 223 F. Supp. 887 (E.D. Pa. 1963); *Varkonyi*, 71 Misc. 2d at 612, 336 N.Y.S.2d at 198.

36. Kapor v. Kuwait Airways, 845 F.2d 1100 (D.C. Cir. 1988); *In re* Air Crash Disaster Near New Orleans, La. on July 9, 1982, 821 F.2d 1147 (5th Cir. 1987), *vacated and remanded for further consideration in light of*, Chan v. Korean Airlines, 490 U.S. 122, 109 S. Ct. 1928 (1989); *In re* Korean Airlines Disaster, 19 Avi. (CCH) ¶ 17,578 (D. D.C. 1985). Restriction of forums available to a passenger in a suit arising out of transportation governed by the Convention is limited to parties to the contract. Although a non-carrier agent or independent contractor may be entitled to the benefit of the Convention's limitation of liability and time limitations, the forums in which a passenger may bring an action against it are not governed by art. 28. Hoffman v. British Overseas Airways, 9 Avi. (CCH) ¶ 17,180 (N.Y. Sup. Ct. 1964).

37. *Smith*, 452 F.2d at 802; Eck v. United Arab Airlines, 360 F.2d 804, 809 (2d Cir. 1966); *In Re Korean Airlines Disaster*, 19 Avi. (CCH) ¶ 17,582; Karfunkel v. Compagnie Nationale Air France, 427 F. Supp. 971, 974 (S.D.N.Y. 1977); *People Ex Rel Compagnie Nationale Air France*, 74 Ill. 2d at 102, 383 N.E.2d at 981; *Duff*, 185 Ill. App. 3d at 996, 542 N.E.2d at 72.

of business.[38] There can be only one place of destination and that is the country of the *ultimate* destination as contemplated by the contract and intent of the parties.[39]

Although Article 28, paragraph 1, of the Convention limits the available countries in which an action might be brought "at the option of the plaintiff," a court in the country chosen by the plaintiff may apply the doctrine of *forum non conveniens* requiring the plaintiff to pursue his action in another Article 28 forum, pursuant to Article 28, paragraph 2.[40] In determining the nation-states which may be proper forums as defined by Article 28, reference must be made to the contract and intent of the particular passenger-plaintiff and not to the contract or intent of any other passenger.[41] Neither the absence, irregularity, or loss of the "Passenger Ticket and Baggage Check" nor the failure to give notice to a passenger of the jurisdictional limits contained in Article 28 will render the limitation of available jurisdictions inapplicable.[42]

Once a plaintiff has satisfied the requirement of "treaty jurisdiction," the plaintiff must then satisfy the "domestic" jurisdictional requirements of the court in which he or she proposes to file the action

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38. Smith v. Canadian Pac. Airways, 452 F.2d 798 (2d Cir. 1971); Nudo v. Societe Anonyme Belege d'Exploitation de la Navigation Aerienne Sabena Belgian World Airlines, 207 F. Supp. 191 (E.D. Pa. 1962).

39. *In re* Alleged Food Poisoning Incident, March 1984, 770 F.2d 3 (2d Cir. 1985); Petrire v. Spantax S.A., 756 F.2d 263 (2d Cir.), *aff'g*, 577 F. Supp. 1013 (E.D.N.Y.), *cert. denied*, 474 U.S. 846 (1985); Solanki v. Kuwait Airways, 20 Avi. (CCH) ¶ 18,150 (S.D.N.Y. 1987); *In re* Korean Airlines Disaster, 19 Avi. (CCH) ¶ 17,578; Vergara v. Aeroflot "Soviet Airlines," 390 F. Supp. 1266 (D. Neb. 1975); Butz v. British Airways, 421 F. Supp. 127 (E.D. Pa. 1976), *aff'd without opinion*, 566 F.2d 1168 (D.C. Cir. 1977); *In re* Air Crash Disaster Near Warsaw, Poland, on May 9, 1987, 707 F. Supp. 650 (E.D.N.Y. 1989) (passenger intent was to fly from Warsaw to New York. Polish government required passenger to purchase round trip tickets. "Ultimate destination" for purpose of determining art. 28, ¶ 1 forums was United States, notwithstanding reference to ticket alone made Warsaw the ultimate destination. There must be mutual consent.); *In re* Air Crash Disaster at Malaga, Spain, 577 F. Supp. 1013 (E.D.N.Y. 1984) (Where passenger intended to travel from Madrid to New York but was in fact issued a round trip ticket from Madrid to New York to Madrid, passenger may offer evidence of mutual mistake.); People *Ex Rel* Compagnie Nationale Air France v. Gilberto, 74 Ill. 2d 90, 383 N.E.2d 977 (1978) (removal of passenger by hijackers at place which was neither the intended destination or an intended intermediate stopping place did not become destination for purpose of art. 28), *cert. denied*, 441 U.S. 932 (1979); Rinck v. Deutsche Lufthansa A.G., 57 A.D.2d 370, 395 N.Y.S.2d 7 (N.Y. App. Div. 1977), *aff'd*, 44 N.Y.2d 714, 376 N.E.2d 929, 405 N.Y.S.2d 456 (1978).

40. *In re* Air Crash Disaster Near New Orleans, La., 821 F.2d at 1161-62.

41. Kolhi v. British Airways, 14 Avi. (CCH) ¶ 18,311 (Mass. Super. Ct. 1977).

42. Biggs v. Alitalia-Linee Aeree Italiane S.P.A., 10 Avi. (CCH) ¶ 18,354 (E.D.N.Y. 1969); *In re* People Ex Rel Compagnie Nationale Air France, 74 Ill. 2d at 104, 383 N.E.2d at 982.

both as to subject matter jurisdiction and as to *in personam* jurisdiction. If the United States is a proper forum pursuant to Article 28, the plaintiff may choose between state and federal courts. The United States District Court has original subject matter jurisdiction over a baggage claim governed by the Convention as a claim arising under a treaty of the United States (i.e., "federal question" jurisdiction).[43] The United States District Court may also have original jurisdiction over a baggage claim on the basis of diversity of citizenship.[44] Subject matter jurisdiction of the United States District Court in the case of loss of, damage to, or delay of baggage, based either upon federal question or diversity of citizenship, is not exclusive. State courts have concurrent subject matter jurisdiction.[45]

Where suit is brought in the United States District Court on the basis of diversity of citizenship, the federal court may exercise personal jurisdiction only to the extent permitted by the state law of the forum.[46] Where suit is brought in the United States District Court on the basis of federal question jurisdiction, the federal court may exercise personal jurisdiction over anyone found within the sovereign territory of the United States limited only by the service of process restraints contained in Rule 4 of the Federal Rules of Civil Procedure.[47] Where suit is brought in a state court, the requirement for *in personam* jurisdiction over the defendant is governed by that state's service of process statutes or its pertinent long-arm statute.[48] Finally, the plaintiff must file the action in the proper venue within the chosen jurisdiction.[49]

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43. 28 U.S.C. § 1331 (1990); Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); Reiser v. Meloi World Travel Serv., 18 Avi. (CCH) ¶ 17,208 (S.D.N.Y. 1983); Greenwald v. Pan Am. World Airways, 547 F. Supp. 159 (S.D.N.Y. 1982). A defendant might also remove a baggage claim governed by the Convention from the State court to the United States District Court as one arising under a treaty of the United States pursuant to 28 U.S.C. § 1441(b).

Not infrequently foreign airlines are instrumentalities of a foreign government within the meaning of the Foreign Soverign Immunities Act. In such a case the airline may remove a case from the state court to the United States District Court pursuant to 28 U.S.C. §§ 1330 and 1441(d). *Reiser*, 18 Avi. (CCH) ¶ 17,211.

44. 28 U.S.C. § 1332 (1990). To satisfy the requirement for the exercise of diversity jurisdiction, there must be diversity of citizenship *and* an amount in controversy in excess of $50,000.00 as to any action commenced on or after May 18, 1989, P.L. 100-702, Title II §§ 201(a), 202(a), 203(a), 102 Stat. § 4646.

45. *See*, Kibler v. Northwest Airlines, 563 So. 2d 550 (La. App. 4 Cir. 1990).

46. Gold Kist v. Baskin-Robbins Ice Cream Co., 623 F.2d 375 (5th Cir. 1980).

47. Catrone v. Odgen Suffolk Downs, 647 F. Supp. 850 (D. Mass. 1986).

48. Mabud v. Pakistan Int'l Airlines, 717 P.2d 1350 (Utah 1986).

49. *See generally*, 28 U.S.C. § 1391 (1990) for actions filed in United States District Court.

