

Comments

The Effects of the Amendments to the Baggage Check Provisions of the Warsaw Convention— Clearing the Way For More Efficient Check-in Procedures

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INTRODUCTION

Under the Warsaw Convention, passengers with lost or damaged baggage could recover the full amount of their baggage if they could show that an airline failed to comply with baggage check provisions.¹ However, Montreal Protocol No. 4, which amends the Warsaw Convention, in part, by eliminating two of the baggage check requirements, took effect in the United States on March 4, 1999.² Further, the Convention for the Unification of Certain Rules of International Carriage by Air

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1. *Cruz v. Am. Airlines, Inc.*, 193 F.3d 526, 527-30 (D.C. Cir. 1999), *cert. denied*, 120 S. Ct. 2025 (2000); Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, art. 4(3)(d), (f), and (h), 4(4), 18(1) and (2), 22(2), 29(1), 49 Stat. 3000 [hereinafter Warsaw Convention].

2. *Perri v. Delta Air Lines, Inc.*, 104 F. Supp. 2d 164, 168 (E.D.N.Y. 2000); Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, *ratified* by U.S. Senate Sept. 28, 1998, *effective* March 4, 1999, S. Exec. Rep. No. 105-20 (1998) [hereinafter Montreal Protocol No. 4].

(hereinafter "Convention") was signed at Montreal on May 28, 1999, and was submitted to the Senate on September 6, 2000 for advice and consent to ratification.³ Upon entry into force for the United States, this Convention, where applicable, would supersede the Warsaw Convention and its amendments contained in Montreal Protocol No. 4.⁴

Amendments to the baggage check provisions, while intended to simplify baggage check procedures, actually have adverse effects on passengers who might seek recovery from airlines for lost or damaged baggage. First, they take away the requirement that airlines record the number and weight of a passenger's baggage on the claim checks, effectively denying passengers this frequently used avenue of recovery. Second, even if passengers can show airlines' noncompliance with the remaining baggage check provisions, passengers might not recover the full value of their baggage because the amendments limit recovery unless the passenger declares a higher value.

The trend of court decisions addressing the amount of a typical passenger's recovery for lost or damaged baggage, due to carrier fault, seemed to be moving toward decisions in favor of the passenger. Non-commercial passengers were beginning to receive full recovery of the actual value of their baggage, and courts seemed to be moving away from decisions that often favored airlines.

The following discussion is intended to set forth the background of the Warsaw Convention, its baggage check provisions, and the provisions' subsequent amendments. This article then analyzes cases concerning the baggage check provisions in order to illustrate the difference in passengers' recoveries prior and subsequent to the amendments to the baggage check provisions.

I. BACKGROUND

A. THE WARSAW CONVENTION

The Warsaw Convention is an international treaty that governs claims arising out of the international carriage of persons and property by air, and it limits airline liability for death, injury, and loss of property.⁵ The Warsaw Convention was drafted at international conferences in Paris in 1925 and Warsaw in 1929, and the United States signed the treaty in

3. S.R. DOC. NO. 106-45, 146 CONG. REC. S8125-8126 (daily ed. Sept. 6, 2000); Message from the President of the United States Transmitting the Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, *submitted to State Department for recommendation* June 23, 2000, *transmitted to Senate for advice and consent to ratification* Sept. 6, 2000, Treaty Doc. 106-45, 1999 U.S.T. LEXIS 175, at *1-2 [hereinafter Convention].

4. Convention, *supra* note 3, at *2.

5. *Cruz*, 193 F.3d at 527; *Feeney v. Am. W. Airlines*, 948 P.2d 110, 112 (Colo. Ct. App. 1997).