D. *Written Notice and Time to Sue*

Article 26, paragraph 2, requires a passenger to complain to the carrier forthwith after discovery and, *at the latest*, within three days from the date of receipt in the case of damage to baggage. In the case of delay of baggage, the complaint must be made, *at the latest*, within fourteen days from the date on which the baggage was placed at his disposal.[50] Article 26, paragraph 3, requires every complaint to be in writing upon the document of transportation or by separate notice in writing dispatched within the applicable time period. Day one of the time period is the day *after* the triggering event.[51] The written complaint must be made directly to the carrier.[52] In the case of successive carriage as defined by Article 1, paragraph 3, and Article 30, paragraph 3, a written notice to one carrier is sufficient to comply with Article 26.[53]

The purpose of the notice requirement is to inform the carrier of the nature of the damage claimed and to allow the carrier to investigate the claim as soon as possible after the event(s) which allegedly caused the damage.[54] The term "damage" has been interpreted to include physical damage and partial loss of baggage.[55]

However, actual knowledge by the carrier of loss, damage, or delay of baggage is insufficient to release the passenger from the require-

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50. The conditions of contract appearing on the ticket stock in use today typically allow 7 days in the case of damage and 21 days in the case of delay. These extended periods were apparently adopted from the Hague Protocol, an amendment to the Warsaw Convention to which the United States has never adhered. The decision in St. Paul Ins. Co. v. Venezuelan Int'l Airways, 807 F.2d 1543 (11th Cir. 1987), would indicate that if an airline were to rely on the shorter periods established by the Convention, the text of which do not appear on the ticket stock, those shorter periods might be binding. In such an instance it is likely that the "fraud" exception of art. 26, ¶ 4, of the Convention might be called into play.

51. *See* Mystique Creatives v. North Star Airlines, 22 Avi. (CCH) ¶ 18,418 (N.Y. City Civ. Ct. 1990).

52. Shah Safari v. Western Airlines, 17 Avi. (CCH) ¶ 17,101 (W.D. Wash. 1982) (notice to inspection organization insufficient); Amazon Coffee Co. v. Trans World Airlines, 18 Avi. (CCH) ¶ 17,264 (N.Y. Sup. Ct. 1983) (report of independent inspection agency and carrier's internal report insufficient), *rev'd in part*, 111 A.D.2d 776, 490 N.Y.S.2d 523 (1985) (internal carrier report *could* satisfy notice requirement *if* signed by plaintiff).

53. Maschinenfabrik Kern, A.G. v. Northwest Airlines, 562 F. Supp. 232 (N.D. Ill. 1983).

54. Highlands Ins. Co. v. Trinidad & Tobago (BWIA Int'l) Airways Corp., 739 F.2d 536 (11th Cir. 1984); Denby v. Seaboard World Airlines, 737 F.2d 172 (2d Cir. 1984); Wexler v. Eastern Airlines, 18 Avi. (CCH) ¶ 17,155 (D.C. Super. Ct. 1982). *But see* Schmoldt Importing Co. v. Pan Am. World Airways, 767 P.2d 411 (Okla. 1989)(notice provision requires only notice of damage or delay and not a description of damages).

55. Panzer v. Aerolineas Argentinas, 19 Avi. (CCH) ¶ 18,228 (N.Y. App. Term 1986); Fothergill v. Monarch Airlines, [1980] 3 W.L.R. 209 (H.L.).

ments of Article 26, paragraph 2.[56] Failure to make a written complaint in accordance with Article 26, paragraph 2, bars any action against the carrier unless there has been "fraud" on part of the carrier.[57] The term "fraud" as used in Article 26, paragraph 4, has been interpreted to include any intentional acts by the carrier or its agents which significantly decrease the likelihood of the passenger giving notice during the brief period allowed.[58]

Article 26 is not a provision of the Convention which "limits or excludes liability" but rather, is a "rule" of the Convention which is rendered applicable by failure to give notice of its terms or by allegations of willful misconduct in relation to the alleged loss, damage, or delay of baggage.[59] Although Article 26, paragraph 2, contains no requirement that written notice be given in the case of total loss, it has been held that a tariff or contractual provision which supplies such a time limit is valid.[60]

Article 29, paragraph 1, of the Convention requires that suit on a baggage claim governed by the Convention must be commenced within two years "reckoned from" 1) the date of arrival at destination, 2) the date on which the aircraft ought to have arrived, or 3) the date on which the transportation stopped. This provision has been construed to be a condition precedent and not a statute of limitations.[61] Neither

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56. Stud v. Trans Int'l Airlines, 727 F.2d 880 (9th Cir. 1984); Amazon Coffee Co. v. Trans World Airlines, 18 Avi. (CCH) ¶ 17,264, *rev'd on other grounds*, 111 A.D.2d 7876, 490 N.Y.S.2d 523 (N.Y. App. Div. 1985). In the case of animals shipped alive but arriving dead, no notice is necessary because destruction was total and obvious. Dalton v. Delta Airlines, 570 F.2d 1244 (5th Cir. 1978); Hughes-Gibb & Co. v. Flying Tiger Line, 504 F. Supp. 1239 (N.D. Ill. 1981). This ruling has not been extended beyond the dead animal factual scenario.

57. Convention, art. 26, ¶ 4, 49 Stat. 3000, 3007, official American translation at 3020.

58. *Denby*, 737 F.2d at 183.

59. Highlands Ins. Co. v. Trinidad & Tobago (BWIA Int'l) Airways Corp., 739 F.2d 536 (11th Cir. 1984); Denby v. Seaboard World Airlines, 737 F.2d 172 (2d Cir. 1984); Talei v. Pan Am. World Airways, 132 Cal. App. 3d 904, 183 Cal. Rptr. 532 (Cal. Ct. App. 1982); Wexler v. Eastern Airlines, 18 Avi. (CCH) ¶ 17,155 (D.C. Super. Ct. 1982); Abdul-Haq v. Pakistan Int'l Airlines, 101 Misc. 2d 213, 420 N.Y.S.2d 848 (N.Y. Sup. Ct. 1979). *Contra* Pirilla v. Eastern Airlines, 15 Avi. (CCH) ¶ 18,070 (D.C. Super. Ct., Small Claims, 1980); Sofranski v. K.L.M. Royal Dutch Airlines, 68 Misc. 2d 402, 326 N.Y.S.2d 870 (N.Y. Civ. Ct. 1971).

60. Butler's Shoe Corp. v. Pan Am. World Airways, 514 F.2d 1283 (5th Cir. 1975); Famolare v. Seaboard World Airlines, 15 Avi. (CCH) ¶ 17,287 (N.Y. Sup. Ct. 1978); Schwimmer v. Air France, 87 Misc. 2d 147, 384 N.Y.S.2d 658 (N.Y. Civ. Ct. 1976). *See also* Denby v. Seaboard World Airlines, 737 F.2d 172 (2d Cir. 1984).

61. Seguritan v. Northwest Airlines, 86 A.D.2d 658, 446 N.Y.S.2d 397 (1982), *aff'd mem.*, 57 N.Y.2d 767, 440 N.E.2d 1339, 454 N.Y.S.2d 991 (1982); Kahn v. Trans World Airlines, 82 A.D.2d 696, 443 N.Y.S.2d 79 (1981).

tolling statutes,[62] the doctrine of "relation back,"[63] nor the common law doctrine of equitable estoppel[64] are effective to save a time-barred claim. However, no decision offers a precise interpretation of the meaning or application of the three "reckoning" dates set forth in Article 29, paragraph 1.[65]

The consensus of courts seems to hold, as to *loss* of goods or baggage, the two-year time limitation begins to run, *at the latest*, on the date on which the passenger knew or had reason to know that something was wrong with the baggage.[66] As to *damaged* goods or baggage, the consensus holds the time limitation does not begin to run until the goods or baggage have left the custody of the air carrier.[67]

One state court interpreted the term "destination," as used in Article 29, paragraph 1, to mean each point at which baggage is returned to the custody of the passenger and *not* the "ultimate destination" used in determining the jurisdictional forums available pursuant to Article 28.[68] The time period established by Article 29 has

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62. Data General Corp. v. Air Exp. Intern. Co., 676 F. Supp. 538 (S.D.N.Y. 1988); Darghouth v. Swiss Air Transport Co., 18 Avi. (CCH) ¶ 18,536 (D. D.C. 1984); *Kahn*, 82 A.D.2d at 709, 443 N.Y.S.2d at 87; Lewin v. Air Jamaica, 14 Avi. (CCH) ¶ 17,251 (N.Y. Sup. Ct. 1976); Sackos v. Compagnie Nationale Air France, 9 Avi. (CCH) ¶ 17,673 (N.Y. Sup. Ct. 1965).

63. Fed. R. Civ. P. 15(c); *See also* Quantime v. W.J. Donovan, 21 Avi. (CCH) ¶ 17,367 (D. Mass. 1988).

64. Borham v. Pan Am. World Airways, 19 Avi. (CCH) ¶ 18,236 (S.D.N.Y. 1986); H.S. Strygler & Co. v. Pan Am. Airlines, 19 Avi. (CCH) ¶ 17,280 (S.D.N.Y. 1985); Srivastava v. Alia: The Royal Jordanian Airlines, 129 Ill. App. 3d 988, 473 N.E.2d 564 (1985).

65. Magnus Elecs. v. Royal Bank of Canada, 611 F. Supp. 436 (N.D. Ill. 1985) (holding that the three reckoning dates in art. 29, ¶ 1, are not alternatives but are obviously provided for different circumstances under which a claim against an air carrier might arise); Alltransport v. Seaboard World Airlines, 76 Misc. 2d 308, 349 N.Y.S.2d 277 (N.Y. Civ. Ct. 1973) (holding that the three reckoning dates of art. 29, ¶ 1, are in the disjunctive allowing the plaintiff to pick the one most beneficial).