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1934.⁶ In 1929, the airline industry was still relatively new, and negotiators feared that liability for catastrophic judgments could hinder the industry's development.⁷ Thus, one of the Warsaw Convention's goals was to limit the potential liability of air carriers.⁸ To balance this, the Warsaw Convention contained certain baggage check provisions with which airlines were required to comply.⁹ "A central quid pro quo of the [Warsaw] Convention is presumptive liability for the loss of cargo (Article 18), but a low limit on carrier liability calculated by the weight of the cargo (Article 22)."¹⁰

Article 18(1) provides that "the carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air."¹¹ Article 18(2) defines "transportation by air," in part, as "the period during which the baggage . . . [is] in [the] charge of the carrier . . . in an airport or on board an aircraft."¹²

Article 4, Sections (3)(d), (f), and (h), and Section (4) initially and often successfully provided the basis for claims in cases involving lost or damaged baggage.¹³ Article 4 sets forth the specific process airlines were required to follow with respect to baggage checks:

(3) The baggage check shall contain the following particulars . . . (d) The number of the passenger ticket . . . (f) The number and weight of the packages . . . (h) A statement that the transportation is subject to the rules relating to liability established by this [C]onvention. (4) . . . [I]f the baggage check does not contain the particulars set out at (d), (f), and (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.¹⁴

Plaintiff-passengers often emphasized these provisions because an airline's failure to follow even one of them should have precluded the applicability of the liability limitations, thus maximizing an airline passenger's recovery to the actual value of the baggage, rather than \$9.07 per pound of baggage.¹⁵

Article 22(2) of the Warsaw Convention sets forth the particulars of

6. *Spanner v. United Airlines, Inc.*, 177 F.3d 1173, 1175 (9th Cir. 1999).

7. *Onyeanusu v. PAN AM*, 952 F.2d 788, 792 (3d Cir. 1992).

8. *Id.*

9. Warsaw Convention, *supra* note 1, art. 4(3)(d), (f), and (h), 4(4).

10. *Spanner*, 177 F.3d at 1175.

11. Warsaw Convention, *supra* note 1, art. 18(1).

12. Warsaw Convention, *supra* note 1, art. 18(2)

13. Warsaw Convention, *supra* note 1, art. 4(3)(d), (f), and (h), 4(4).

14. *Id.*

15. Warsaw Convention, *supra* note 1, art. 4(3)(d), (f), and (h), 4(4), 22(2).

the limited liability provision.¹⁶ Article 22(2) states that in the transportation of checked baggage, the liability of the carrier shall be limited to a sum of 250 francs per kilogram unless the passenger makes a special declaration of value.¹⁷ Thus, the rate applied to lost or damaged baggage was \$9.07 per pound.¹⁸ This is the provision that airlines often attempted to rely on in contending that plaintiffs' recoveries should be limited.

B. THE AMENDMENTS TO THE WARSAW CONVENTION

The Montreal Protocol No. 4 took effect in the United States on March 4, 1999, eliminating the requirement that a carrier record the number and weight of a passenger's baggage on the claim check.¹⁹ In essence, for a passenger to recover from an airline for lost or damaged baggage, based on the airline's failure to record the weight and number of a passenger's bags, the passenger's claims must have arisen before March 4, 1999.²⁰ Further, passengers must have brought or are limited to bringing those claims within two years of the circumstances giving rise to their claims.²¹

Where applicable and if ratified, the Convention signed on May 28, 1999, will supersede the Warsaw Convention, as amended by the Montreal Protocol No. 4.²² Article 55(1) "establishes the supremacy of this Convention, as between States commonly party to this Convention, over the Warsaw Convention, The Hague Protocol, the Guadalajara Convention, the Guatemala City Protocol, and Montreal Protocols Nos. 1, 2, 3 and 4."²³ Articles 53(1) and 53(6) of the Convention set forth the provisions concerning signature, ratification and entry into force of the Convention.²⁴

Should airline customers with lost or damaged luggage, whose claims arose after March 4, 1999, wish to proceed with claims based on improper baggage check procedures, they will need to do so under the Convention's provisions.²⁵ Although the claims cannot be based on failure to

16. Warsaw Convention, *supra* note 1, art. 22(2).

17. *Id.*

18. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 256-60 (1984), *reh'g denied*, 467 U.S. 1231 (1984) (addressing the conversion from the French franc into the U.S. dollar and holding that the Civil Aeronautics Board's declared liability limit of \$9.07 per pound of cargo, based on the official gold conversion rate, is consistent with the Warsaw Convention, and is thus a valid basis for conversion).