66. *H.S. Strygler & Co.*, 19 Avi. (CCH) ¶ 17,282 (relying on a New York state discovery rule purportedly by authority of art. 29, ¶ 2 of the Convention, the court held that the limitations period began when plaintiff was on notice of claim); Magnus Elecs. v. Royal Bank of Canada, 611 F. Supp. 436 (N.D. Ill. 1985) (adopting conclusion of court in *Strygler*); Chandler v. Jet. Air Freight, 54 Ill. App. 3d 1005, 370 N.E.2d 95 (1977) (relating accrual of cause of action to date on which the plaintiff became aware transportation had stopped); *Srivastava*, 129 Ill. App. 3d at 995, 473 N.E.2d at 569 (adopting reasoning of *Chandler*); *see also* Blaw-Knox Constr. Equip. Co. v. Alia: The Royal Jordanian Airline, 21 Avi. (CCH) ¶ 17,450 (N.D. Ill. 1988) (breach occurred not when goods were shipped but when goods did not arrive). *But see* Hayden v. TNTAIR, 22 Avi. (CCH) ¶ 18,413 (D. Cal. 1990) (When the transportation stopped is not necessarily equivalent to the date flight arrived, the discovery rule is not the appropriate measure.).

67. *Alltransport*, 76 Misc. 2d at 310, 349 N.Y.S.2d at 280; Rush v. U.S. Air, 19 Ohio App. 3d 301, 484 N.E.2d 196 (1984).

68. *Rush*, 19 Ohio App. 3d at 303, 484 N.E.2d at 198.

no relation to the provisions of Article 26 requiring written notice of damage or delay of baggage. The period established by Article 29 begins on one of the reckoning dates and not from the conclusion of the time in which written notice must be made.[69]

Article 29, paragraph 2, states that the "method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted." The only issue left to a court by Article 29, paragraph 2, is the determination of whether the plaintiff has taken the measures within the two-year period to invoke the particular court's jurisdiction over the action.[70] The two-year time limitation is not a provision of the Convention which "limits or excludes liability" and, therefore, is binding notwithstanding the absence of any notice of its content[71] or the presence of any allegations or proof of willful misconduct.[72]

E. *Plaintiff's Burden of Proof and Carrier's Defenses*

An air carrier is not an insurer against loss of, damage to, or delay of baggage during transportation governed by the Convention.[73] Article 18 does, however, create a presumption of liability.[74]

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69. *Srivastava*, 129 Ill. App. 3d at 991, 473 N.E.2d at 566 (1985).

70. Darghouth v. Swiss Air Transport Co., 18 Avi. (CCH) ¶ 18,536 (D.D.C. 1984); Kahn v. Trans World Airlines, 82 A.D.2d 696, 443 N.Y.S.2d 79 (1981). In United States District Court and those states which have adopted the content of the Federal Rules of Civil Procedure, an action is commenced by the filing of the complaint. *See* Fed. R. Civ. P. 3. *But see* Advance Footwear Co. v. Air Jamaica, 124 Misc. 2d 6, 476 N.Y.S.2d 438 (N.Y. Sup. Ct. 1984) (in New York an action is commenced by service and not by filing).

71. Molitch v. Irish Int'l Airlines, 436 F.2d 42 (2d Cir. 1970); Tames v. Yugoslav Airlines, 13 Avi. (CCH) ¶ 18,228 (E.D.N.Y. 1975); Sanchez v. Beacon Shipping Co., 79 A.D.2d 591, 434 N.Y.S.2d 236 (1980); Jaffe v. British Overseas Airways Corp., 34 A.D.2d 527, 309 N.Y.S.2d 58, *app. dismissed*, 27 N.Y.2d 796, 264 N.E.2d 349, 315 N.Y.S.2d 856 (1970); Bergman v. Pan Am. World Airways, 32 A.D.2d 95, 299 N.Y.S.2d 982 (1969); DeMarco v. Pan American World Airways, 16 Avi. (CCH) ¶ 17,269 (N.Y. Sup. Ct. 1981).

72. Stone v. Mexicana Airlines, 610 F.2d 699 (10th Cir. 1979); Bapes v. Trans World Airlines, 209 F. Supp. 380 (N.D. Ill. 1962); Kordich v. Butler Aviation Detroit, 103 Mich. App. 566, 303 N.W.2d 238 (1981); *Jaffe*, 34 A.D.2d at 527, 309 N.Y.S.2d at 58; *Demarco*, 16 Avi. (CCH) ¶ 17,270; Derma Export Import v. B.V. Imports, 14 Avi. (CCH) ¶ 18,101 (N.Y. Sup. Ct. 1977).

73. Rugani v. K.L.M. Royal Dutch Airlines, 4 Avi. (CCH) ¶ 17,257 (1954), *aff'd mem.*, 285 A.D. 944, 139 N.Y.S.2d 899, *aff'd mem.*, 309 N.Y. 810, 130 N.E.2d 613 (1955).

74. Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243 (1984); Manufacturers Hanover Trust Co. v. Alitalia Airlines, 429 F. Supp. 964 (S.D.N.Y. 1977), *aff'd mem.*, 573 F.2d 1292, *cert. denied*, 435 U.S. 971 (1978); Schedlmayer v. Trans Int'l Airlines, 99 Misc. 2d 478, 416 N.Y.S.2d 461 (N.Y. Civ. Ct. 1979).

In order to establish a *prima facie* case and to recover damages for the loss of, damage to, or delay of baggage during transportation governed by the Convention, the plaintiff has the burden of establishing 1) the baggage was delivered to the carrier in good condition, 2) the baggage was lost, damaged, or delayed, 3) the loss, damage or delay occurred while the baggage was in the charge of the carrier (i.e., during transportation by air), and 4) the baggage was damaged to a certain extent.

The Convention provides a means by which a carrier can avoid liability and a means by which the carrier's liability may be reduced. Article 20, paragraph 2, of the Convention states that in the transportation of baggage, the carrier "shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in the navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage."[75] The term "all necessary measures" has been interpreted to mean all *reasonable* measures.[76] Article 21 states that if the carrier proves that the damage was caused by or contributed to by the negligence of the injured person, the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.[77] Lastly, Article 26, paragraph 1, can be the source of a potential defense to a baggage claim in stating that receipt by the person entitled to the delivery of baggage without complaint shall be *prima facie* evidence that the baggage was delivered in good condition and in accordance with the document of transportation.[78]

F. *Limitation of Liability*

The liability of the carrier for damages sustained in the event of the destruction or loss of checked baggage or delay in the transportation of baggage is limited to $9.07 per pound ($20 per kilogram) of

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75. Convention, art. 20, ¶ 2, 49 Stat. 3000, 3005, official American translation at 3019; *Manufacturers Hanover Trust Co.*, 429 F. Supp. at 967, Wing Hang Bank v. Japan Airlines, 357 F. Supp. 94 (S.D.N.Y. 1973); *Rugani*, 4 Avi. (CCH) ¶ 17,258; American Smelting & Refining Co. v. Philippine Airlines, 4 Avi. (CCH) ¶ 17,413, *aff'd without opinion*, 285 A.D. 1119, 141 N.Y.S.2d 818 (1954), *aff'd*, 1 N.Y.2d 866, 136 N.E.2d 14, 153 N.Y.S.2d 900 (1956); United Int'l Stables v. Pacific W. Airlines, 68 W.W.R. 317 (Sup. Ct. Brit Co. 1969).

76. *Manufacturers Hanover Trust Co.*, 429 F. Supp. at 967.

77. Williams v. Fidelity & Casualty Co., 442 F. Supp. 455 (D.C. La. 1977); *Schedlmayer*, 99 Misc. 2d at 483, 416 N.Y.S.2d at 464; Felous v. Swiss Air, 16 Avi. (CCH) ¶ 17,833 (Mass. 1981).

78. *See* Dalton v. Delta Airlines, 570 F.2d 1244, 1247 (5th Cir. 1978) (art. 26, ¶ 1, shifts the burden of proof to the plaintiff).

lost, damaged, or delayed baggage.[79] The limitation is based upon the weight of the baggage which was lost, damaged or delayed only, and not the entire weight of all baggage checked.[80]

Article 22, paragraph 4, limits the carrier's liability for "objects of which the passenger takes charge himself" to $400.00 per passenger.[81] Article 23 renders void any rule or contractual provision which tends "to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention."[82] There is no definitive ruling in the United States as to whether a limitation of liability contained in a *filed* tariff, which fixes a limit at the *same amount* as that set forth in Article 22, is valid if a carrier is unable to assert the limitation of Article 22 by reason of failure to comply with Article 4 or willful misconduct as defined by Article 25.[83]

G. *Avoiding the Limitation of Liability*

By its terms, the Convention renders the limitation of liability set forth in Article 22 inapplicable in several instances. First, the limitation of liability is inapplicable if the passenger has made a "special declaration of value at delivery and paid a supplementary sum if required to do so."[84] Second, the limitation of liability is inapplicable if

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79. Convention, art. 22, 49 Stat. 3000, 3006, official American translation at 3019. *Trans World Airlines*, 466 U.S. at 247.

80. Hartford Fire Ins. Co. v. Trans World Airlines, 671 F. Supp. 693 (C.D. Cal. 1987); Data Card v. Air Express Int'l, [1983] 2 All E.R. 639 (Q.B. Div.).

81. *See* CAB Order 74-1-16, 39 Fed. Reg. 11526 (1974).

82. Saiyed v. Transmediterranean Airways, 509 F. Supp. 1167 (W.D. Mich. 1981) (tariff which excluded liability for consequential damages invalid); Danziger v. Compagnie Nationale Air France, 14 Avi. (CCH) ¶ 18,260 (S.D.N.Y. 1977) (tariff which excluded liability for loss of jewelry invalid); Schedlmayer v. Trans Int'l Airlines, 99 Misc. 2d 478, 416 N.Y.S.2d 461 (N.Y. Civ. Ct. 1979) (carrier may not exclude liability for cash); Cohen v. Varig Airlines, 85 Misc. 2d 653, 380 N.Y.S.2d 450 (N.Y. Civ. Ct. 1975), *aff'd as modified*, 88 Misc. 2d 998, 390 N.Y.S.2d 515 (App. Term 1976), *aff'd as modified*, 62 A.D.2d 324, 405 N.Y.S.2d 44 (1978) (tariff exluding liability for loss of jewelry contravened art. 23 of the Convention and was invalid).

83. *See* Hill v. Eastern Airlines, 103 Misc. 2d 306, 425 N.Y.S.2d 715 (N.Y. Civ. Ct. 1980) and Stolk v. Compagnie Nationale Air France, 58 Misc. 2d 1008, 299 N.Y.S.2d 58 (N.Y. Civ. Ct. 1969), *aff'd*, 64 Misc. 2d 859, 316 N.Y.S.2d 455 (N.Y. Sup. App. Term 1970), for decisions which hold that if the limit of art. 22 is unavailable then any tariff rule which purports to supply the same limitation is null and void. *See also* Locks v. British Airways, 759 F. Supp. 1137, 1140 n.6 (E.D. Pa 1991). *See* Alexander v. Pan Am. World Airways, 757 F.2d 362 (D.C. Cir. 1985); Carriage Bags v. Aerolineas Argentinas, 521 F. Supp. 1363 (D. Colo. 1981); Talei v. Pan Am. World Airways, 132 Cal. App. 3d 904, 183 Cal. Rptr. 532 (1982), for decisions suggesting that provisions contained in filed tariffs might be enforceable notwithstanding the unavailability of identical provisions contained in the Convention.

84. Convention, art. 22, 49 Stat. 3000, 3006, official American translation at 3019. L&C Mayers Co. v. K.L.M. Royal Dutch Airlines, 108 N.Y.S.2d 251 (N.Y. Sup. Ct. 1951) (must be agreement to pay increased rate).

the carrier accepts baggage without a baggage check being delivered.[85] Third, the limitation of liability is inapplicable if the claimant establishes willful misconduct on the part of the carrier.[86] Fourth, the limitation of liability is inapplicable if the carrier has delivered a baggage check but that check fails to contain 1) the number of the passenger ticket,[87] 2) the number and weight of the packages checked,[88] or 3) a

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85. Convention, art. 4, 49 Stat. 3000, 3002, official American translation at 3015; Hexter v. Air France, 563 F. Supp. 932 (S.D.N.Y. 1982); Chukwvma v. Groupe Air France, 23 Avi. (CCH) ¶ 17,696 (S.D.N.Y. 1991); Schedlmayer v. Trans Int'l Airlines, 99 Misc. 2d 478, 416 N.Y.S.2d 461 (N.Y. Civ. Ct. 1979).

86. Convention, art. 25, 49 Stat. 3000, 3006, official American translation at 3020. Willful misconduct is defined as a conscious intent to do or omit doing an act from which harm results to another, or an intentional omission of a manifest duty. There must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct. Berner v. British Commonwealth Pac. Airlines, 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966); Grey v. American Airlines, 227 F.2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956); Pekelis v. Transcontinental & W. Air, 187 F.2d 122 (2d Cir.), *cert. denied*, 341 U.S. 951 (1951); Martin v. Pan Am. World Airways, 563 F. Supp. 135 (D.D.C. 1983) (refusal of baggage handler to check to see whether plaintiff's bag was tagged not willful misconduct); Danziger v. Compagnie Nationale Air France, 16 Avi. (CCH) ¶ 17,261 (S.D.N.Y. 1979) (failure to warn of the general risk of theft of jewelry in checked baggage was not willful misconduct); Olshin v. El Al Israel Airlines, 15 Avi. (CCH) ¶ 17,463 (E.D.N.Y. 1979) (failure to warn of danger of theft of jewelry in checked baggage was not willful misconduct); Bagnardi v. Pan Am. World Airways, 444 So. 2d 536 (Fla. Dist. Ct. App. 1984) (placing incorrect claim checks on baggage was not willful misconduct); Compania De Aviacion Faucett v. Mulford, 386 So. 2d 300 (Fla. Dist. Ct. App. 1980) (deliberately or recklessly giving misinformation as to whereabouts of luggage was willful misconduct); Kupferman v. Pakistan Int'l Airlines, 108 Misc. 2d 485, 438 N.Y.S.2d 189 (N.Y. Civ. Ct. 1981) (refusing to place correct claim checks on baggage coupled with refusal to verify that luggage was on the plane and failure to retrieve luggage for 15 days was willful misconduct); Cohen v. Varig Airlines, 85 Misc. 2d 653, 380 N.Y.S.2d 450 (N.Y. Civ. Ct. 1975), *aff'd as modified*, 88 Misc. 2d 998, 390 N.Y.S.2d 515 (N.Y. App. Term 1976), *aff'd as modified*, 62 A.D.2d 324, 405 N.Y.S.2d 44 (N.Y. App. Div. 1978) (refusal to delay plane to unload passenger baggage was willful misconduct).

87. Since the passenger ticket and the baggage check are combined into one document reliance on this provision to avoid the limitation of liability is not likely.

88. There is an on-going difference of judicial opinion as to whether the failure on the part of the carrier to enter on the baggage check the number of pieces checked and their weight will render the limitation of liability inapplicable. *Compare* Vekris v. Peoples Express, 707 F. Supp. 675 (S.D.N.Y. 1988); Gill v. Lufthansa German Airlines, 620 F. Supp. 1453 (E.D.N.Y. 1985); Maghsoudi v. Pan Am. World Airways, 470 F. Supp. 1275 (D. Hawaii 1979); Hill v. American Airlines, 239 N.J. Super. 105, 570 A.2d 1040 (1989); Arkin v. N.Y. Helicopter Corp., 149 A.D.2d 5, 544 N.Y.S.2d 343 (N.Y. App. Div. 1989); Kupferman v. Pakistan Int'l Airlines, 108 Misc. 2d 485, 438 N.Y.S.2d 189 (N.Y. Civ. Ct. 1981); Hill v. Eastern Airlines, 103 Misc. 2d 306, 425 N.Y.S.2d 715 (N.Y. Civ. Ct. 1980), in which the limitation of liability was found inapplicable because the carrier failed to enter the number of pieces and weight of checked baggage on the baggage check *with* Republic Nat'l Bank v. Eastern Airlines, 815 F.2d 232 (2d Cir. 1987), *aff'g* 639 F. Supp. 1410 (S.D.N.Y. 1986); Abbaa v. Pan Am. World Airways, 673 F. Supp. 991 (D.C. Minn. 1987); Martin v. Pan Am. World Airways, 563 F. Supp. 135 (D.D.C.

statement that the transportation is subject to the rules relating to liability established by the Convention.[89] Lastly, beyond the provisions of the Convention, the carrier may be unable to enforce a limitation of liability if it failed to comply with 14 C.F.R. § 221.176 which requires carrier to post conspicuous signs regarding liability limitations at ticket stations.[90]

IV. THE "DOMESTIC" BAGGAGE CLAIM

If it is determined that a baggage claim is for loss of, damage to, or delay of baggage during transportation which is not covered by the Warsaw Convention, reference must be made to different sources to determine what substantive provisions apply to the claim.[91]

A. *Governing Law and Contractual Terms*

The determination of the sources of the law currently governing interstate air transportation must begin with a basic understanding of the history of airline regulation. Beginning in 1938 with the passage of the Civil Aeronautics Act of 1938 and later followed by the Federal Aviation Act of 1958 (hereinafter Acts), the airline industry, which

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1983); Thompson v. British Airways, 21 Avi. (CCH) ¶ 18,290 (D.D.C. 1989); Jalloh v. Trans World Airlines, 19 Avi. (CCH) ¶ 17,804 (D.D.C. 1985); McPherson v. Quantas Airways, 23 Avi. (CCH) ¶ 17,557 (D.C.N.J. 1991); Lourenco v. Trans World Airlines, 244 N.J. Super. 48, 581 A.2d. 532 (1990), in which the limitation was found applicable notwithstanding the failure to enter the number of pieces and the weight of checked baggage on the baggage check. *See also* Exim Indus. v. Pan Am. World Airways, 754 F.2d 106 (2d Cir. 1985) (failure to record baggage information should not preclude carrier from involking liability limitation).