19. *Supra* text accompanying note 2.

20. *Id.*

21. Warsaw Convention, *supra* note 1, art. 29(1).

22. *Supra* text accompanying note 4.

23. Convention, *supra* note 3 at *74.

24. Convention, *supra* note 3, art. 53(1), (6) at *112, 113-14.

25. *Supra* text accompanying note 22.

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record the weight and number of the passenger's bags, they can be based on an airline's failure to either: (1) give passengers written notice that the Convention may limit carrier liability for the loss of, damage to, or the destruction of baggage; or (2) provide the passenger with a baggage identification tag for each piece of checked baggage.²⁶ However, regardless of compliance with these provisions, passengers' recoveries will still be subject to limited liability.²⁷

Article 17(2) of the Convention basically combines Articles 18(1) and 18(2) of the Warsaw Convention.²⁸ Article 17(2) of the Convention provides, in part, "[t]he carrier is liable for damage sustained in case of destruction or loss of, or damage to, checked baggage upon condition only that the event . . . took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier."²⁹ Therefore, like the Warsaw Convention and its related instruments, the carrier is strictly liable for damages for checked baggage that is lost or damaged.³⁰ However, this presumption is subject to limited specified defenses.³¹

Articles 3(3) and 3(4) of the Convention are similar to Articles 4(3)(d) and 4(3)(h) of the Warsaw Convention.³² Article 3(3) states that "[t]he carrier shall deliver to the passenger a baggage identification tag for each piece of checked baggage."³³ Prior to the Convention, the baggage check could be and usually was incorporated into the passenger's ticket.³⁴ Article 3(4) provides that "[t]he passenger shall be given written notice to the effect that where this Convention is applicable it governs and may limit the liability of carriers in respect to death or injury and for destruction or loss of, or damage to, baggage, and for delay."³⁵ This paragraph preserves the requirement set forth in the Warsaw Convention, that carriers give passengers written notice of liability limitations.³⁶

Article 3 of the Convention, which sets forth, in part, the duties of the parties relating to the carriage of passengers and baggage, makes no mention that a carrier shall record the number and weight of the pack-

26. Convention, *supra* note 3, at *33-34.

27. Convention, *supra* note 3, art. 3(5) at *80-81.

28. Convention, *supra* note 3, art. 17(2) at *88; Warsaw Convention, *supra* note 1, art. 18(1) and (2).

29. Convention, *supra* note 3, art. 17(2) at *88.

30. Convention, *supra* note 3 at *44-45.

31. *Id.*

32. Convention, *supra* note 3, art. 3(3) and (4) at *80; Warsaw Convention, *supra* note 1, art. 4(3)(d) and (h).

33. Convention, *supra* note 3, art. 3(3) at *80.

34. Convention, *supra* note 3 at *33.

35. Convention, *supra* note 3, art. 3(4) at *80.

36. Convention, *supra* note 3 at *34; Warsaw Convention, *supra* note 1, art. 4(3)(h).

ages on the baggage check.³⁷ In other words, the Convention contains no provision that parallels Article 4(3)(f) of the Warsaw Convention. Airlines are thus no longer required to weigh passengers' baggage.

However, whereas the Warsaw Convention only limited carrier liability upon a showing of compliance with the baggage check procedures, the Convention limits liability for lost or damaged baggage regardless of carrier compliance with baggage check procedures.³⁸ "Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability."³⁹ Thus, the Convention's liability limits for baggage shall govern, even if the carrier fails to provide the passenger with a baggage identification tag or give passengers written notification of the Convention's applicability.⁴⁰

Article 22(2) of the Convention changes the limits of liability in relation to baggage from that set forth in the Warsaw Convention.⁴¹ "Paragraph 2 limits carrier liability for destruction, loss, damage, or delay of both checked and unchecked baggage to 1,000 SDR [Special Drawing Rights] per passenger (approximately \$1,350), unless the passenger declares a higher value."⁴²