89. Convention, art. 4, ¶ 3(h), 49 Stat. 3000, 3002, official American translation at 3015-3016. A notice to the passenger that "carriage is subject to the Convention 'unless' such carriage is not 'international transportation' as defined by the Convention" is sufficient to satisfy the requirement of art. 4, ¶ 3(h). *Exim Indus.*, 754 F.2d at 108; Seth v. British Overseas Airways Corp., 329 F.2d 302 (1st Cir.), *cert. denied*, 379 U.S. 858 (1964); Moyer v. Port Authority of N.Y., 16 Avi. (CCH) ¶ 18,081 (E.D.N.Y. 1981).

90. Deutsche Lufthansa Aktiengesellschaft v. Civil Aeronautics Bd., 479 F.2d 912 (D.C. Cir. 1973); Hauslohner v. Eastern Airlines, 18 Avi. (CCH) ¶ 17,238 (E.D. Pa. 1983). Although 14 C.F.R. § 221.176 does not specifically say so, a failure to provide the notice or signs required implicitly removes the right to limit liability. Tariffs typically provide that if the plaintiff can show that notice was not provided as required by 14 C.F.R. § 221.176 the monetary limit shall be waived. *See* Chambers v. Trans World Airlines, 533 F. Supp. 426 (S.D.N.Y. 1982).

91. Transportation which is not covered by the Convention might come within the definition of "foreign air transportation" as defined in 49 U.S.C. § 1301(24)(c), "overseas air transportation" as defined in 49 U.S.C. § 1301(24)(b), "intrastate air transportation" as defined in 49 U.S.C. § 1301(26), or "interstate air transportation" as defined in 49 U.S.C. § 1301(24)(a). This article will discuss only "interstate air transportation," frequently referred to as "domestic" air transportation.

had not previously been regulated by statute, became subject to detailed economic regulation. Two of the goals of that economic regulation were uniformity of rates and services, and prevention of discrimination and preference.[92] Economic regulation was administered by the Civil Aeronautics Board (hereinafter CAB), which was created by the Acts.[93]

The Acts required a carrier to "file" tariffs with the CAB. The tariffs set forth rates, fares, and charges for air transportation, as well as the extent of all rules, regulations or practices in connection with said air transportation.[94] The CAB was tasked with the responsibility of determining what rates and rules were reasonable and in the public interest. It was said that the CAB had "primary jurisdiction" over the issue of the reasonableness of any filed rate or rule.[95] A rule contained within a *filed* tariff was deemed to be valid, unless declared otherwise by the CAB, and binding on passengers notwithstanding lack of knowledge.[96] At the base of almost every judicial opinion regarding claims of loss, damage, or delay in the carriage of baggage rendered during the period from 1938 to 1983, is the application of the following principles: 1) a filed tariff rule is valid until declared otherwise by the CAB; and 2) a filed tariff rule is binding on a passenger notwithstanding any lack of knowledge or notice.

In 1977, Congress enacted amendments to the Federal Aviation Act of 1958 which deregulated air-cargo.[97] Approximately one year later, Congress enacted the Airline Deregulation Act of 1978 which further amended the Federal Aviation Act of 1958 by deregulating interstate transportation of passengers and baggage.[98] By these enactments, Congress intended, in part, to return the airline industry to

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92. National Small Shipments Traffic Conf. v. Civil Aeronautics Bd., 618 F.2d 819 (D.C. Cir. 1980); North Am. Phillips Corp. v. Emery Air Freight Corp., 579 F.2d 229 (2d Cir. 1978).

93. 49 U.S.C. § 1321 (1982), *omitted by*, P.L. 95-504, 92 U.S. Stat. 1706, 1744 (codified at 49 U.S.C. § 1551(a)(3)(Supp. V 1987)).

94. 49 U.S.C. § 1373(a) (1982) (application to interstate and overseas transportation eliminated by P.L. 95-504, 92 Stat. 1706, 1744 (codified at 49 U.S.C. § 1551(a)(4)(B)(Supp. V 1987)).

95. Lichten v. Eastern Airlines, 189 F.2d 939 (2d Cir. 1951); United Airlines v. Civil Aeronautics Bd., 155 F.2d 169 (D.C. Cir. 1946); Adler v. Chicago & S. Airlines, 41 F. Supp. 366 (D. Mo. 1941).

96. *North Am. Phillips Corp.*, 579 F.2d at 233; Blair v. Delta Airlines, 344 F. Supp. 360 (S.D. Fla. 1972), *aff'd on opinion below*, 477 F.2d 564 (5th Cir. 1973); Tishman & Lipp v. Delta Airlines, 413 F.2d 1401 (2d Cir. 1969); *Lichten*, 189 F.2d at 940.

97. P.L. 95-163, 91 Stat. 1278 (1977).

98. P.L. 95-504, 92 Stat. 1705 (1978).

competitive market forces based upon the contractual relationship between carriers and passengers or shippers.[99]

The Airline Deregulation Act of 1978 provided that, effective January 1, 1983, air carriers would be exempted from filing tariffs pertaining to interstate transportation of passengers and baggage.[100] Since January 1, 1983, the term "tariff," which generally meant an officially required and filed statement of rates and rules, meant nothing more than a document issued by the carrier or on its behalf setting forth the contract terms of the areas covered.[101] The rights and liabilities of the parties to an interstate contract for the transportation of passengers and baggage are currently governed, in order of primacy, by Acts of Congress, federal regulation promulgated pursuant thereto, federal common law, and the contract of transportation.[102]

In litigation involving tariff provisions related to interstate transportation, two questions are presented which were not presented under the regulatory framework of *filed* tariffs. First, is the tariff provision properly included within the contract of transportation. Second, if properly included, is the tariff provision substantively valid and enforceable? Part 253 of Title 14, Code of Federal Regulations, entitled "Notice of Terms of Contract of Carriage," promulgated to be effective January 1, 1983, the same date the tariffs ceased to be *filed*, establishes the notice required on passenger tickets to be incorporated by reference as contractual terms not contained within the ticket booklet.[103] The requirements of Part 253 of Title 14, Code of

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99. Arkwright-Boston Mfr. Mutual Ins. Co. v. Great W. Airlines, 767 F.2d 425 (8th Cir. 1985); Fireman's Fund Ins. Co. v. Barnes Elec., 540 F. Supp. 640 (N.D. Ind. 1982); Shippers Nat'l Freight Claim Council v. United Airlines, 15 Avi. (CCH) ¶ 17,439 (D.D.C. 1978).

100. 49 U.S.C. § 1551 (1982 & Supp. V 1987); First Pa. Bank v. Eastern Airlines, 731 F.2d 1113 (3d Cir. 1984). The Act also eliminated the CAB effective January 1, 1985, transferring any functions remaining to other departments, primarily the Department of Transportation.

101. *See* 43 Fed. Reg. 33,733 at 33,737 n.11 (1978), Notice of Proposed Rule Making for All-Cargo Air Carriers and Domestic Cargo Transportation by § 401 and § 418 Air Carriers.

102. Gooch v. Oregon Short Line R.R., 258 U.S. 22 (1922); Modern Wholesale Florist v. Braniff Int'l Airways, 162 Tex. 594, 350 S.W.2d 539 (1961).

103. *See* 47 Fed. Reg. 52,128 (1982)(codified at 14 C.F.R. § 253) for a detailed background of the history, purpose, and authority for these rules.

Section 253 applies to all contracts with passengers for all scheduled direct air carrier operations in interstate and overseas transportation that incorporate terms by reference. 14 C.F.R. § 253.2 (1989). Although 14 C.F.R. § 253.3 (1989) Definitions, includes a definition of "large aircraft," no where in § 253 does there appear any restriction on its application to flight segments involving "large aircraft."

As to contractual terms, the text of which are contained within the ticket booklet, the United States Circuit Court of Appeals for the Ninth Circuit has applied a "reasonable communicativeness" test to determining whether such terms are properly to be considered as part of the con-

Federal Regulations, pre-empt state statutes and regulations of common law on the subject of adequate notice.[104]

In order for an air carrier to incorporate any terms into the contract of carriage by reference, it must include "on or with a ticket" a "conspicuous notice" that 1) any terms incorporated by reference are part of the contract, 2) the passenger may inspect the full text of each term incorporated by reference at the carrier's airport or city ticket offices, and 3) all passengers have the right, upon request at any location where the carrier's tickets are sold within the United States, to receive free of charge by mail or other delivery service the full text of each such incorporated term.[105] As pertains to baggage, a carrier may incorporate terms limiting liability for loss, damage or delay of baggage, including fragile or perishable goods, and limiting the time within which written notice must be made and suit brought.[106] As yet, there are no reported decisions specifically interpreting the requirement of "conspicuousity" contained in 14 C.F.R. § 253.5.[107]

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tract. Deiro v. American Airlines, 816 F.2d 1360 (9th Cir. 1987), *aff'g*, 19 Avi. (CCH) ¶ 17,777 (D. Or. 1985). A close reading of the Court's decision reveals that the Court did not address an incorporation by reference issue with respect to *tariff* terms external to the ticket booklet but rather found that the limitation of liability *notice* contained within the ticket booklet (the text and requirement of which was established at that time by 14 C.F.R. § 221.176) was itself a contractual term, that it had been properly included in the contract and that as a matter of federal common law it was valid in substance. In ruling that the notice had been incorporated, the Court applied the "reasonable communicativeness" test developed in a series of cases dealing with steamship passengers concluding that such reasoning was equally applicable to passengers of air carriers. *See* Rubinton v. Pan Am. World Airways, 22 Avi. (CCH) ¶ 18,400 (N.Y. Sup. Ct. 1990). The "reasonable communicativeness" test requires a court to look both to the physical characteristics of the ticket booklet *and* to external passenger related circumstances, e.g. passenger experience, opportunity to become aware of ticket terms, etc. Oddly, the Court's decision does not mention 14 C.F.R. § 253 which had become effective on January 1, 1983 and established that standard by which an air carrier may incorporate limitations of liability and other terms into the contract of carriage. Pursuant to 14 C.F.R. § 253 a passenger is bound by terms not appearing in the ticket booklet itself by a "conspicuous" notice containing various particulars on or with the ticket. Clearly, the second prong of the "reasonable communicativeness" test, passenger related circumstances external to the ticket booklet, should have no effect on that standard. The Court did describe the baggage liability limitation notices used and found that the notices inside the passenger-plaintiff's ticket coupon were conspicuous and understandable.

104. 14 C.F.R. § 253.1 (1989).

105. 14 C.F.R. § 253.5(a) (1989).

106. 14 C.F.R. § 253.5(b) (1989).

107. In Hauslohner v. Eastern Airlines, 18 Avi. (CCH) ¶ 17,238 (E.D. Pa. 1983), a case involving the death of a dog checked as baggage on a flight in 1981, the court interpreted a requirement that signs related to baggage liability limitations be posted in a "conspicuous" public place at each ticket sales position with the following language: "Presumably, the signs must be sufficient to attract or tend to attract the attention of incoming passengers because of the sign's size, brilliance, contrast or position. In short, the signs must be noticable." The sign requirement

Although, as a result of deregulation, reliance upon the legal status accorded a *filed* tariff rule as a basis for enforcement of its substantive provisions is now misplaced, those same provisions, and perhaps provisions even more restrictive than those once accepted by the CAB, may be valid and enforceable pursuant to federal common law.[108]

B. *Jurisdiction and Venue*

Actions against air carriers arising out of an interstate contract of transportation may be commenced either in state or federal court.

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as applicable in 1981 appeared in 14 C.F.R. § 221.176. Effective January 22, 1983, the portion of that regulation which referred to the domestic baggage limitation was removed as being superceded by the notice requirement of 14 C.F.R. § 254 (*See* Conforming Amendment, ER-1310, 48 Fed. Reg. 227, Jan. 4, 1983); Greenberg v. United Airlines, 98 Misc. 2d 544, 414 N.Y.S.2d 240 (N.Y. Civ. Ct. 1979) (the notice required by 14 C.F.R. § 221.176, which at the time in issue required conspicuous signs pertaining to baggage liability limitations be posted, must be positioned and identified so as to penetrate the traveling public's reasonably focused consciousness). *See* Wells v. American Airlines, 23 Avi. (CCH) ¶ 17,749 (S.D.N.Y. 1991).

Several decisions interpreting the provisions of the Warsaw Convention requiring notice be delivered may be of some assistance in determining just what the "conspicuous" standard may be. *See* Chan v. Korean Airlines, 490 U.S. 122, (1989) (Brennen J., concurring opinion) (a notice of Warsaw applicability in 8 point type is possibly adequate); Lisi v. Alitalia-Linee Aeree Italiane, 370 F.2d 508 (2d Cir. 1966), *aff'd*, 390 U.S. 455, *reh. denied*, 391 U.S. 929 (1968) (notice in 4-1/2 point print insufficient to provide a reasonable opportuntity to take precautions against limitations of liability); Egan v. Kollsman Instrument Corp., 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967) (exceedingly small, almost unreadable 4-1/2 point print, failed to give "clear and conspicuous" notice of Warsaw applicability as required by art. 3 pertaining to passengers), *cert denied*, 390 U.S. 455 (1968); Millikin Trust Co. v. Iberia Lineas Aereas De Espana S.A., 11 Avi. (CCH) ¶ 17,331 (N.Y. Sup. Ct. 1969)(notices of Warsaw applicability in 8 point print were easily readable and noticeable); Stolk v. Compagnie Nationale Air France, 58 Misc. 2d 1008, 299 N.Y.S.2d 58 (N.Y. Civ. Ct. 1969), *aff'd*, 64 Misc. 2d 859, 316 N.Y.S.2d 455 (N.Y. App. Term 1970)(a notice relating to death and personal injury liability in 10 point print without an equally clear and legible statement regarding the limitations of liability for baggage was insufficient to satisfy the Convention's requirement of notice with respect to baggage). *See* Domangue v. Eastern Airlines, 531 F. Supp. 334, 343 App. A (E.D. La. 1981) for a comparison of various print sizes.

See also Shankles v. Costa Armatori S.P.A., 722 F.2d 861 (1st Cir. 1983); Barbachym v. Costa Line, 713 F.2d 216 (6th Cir. 1983); DeNicola v. Cunard Line, 642 F.2d 5 (1st Cir. 1981) for decisions involving steamship passenger tickets.

Cf. the Uniform Commercial Code § 1-201 defining "conspicuous," as the term is used in that Code, to mean "noticeable."

108. Deiro v. American Airlines, 816 F.2d 1360 (9th Cir. 1987), *aff'g* 19 Avi. Cas. (CCH) ¶ 17,777 (D. Or. 1985); Ruston Gas Turbines v. Pan Am. World Airways, 757 F.2d 29 (2d Cir. 1985); First Pa. Bank v. Eastern Airlines, 731 F.2d 1113 (3d Cir. 1984); Klicker v. Northwest Airlines, 563 F.2d 1310 (9th Cir. 1977); Neal v. Republic Airlines, 605 F. Supp. 1145 (N.D. Ill. 1985); Fireman's Fund Ins. Co. v. Barnes Elec., 540 F. Supp. 640 (N.D. Ind. 1982); Shapiro v. United Airlines, 22 Avi. (CCH) ¶ 17,394 (E.D.N.Y. 1989); United States Gold Corp. v. Federal Express Corp., 719 F. Supp. 1217 (S.D.N.Y. 1989).

The United States District Court has subject matter jurisdiction over claims for loss, damage, or delay of baggage in interstate transportation if the requirements of diversity of citizenship are met,[109] and, even if they are not, perhaps as a federal question or pursuant to the federal court's commerce jurisdiction.[110] The jurisdiction of the United States District Court is not exclusive and state courts have concurrent original subject matter jurisdiction.[111] The plaintiff must, of course, also satisfy the pertinent venue statutes within the chosen jurisdiction.

C. *Proper Plaintiff and Proper Defendant*

An action against the carrier for loss, damage, or delay of baggage is limited to parties to the contract.[112] In interstate transportation, the passenger-plaintiff may bring an action for loss, damage, or delay of baggage against the carrier performing the transportation, or if involving more than one carrier, against the carrier responsible for the loss, damage, or delay, or if the passenger does not know which carrier is responsible, against the terminal carrier, in accordance with the "terminal carrier presumption" enforced by federal common law.[113]

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109. 28 U.S.C. § 1332 (1990) (diversity of citizenship and an amount in controversy of $50,000, exclusive of interest and costs).

110. In North Am. Phillips Corp. v. Emery Air Freight Corp., 579 F.2d 229 (2d Cir. 1978), the court held that in the context of *filed* tariffs establishing national equality of rates and services to the exclusion of state law a claim for loss of goods did state a claim arising under federal law. Although there are no longer *filed* tariffs for interstate transportation, the gap left by the absence of filed tariffs is now filled by federal regulations as to incorporation by reference and federal common law as to substantive validity of contractual terms. Arguably there might still exist federal question jurisdiction over claims for loss, damage, or delay of baggage in interstate air transportation. *See United States Gold Corp.*, 719 F. Supp. at 1223.

In Killian v. Frontier Airlines, 150 F. Supp. 17 (D. Wyo. 1957), the court held that it had jurisdiction over a claim for damages arising out of a delay of goods pursuant to 28 U.S.C.A. § 1337. That a court would uphold jurisdiction under that provision in the absence of a *filed* tariff seems less likely.

111. *See* Kibler v. Northwest Airlines, 563 So. 2d 550 (La. App. 4th Cir. 1990).

112. *Neal*, 605 F. Supp. at 1150. *See also* Reece v. Delta Airlines, 686 F. Supp. 21 (D. Me. 1988) (claim was not for damage to casket but for emotional distress in delivering casket such that corpse was open to view. Court held not covered by tariff limitation. Identity of persons entitled to recovery not limited by contract).