Finally, Article 35(1) of the Convention is substantially the same as Article 29(1) of the Warsaw Convention.⁴³ Article 35(1) of the Convention, concerning limitations of actions, provides that "[t]he right to damages shall be extinguished if an action is not brought within an period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped."⁴⁴

The Montreal Protocol No. 4 and its subsequent amendments in the Convention greatly affect future passengers' options for bringing claims for lost or damaged baggage, based on an airline's failure to comply with baggage check provisions. Specifically, the amendments obviate the need that airlines comply with those provisions setting forth the requirement that the carrier record the number and weight of the passengers' bags.⁴⁵ "In future cases, a carrier will not surrender its limited liability simply by

37. Convention, *supra* note 3, art. 3(1)-(5) at *80-81.

38. Warsaw Convention, *supra* note 1, art.4(4); Convention, *supra* note 3, art. 3(5) at *80-81.

39. Convention, *supra* note 3, art. 3(5) at *80-81.

40. Convention, *supra* note 3 at *34.

41. Convention, *supra* note 3, art. 22(2) at *92; Warsaw Convention, *supra* note 1, art. 22(2).

42. Convention, *supra* note 3 at *52.

43. Convention, *supra* note 3, art. 35(1) at *104; Warsaw Convention, *supra* note 1, art. 29(1).

44. Convention, *supra* note 3, art. 35(1) at *104.

45. *Supra* text accompanying note 2.

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failing to record the weight of a passenger's luggage on the claim check."⁴⁶ The amendments basically allow airlines to further claim limited liability to passengers, while taking away some of passengers' avenues to complete recovery for their lost or damaged baggage.

The requirement that airlines follow fewer baggage check procedures was purportedly to achieve the purpose behind the amendments to Article 4, or to substantially reduce the number of entries required on each baggage check, clearing the way for more efficient check-in procedures.⁴⁷ "By establishing a fixed liability limit for baggage, rather than the Warsaw Convention's weight-based limitation, this provision should expedite passenger check-in by avoiding the need to weigh baggage at that time."⁴⁸

II. THE BAGGAGE CHECK PROVISIONS

A. THE WARSAW CONVENTION

1. *Caselaw Addressing Article 4(3)(f)*

a. The Commercial or Sophisticated Traveler

Some courts have limited customers' recoveries regardless of the airlines' failure to comply with Article 4(3)(f) of the Warsaw Convention, which provides that a baggage check must contain the number and weight of the packages.⁴⁹ For example, in *Martin v. Pan American World Airways*, the plaintiff argued that Pan Am was not entitled to take advantage of the limited liability provisions of the Warsaw Convention, in part, because the airline did not record the weight of her bags as required by Article 4(3)(f).⁵⁰ The Court concluded that the airline's failure to record the weight of the plaintiff's luggage was a technical and insubstantial omission which did not prejudice the plaintiff, and which should not act to extend the airline's liability beyond the limits set forth in the Warsaw Convention.⁵¹ The Court reasoned that the plaintiff was an experienced traveler, and air travelers understand that separate insurance is available to cover the risks of loss of luggage.⁵² Further, the plaintiff had been advised of the limited liability provisions of the Warsaw Convention and could have elected to take the risk of excess damage or insure, and here, the plaintiff chose not to insure.⁵³

46. *Perri*, 104 F. Supp. 2d at 168.

47. *Id.* at 168-69.

48. Convention, *supra* note 3 at *51-52.

49. Warsaw Convention, *supra* note 1, art. 4(3)(f).

50. *Martin v. Pan Am. World Airways, Inc.*, 563 F. Supp. 135, 138 (D. D.C. 1983).

51. *Id.* at 141.