113. Braniff Airways v. El Paso Coin Co., 517 S.W.2d 915 (Tex. Civ. App. 1974), *cert. denied*, 423 U.S. 1032 (1975); Modern Wholesale Florist v. Braniff Int'l Airways, 162 Tex. 594, 350 S.W.2d 539 (1961). There is no right of action against the originating carrier based upon mere acceptance of baggage for transportation to a point beyond its line in the absence of an agreement to carry over the whole route. American Airlines v. Miller, 163 Tex. 400, 356 S.W.2d 771 (1962). *See also* Arkwright Boston Mfr. Mutual Ins. Co. v. Great W. Airlines, 767 F.2d 425 (8th Cir. 1985) (declining to accept § 7-302 of the Uniform Commercial Code as a correct statement of "federal common law"). Typically air carrier tariffs will contain a provision limiting the carrier's responsibility to acts or omissions which occur on its own line.

D. *Plaintiff's Burden of Proof and Carrier Defenses*

In an action seeking damages for loss of, damage to, or delay of baggage, the plaintiff's cause of action is one for breach of contract.[114] To establish a *prima facie* case the passenger-plaintiff must prove delivery to the carrier in good condition and that the baggage was not re-delivered (lost), was re-delivered in a damaged condition (damage), or was not re-delivered within the time required by the contract (delay) with resulting damages. The defendant must then come forward and prove that it was not negligent.[115]

E. *Written Notice and Time Limitations*

Contractual requirements that passengers give a carrier notice of loss, damage, or delay of baggage within specified time periods and bring any action against the carrier arising out of an interstate contract of transportation, are not provisions which exculpate the carrier and are valid according to federal common law so long as the time is not unreasonable as measured according to federal common law.[116] Whether the time fixed is reasonable depends on the course and nature of the business and on the time which ordinarily might be expected to elapse in the usual course of business before a passenger with ordinary diligence would be in a position to make demand on the carrier.[117]

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114. Neal v. Republic Airlines, 605 F. Supp. 1145 (N.D. Ill. 1985).

115. Missouri Pac. R.R. v. Elmore & Stahl, 377 U.S. 134 (1964).

116. Gooch v. Oregon Short Line R.R., 258 U.S. 22 (1922); St. Louis Iron Mountain & S. R.R. v. Starbird, 243 U.S. 592 (1917); Missouri, Kansas & Texas R.R. v. Harriman, 227 U.S. 657, 672-673 (1913); Express Co. v. Caldwell, 88 U.S. 264 (1874); *see also* Hepp v. United Airlines, 36 Colo. App. 350, 540 P.2d 1141 (1975); Cox v. Central Vermont R.R., 170 Mass. 129 (1988); Robert v. Pan Am. World Airways, 71 Misc. 2d 991, 337 N.Y.S.2d 891 (App. Term 1972), *aff'd*, 42 A.D.2d 929, 347 N.Y.S.2d 1005 (1973) (holding that even in the context of a filed tariff, the court may refuse to recognize what it deems to be an unreasonable time limit until the CAB passes on the rule with appropriate review).

117. A variety of time limits for written notice were enforced as *filed* tariff rules. In the context of filed tariffs, of course, the courts were not empowered to question the reasonableness. Nylen v. Delta Airlines, 14 Avi. (CCH) ¶ 17,927 (Mass. Dist. Ct. 1977) (parties did not contest that 45-day limit for notice of baggage claim was unreasonably short); Scheinman v. Eastern Airlines, 66 Misc. 2d 44, 318 N.Y.S.2d 992 (Civ. Ct. 1971) (45-day limit for notice of baggage loss contained in filed tariff enforced); *Robert*, 71 Misc. 2d at 992, 347 N.Y.S.2d at 892 (7-day time limit for damage to baggage in international filed tariff was enforced). *See also* Domestic Baggage Liability Rules Investigation, C.A.B. Order 77-9-80, 73 C.A.B. 1096, Sept. 20, 1977 (requiring that a 45-day period for written notice be allowed as to domestic transportation and that the limit be waived for good cause).

F. *Limitation of Liability*

An air carrier may not exculpate itself from liability for loss, damage, or delay of checked baggage.[118] However, air carriers may limit their liability for loss, damage, or delay of checked baggage based on the "released value" doctrine which has been accepted and enforced by federal common law.[119] The underlying rationale of the "released value" doctrine is that the passenger receives a rate for carriage based upon a stated amount of liability for baggage. The passenger is said to have "released" the carrier from liability beyond this amount. The carrier can limit recovery of the passenger for loss, damage or delay of baggage to an amount less than the actual loss sustained only if it grants the passenger a fair opportunity to choose between higher or lower liability by paying a correspondingly greater or lesser charge.[120]

Part 254 of Title 14, Code of Federal Regulations, prohibits a carrier from limiting its liability for provable direct or consequential damages resulting from the disappearance of, damage to, or delay in delivery of a passenger's personal property, including baggage, in its custody to an amount less than $1250.00 for each passenger.[121] Part

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Likewise, limitations on the time within which suit must be brought were upheld as filed tariff rules. Shea v. National Airlines, 16 Avi. (CCH) ¶ 17,822 (Mass. Sup. Ct. 1981) (2 years); Lyons v. American Airlines, 12 Avi. (CCH) ¶ 17,807 (D.C. Sup. Ct. 1973) (2 years).

In considering what is a reasonable limitation period certainly some deference must be given to the time limitation periods applicable to international transportation. Article 26, ¶ 1, of the Convention pertaining to carriage of baggage in international transportation allows 3 days in which to make written complaint of damage to baggage and 14 days with respect to delay of baggage. Article 29, ¶ 1, allows a two year period in which to bring suit.

But see Shippers Nat'l Freight Claim Council v. United Airlines, 15 Avi. (CCH) ¶ 17,439 (D.D.Cir. 1978) (reasonableness of rule after deregulation is to be determined by marketplace alone, not by court).

118. Klicker v. Northwest Airlines, 563 F.2d 1310 (9th Cir. 1977).

119. Deiro v. American Airlines, 816 F.2d 1360 (9th Cir. 1987), *aff'g*, 19 Avi. (CCH) ¶ 17,777 (D. Or. 1985); *Klicker*, 563 F.2d at 1315; Apartment Specialists v. Purolator Courier Corp., 628 F. Supp. 55 (D.D.Cir 1986); Neal v. Republic Airlines, 605 F. Supp. 1145 (N.D. Ill. 1985); Ragsdale v. Airborne Freight Corp., 173 Ga. App. 48, 325 S.E.2d 428 (1984). *But see* Wells v. American Airlines, 23 Avi. (CCH) ¶ 17,749 (S.D.N.Y. 1991).

120. New York, New Haven & Hartford R.R. v. Nothnagle, 346 U.S. 128 (1953); Hart v. Pennsylvania R.R., 112 U.S. 331 (1884); *Deiro*, 816 F.2d at 1365; Hopper Furs v. Emery Air Freight Corp., 749 F.2d 1261 (8th Cir. 1984); First Pa. Bank v. Eastern Airlines, 731 F.2d 1113 (3d Cir. 1984); *Neal*, 605 F. Supp. at 1147-1148; Fireman's Fund Ins. Co. v. Barnes Elec. Co., 540 F. Supp. 640 (N.D. Ind. 1982).

121. The notice requirement and minimum monetary limitation established in Part 254 apply only to flight segments using "large aircraft," defined as having a maximum passenger capacity of 60 seats or more, or any flight segment included on the same ticket as another flight segment that uses large aircraft. It is clear that carriers operating aircraft which are smaller than "large aircraft" may set a baggage liability limitation lower than $1250.00. In addition, since the notice

254 also requires that, by "conspicuous written material included on or with its ticket," the carrier include either a notice of any monetary limitation on baggage liability or the language "Federal rules require any limit on an airline's baggage liability to be at least $1250.00 per passenger."[122] Typical forms of passenger ticket and tariff provisions are likely to include special provisions with respect to fragile or perishable items checked as baggage, as well as listing of items that are "not acceptable" as checked baggage for which it may exclude any liability.[123]

The extent to which a tariff rule will be applied to limit liability is governed by the terms of the rule. A rule may extend to loss, damage, or delay of baggage occurring before or after actual flight.[124]

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requirement of 14 C.F.R. § 254.5 (1984), would not apply to flight segments other than those involving "large aircraft," it would seem that those carriers might be allowed to establish a monetary limit of baggage liability by incorporating such a limitation by reference so long as the notice requirements of § 253, which is not limited in application to flight segments involving "large aircraft," were satisfied.

122. *See* Notice of Proposed Rulemaking, 47 Fed. Reg. 5232 (1982); Final Rule, 47 Fed. Reg. 52,987 (1982); Stay of Effective Date of Final Rule, 48 Fed. Reg. 6961 (1983); and, Final Rule, 49 Fed. Reg. 5065 (1984), for the history, purpose, and authority for such rules.