52. *Id.*

53. *Id.*

The Court reached a similar conclusion in *Republic National Bank of New York v. Eastern Airlines* when it held that the plaintiff-traveler was more like a commercial shipper than a typical airline passenger.⁵⁴ There, the Court stated:

[T]he purpose of the weight requirement is to enable passengers to calculate the amount recoverable from the carrier under the Warsaw Convention for lost or damaged baggage. A passenger need only multiply the amount recoverable per pound under the Convention (\$9.07) by the weight of his baggage to arrive at this figure. Once having made the calculation, a passenger has enough information to decide whether to purchase insurance.⁵⁵

The Court then reasoned that the plaintiff had not been prejudiced because regardless of whether the plaintiff knew the exact weight of its baggage, the plaintiff could not have recovered \$2 million (the contents of one of plaintiff's bags) unless its bag weighed 220,507 pounds.⁵⁶ The plaintiff thus must have been on notice that insurance coverage would have been necessary to adequately protect its shipment, especially because the plaintiff, a professional courier, stated in its export declaration that its bag weighed fifty-two pounds.⁵⁷

In *Abbaa v. Pan American World Airways*, the plaintiffs argued that the baggage checks for their lost baggage did not indicate the weight of the packages and that the Warsaw Convention's limitations were therefore inapplicable.⁵⁸ The Court agreed with Pan Am's position that technical failures to comply with the Warsaw Convention will not preclude applying the limitations on liability when the omissions have not prejudiced the claimants.⁵⁹ The Court stated that plaintiffs were not prejudiced by Pan Am's failure to note the weight of the baggage because Mr. Abbaa knew the approximate weight of the baggage, and the plaintiffs are in the business of exporting merchandise, or have several times exported goods through international air carriers.⁶⁰ Further, the plaintiffs chose not to obtain additional insurance for the full value of the baggage, and chose not to declare excess value on the shipment when offered the opportunity before departure.⁶¹

Finally, in *Lourenco v. Trans World Airlines*, the Court held that the failure to record the weight and number of the plaintiffs' luggage was a technical and insubstantial omission and denied the defendant the benefit

54. *Republic Nat'l Bank of N.Y. v. E. Airlines, Inc.*, 815 F.2d 232, 237 (2d Cir. 1987).

55. *Id.*

56. *Id.* at 238.

57. *Id.*

58. *Abbaa v. Pan Am. World Airways, Inc.*, 673 F. Supp. 991, 993 (D. Minn. 1987).

59. *Id.*

60. *Id.*

61. *Id.*

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of the limitation of liability provisions of the Warsaw Convention.⁶² In *Lourenco*, the plaintiffs were carrying valuable jewelry, and Mr. Lourenco was an employee of Trans World Airlines.⁶³ The plaintiffs did not make a special declaration of value concerning the contents of their luggage, did not request special handling of the baggage, and did not purchase special insurance covering the full value of their possessions.⁶⁴

Martin, *Republic National Bank, Abbaa*, and *Lourenco* are all similar to each other in that the Courts held that the plaintiffs in these cases were not prejudiced by the airlines' failure to record the number and weight of the plaintiffs' bags, and thus the airlines' liabilities were limited. However, these cases dealt with what the courts considered commercial or sophisticated travelers rather than typical non-commercial travelers.⁶⁵ Similarly, the courts in these cases may have reasoned that they should hold these plaintiffs to somewhat higher of a standard as a result of the plaintiffs' experience in travel, their prior dealings with the shipment of goods, both combined with the value of the contents of their luggage.

b. The Typical or Non-Commercial Traveler

In *Cruz v. American Airlines*, discussed below, the Court held that the airline's failure to include the weight of the baggage, as required by Article 4(3)(f), precluded its reliance on the Warsaw Convention.⁶⁶ Courts had reached similar conclusions in many other cases dealing with this provision of the Warsaw Convention.⁶⁷ For example, in *Da Rosa v.*

62. *Lourenco v. Trans World Airlines, Inc.*, 581 A.2d 532, 537 (N.J. Super. Ct. Law Div. 1990).

63. *Id.* at 533.

64. *Id.*

65. *But see* *New Pentax Film, Inc. v. Trans World Airlines, Inc.*, 936 F. Supp. 142, 151 (S.D.N.Y. 1996)(court was not willing to determine where plaintiff fell in the range between "sophisticated commercial traveler" and "typical airline passenger"); *Feeney*, 948 P.2d at 112 (stating that federal courts tend to agree that technical omissions which do not prejudice the passenger are not violative of the Convention's purpose of limiting airline liability); *see also* *Hibbard v. Trans World Airlines, Inc.*, 592 N.E.2d 889, 892 (Ohio Ct. App. 1990).