123. Baggage is generally defined as such personal property as is necessary or appropriate for the wear, use, comfort or convenience of the pasenger for the purposes of the trip. *Deiro*, 19 Avi. (CCH) ¶ 17,781 (a reading of the tariff rule brought dogs within the definition of baggage); Seth v. British Overseas Airways Corp., 329 F.2d 302 (1st Cir. 1964) (unique manuscripts for religious treaties were baggage for a clerk on his way to pursue advanced study), *cert. denied*, 379 U.S. 858 (1964); Lichten v. Eastern Airlines, 189 F.2d 939 (2d Cir. 1951) (carrier may exclude liability where no consensual agreement to carry); Tishman & Lipp v. Delta Airlines, 413 F.2d 1401 (2d Cir. 1969) (under common law carrier liability extends only to items it agrees to carry); Weinglas v. Eastern Airlines, 13 Avi. (CCH) ¶ 17,549 (N.Y. Civ. Ct. 1975); Mechaber v. Omaha Indemnity Co., 75 Misc. 2d 969, 350 N.Y.S.2d 301 (App. Term 1973); Wadel v. American Airlines, 269 S.W.2d 855 (Tex. Civ. App. 1954); Shtulman v. Eastern Smelting & Refining Corp., 17 Avi. (CCH) ¶ 18,026 (Mass. Dist. Ct. 1982) (no liability for goods lost which were defined as unacceptable by tariff rule); Features Enterprises v. Continental Airlines, 745 F. Supp. 198 (S.D.N.Y. 1990) (Reliance on tariff rule liability exclusion for jewelry is prohibited as inconsistent with 14 C.F.R. § 253.5(b) and 14 C.F.R. § 254.). *See also* Schedlmayer v. Trans Int'l Airlines, 99 Misc. 2d 478, 416 N.Y.S.2d 461 (N.Y. Civ. Ct. 1979) (exclusion of liability of cash checked as baggage held invalid in a Warsaw case).

124. Chambers & Assocs. v. Trans World Airlines, 533 F. Supp. 426 (S.D.N.Y. 1982) (tariff limit applied to loss occurring after flight while in possession of delivery service); Hexcel Corp. v. Northwest Airlines, 12 Avi. (CCH) ¶ 18,292 (N.Y. Civ. Ct. 1974) (tariff applies until delivery to consignee, even though transit completed and carrier acting as warehouseman). *But see* Tremaroli v. Delta Airlines, 117 Misc. 2d 484, 458 N.Y.S.2d 159 (N.Y. Civ. Ct. 1983) (tariff limitation did not apply to hand baggage where loss occurred during security check prior to boarding); Karmely v. Alitalia-Linee Aeree Italiane, 13 Avi. (CCH) ¶ 18,097 (N.Y. Sup. Cit. 1975) (loss did not occur during services "incidental" to carriage as required for tariff limit application and tariff limits therefore were not applicable).

However, a limitation of liability may not extend to claims which are not in the nature of claims for loss, damage, or delay of baggage.[125]

G. *Avoiding the Limitation of Liability*

A limitation on the liability of the carrier for the loss, damage, or delay of checked baggage is not rendered inapplicable by any of the following: 1) a passenger's lack of actual notice of the terms of the limitation or his or her failure to read the terms of the contract;[126] 2) the lack of a passenger's signature assenting to the terms of the contract;[127] 3) the failure of the "Passenger Ticket & Baggage Check" to list in detail the rate structure;[128] 4) the failure of the carrier's agent to affirmatively advise a passenger that a value must be declared and a supplementary sum must be paid to obtain full protection;[129] 5) the degree of breach of duty on the part of the carrier arising from any attempt to perform the contract of carriage;[130] 6) the willful misconduct on the part of the carrier arising from any attempt to perform the contract of carriage;[131] 7) the theft or pilferage of baggage by third persons or by employees of the carrier;[132] 8) the "deviation" from the intended manner of carriage or routing;[133] 9) the misdelivery of bag-

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125. Reece v. Delta Airlines, 686 F. Supp. 21 (D. Me. 1988) (claim was not for damage to casket but for emotional distress resulting from delivering casket such that corpse was open to view); Delta Airlines v. Isaacs, 141 Ga. App. 209, 233 S.E.2d 212 (1977) (tariff limit did not apply to liability for misconduct in handling claim after loss).

126. Deiro v. American Airlines, 816 F.2d 1360 (9th Cir. 1987), *aff'g* 19 Avi. (CCH) ¶ 17,777 (D. Or. 1985).

127. *Id.* at 1366.

128. *Id.*

129. *Id.*; Randall v. Frontier Airlines, 397 F. Supp. 840 (W.D. Ark. 1975).

130. *Deiro*, 816 F.2d at 1366 (gross negligence); Neal v. Republic Airlines, 605 F. Supp. 1145 (N.D. Ill. 1985) (gross negligence); Shapiro v. United Airlines, 3 Avi. (CCH) ¶ 17,394 (S.D.N.Y. 1989) (gross negligence). *See also* Sorensen-Christian Indus. v. Railway Express Agency, 434 F.2d 867 (4th Cir. 1970); Gibson v. Greyhound Bus Lines, 409 F. Supp. 321 (M.D. Fla. 1976); Minneapolis Society of Fine Arts v. Railway Express Agency, 213 F. Supp. 129 (D. Minn. 1963); Greyhound Lines v. Mah, 216 Va. 401, 219 S.E.2d 842 (1975).

131. Rocky Ford Moving Vans v. United States, 501 F.2d 1369 (8th Cir. 1974); Mitchell v. Union Pac. R.R., 188 F. Supp. 869 (S.D. Cal. 1960).

132. Tishman & Lipp v. Delta Airlines, 413 F.2d 1401 (2d Cir. 1969); Vogelsang v. Delta Airlines, 302 F.2d 709 (2d Cir. 1962).

133. Lichten v. Eastern Airlines, 189 F.2d 939 (2d Cir. 1951); *Minneapolis Society of Fine Arts*, 213 F. Supp. at 132. *See also Vogelsang*, 302 F.2d at 712. Rosch v. United Airlines, 146 F. Supp. 266 (S.D.N.Y. 1956); Barr v. United Airlines, 10 Avi. (CCH) ¶ 18,429 (N.Y. Sup. Ct. 1969), *aff'd without opinion*, 35 A.D.2d 1080, 316 N.Y.S.2d 980 (1970); Bianchi v. United Airlines, 22 Wash. App. 81, 587 P.2d 632 (1978). Initial reference must be made to the specific terms of the contract which may expressly allow deviation. *See* Blaw-Knox Constr. Equip. Co. v. Alia:

gage;[134] or 10) the labeling of the cause of action as one for other than breach of contract.[135] A limitation on the liability of the carrier for the loss, damage, or delay of checked baggage is rendered inapplicable in the following instances: 1) where the carrier has converted the property for its own use;[136] 2) where the contract of transportation with respect to the baggage was obtained by fraud;[137] and 3) where the carrier has accepted baggage but refused to allow the passenger to declare a value and pay an additional charge.[138] Lastly, although Part 254 of Title 14, Code of Federal Regulations, does not specifically say so, if the carrier has failed to give notice to the passenger in accordance with Part 254, it is implicit that it may not claim the benefit of a monetary limitation of liability.[139]

V. CONCLUSION

Relative to the amount in controversy typically seen in airline baggage claims, the litigation can be inordinately complex. First, it is imperative that parties, attorneys, and judges be able to distinguish between baggage claims which are governed by the Warsaw Convention and those which are not. Second, the parties, attorneys, and judges must be able to recognize the issues and the governing law.

The Royal Jordanian Airline, 21 Avi. (CCH) ¶ 17,450 (N.D. Ill. 1988). Typical tariffs state that the carrier agrees to move baggage on the same flight as the passenger *unless* deemed to be impractical in which case the carrier will transport the baggage on the preceding or subsequent flight on which space is available. *But see* Cohen v. Varig Airlines, 85 Misc. 2d 653, 380 N.Y.S.2d 450 (N.Y. Civ. Ct. 1975) (any rule which allows carrier to carry baggage on a vehicle other than the one on which the passenger travels is unreasonable and illegal), *modified*, 88 Misc. 2d 998, 390 N.Y.S.2d 515 (App. Term 1976), *aff'd as modified*, 62 A.D.2d 324, 405 N.Y.S.2d 44 (1978).

134. *Vogelsang*, 302 F.2d at 712; Franklin v. United Airlines, 184 F. Supp. 814 (S.D.N.Y. 1960).

135. Neal v. Republic Airlines, 605 F. Supp. 1145 (N.D. Ill. 1985).

136. Deiro v. Amercian Airlines, 816 F.2d 1360 (9th Cir. 1987), *aff'g* 19 Avi. (CCH) ¶ 17,777 (D. Or. 1985); Glickfeld v. Howard Van Lines, 213 F.2d 723 (9th Cir. 1954).

137. Chandler v. Aero Mayflower Transit Co., 374 F.2d 129 (4th Cir. 1967); Mitchell v. Union Pac. R.R., 188 F. Supp. 869 (S.D. Cal. 1960).

138. Coughlin v. Trans World Airlines, 847 F.2d 1432 (9th Cir. 1988); Klicker v. Northwest Airlines, 563 F.2d 1310 (9th Cir. 1977); Boyle v. Amercian Airlines, 89 A.D.2d 667, 453 N.Y.S.2d 146 (1982).

139. *See* DOT Economic Regulations, 14 C.F.R. § 254.5 (1989). *See also* DOT Notice of Terms of Contract of Carriage, 14 C.F.R. § 253.4(a) (1989), which does specifically prohibit the carrier from claiming the benefit against the passenger of any term incorporated by reference if notice of the term is not provided in accordance with § 253.