66. *Cruz*, 193 F.3d at 527-30; discussion *infra* Part II.A.1.b.i.

67. *Tchokponhove v. Air Afrique*, 953 F. Supp. 79, 82-84 (S.D.N.Y. 1996)(passenger, whose luggage contained cameras and other electronic equipment, was entitled to damages from carrier for cost of replacing items contained in lost luggage because carrier failed to record the number of the passenger ticket and the number and weight of the packages on the passenger's baggage check); *Kupferman v. Pakistan Int'l Airlines*, 438 N.Y.S.2d 189, 192 (N.Y. Civ. Ct. 1981)(examination of plaintiffs' passenger tickets and baggage checks indicated noncompliance with Article 4(3)(f), and airline's liability was clearly not subject to any monetary restriction pursuant to Article 22(2) of the Warsaw Convention); *Schedlmayer v. Trans Int'l Airlines*, 416 N.Y.S.2d 461, 463-64 (N.Y. Civ. Ct. 1979)(fact that no check was issued does not alter the status of the hand luggage as checked baggage because the Warsaw Convention, by its very terms, makes a provision for such a situation); *Perri*, 104 F. Supp. 2d at 166-69 (court found that plaintiff was a typical airline passenger, and defendants could not invoke the limited liability provisions of the Warsaw Convention because ticket agents did not write the weight of plaintiff's luggage directly on her

Tap Air Portugal, the defendant-airline lost the plaintiff's baggage containing artwork valued at \$36,000.⁶⁸ The issue in that case was whether the omission of the number and weight of the packages was material or merely technical.⁶⁹ The Court found that the omission was material and that therefore, the limited liability provisions of the Convention did not apply.⁷⁰ The Court further held that it is not unreasonable or overly technical to require the carrier to comply with the minimum requirements plainly set out by the Convention.⁷¹ The Court quoted *Vekris v. Peoples Express Airlines* in support of its refusal to apply the liability limitations of the Warsaw Convention:

[I]n cases involving non-commercial airline passengers, Article 4 should be interpreted literally. Travelers must be notified of the exact weight of their baggage so that they will know the limit of the airline's liability. Since the effect of the Convention is to keep the liability of the airlines artificially low, it is not unreasonable to require that carriers comply with the strict requirements of Article 4 before availing themselves of the liability limits.⁷²

The plaintiff in *Vekris* had checked two pieces consisting of a canvas suitcase and a cardboard tube.⁷³ The cardboard tube, which contained the plaintiff's paintings purportedly worth \$45,000, never surfaced.⁷⁴ The Court struck the defendant's defense of limited liability because the baggage checks issued by the defendant did not contain the number and weight of the packages.⁷⁵

In *Gill v. Lufthansa German Airlines*, the plaintiff was forced to check his bag so that he could board the plane.⁷⁶ His bag arrived four hours late, allegedly scuttling his business deal.⁷⁷ The Court similarly determined that the airline's failure to comply with baggage check provisions precluded limitation of liability.⁷⁸ In discussing an airline's need to comply with the Article 4 baggage check provisions of the Warsaw Convention, the Court stated that while the Convention limits the risk to the airline, it also contains a presumption of carrier liability that works to the

claim stubs or on her passenger ticket); *see also* *Arkin v. New York Helicopter Corp.*, 544 N.Y.S.2d 343, 344-46 (N.Y. App. Div. 1st Dep't 1989); *Hill v. E. Airlines, Inc.*, 425 N.Y.S.2d 715, 716 (N.Y. Civ. Ct. 1980).

68. *Da Rosa v. Tap Air Port.*, 796 F. Supp. 1508, 1508 (S.D. Fla. 1992).

69. *Id.* at 1509.

70. *Id.*

71. *Id.* at 1510.

72. *Id.* (quoting *Vekris v. Peoples Express Airlines, Inc.*, 707 F. Supp. 675, 678 (S.D.N.Y. 1988)).

73. *Vekris*, 707 F. Supp. at 675.

74. *Id.*

75. *Id.* at 676, 678.

76. *Gill v. Lufthansa German Airlines*, 620 F. Supp. 1453, 1453-54 (S.D.N.Y. 1985)

77. *Id.* at 1454.

78. *Id.* at 1455-56.

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advantage of the passengers.⁷⁹ Similarly, in *Maghsoudi v. Pan American World Airways*, neither the plaintiff's ticket and baggage check nor his baggage claim check contained any information as to the weight of his luggage.⁸⁰ The Court held the liability limitations inapplicable, stating that because the Warsaw Convention was drafted with a bias in favor of the air carriers, the court was reluctant to ignore the clear language of the treaty without a compelling justification for doing so.⁸¹

Also, in *Hill v. American Airlines*, the Court stated that because American issued a baggage check not containing the particulars required by the Warsaw Convention, including the weight of the baggage, American was not entitled to avail itself of the limitation of its liability.⁸² Here, the Court disagreed with the holding in *Martin*, stating that if there is going to be an economic loss, it should be borne by the party in control of the risk.⁸³ The Court went on to state:

Here, control of the risk is in the airline in two regards: 1) the airline could limit its liability by complying with the conditions as stated in the [C]onvention, and that is exclusively within the power of the airline, and 2) the airline has exclusive control over the handling and delivery of the baggage.⁸⁴

Finally, in *Spanner v. United Airlines*, United argued that the technical requirements of the Warsaw Convention varied depending on the prejudice to, or the sophistication of, the passenger or shipper.⁸⁵ The Court held that United was not entitled to limited liability because United had failed to show that it had indicated the weight and number of the plaintiff's bags on the baggage check.⁸⁶ The Court provided that even where a distinction is made between unsophisticated and sophisticated passengers and shippers, the typical airline passenger still retains the benefits of strict enforcement of the Warsaw Convention.⁸⁷

i. *Cruz v. American Airlines, Inc.*

Cruz v. American Airlines exemplifies the trend in court decisions that were favoring the typical, non-commercial traveler, prior to the amendments to the baggage check provisions of the Warsaw Convention. The Court held that American Airline's (hereinafter "American") failure

79. *Id.* at 1454.

80. *Maghsoudi v. Pan Am. World Airways, Inc.*, 470 F. Supp. 1275, 1276 (D. Haw. 1979).

81. *Id.* at 1278-79.

82. *Hill v. Am. Airlines, Inc.*, 570 A.2d 1040, 1042 (N.J. Super. Ct. Law Div. 1989).

83. *Id.*

84. *Id.*

85. *Spanner*, 177 F.3d at 1176.

86. *Id.* at 1175-1177.

87. *Id.* at 1176.

to include the weight of the baggage, as required by Article 4(3)(f), prevented American's reliance on the limited liability provisions of the Warsaw Convention.⁸⁸

a. Facts and Procedural History

Fourteen members of the Cruz family had purchased airline tickets for travel from Washington to Santo Domingo.⁸⁹ Each family member checked two suitcases and was issued a baggage claim stub for each piece of luggage, none of which indicated the weight of the suitcases.⁹⁰ Ultimately, five of their suitcases did not arrive in Santo Domingo, so they promptly filed a missing property report with American.⁹¹

Among other claims, the Cruzes argued that American could not limit the amount of recovery because the airline did not comply with Article 4(3)(f) of the Warsaw Convention, and therefore, pursuant to Article 4(4), American could not invoke the liability limitations set forth in Article 22(2) of the Warsaw Convention.⁹²

Notwithstanding Plaintiffs' arguments, the district court ruled in favor of American and limited the Cruzes' recovery to \$9.07 per pound of luggage.⁹³ The district court stated that Article 4(4) does not require that an airline comply with all of the particulars of Article 4, Sections 3(d), (f), and (h), but rather, "a carrier loses its liability limitation protection only if it complies with *none* of the particulars."⁹⁴ The court based its interpretation of Article 4(4) on the conjunctive meaning of the word "and," and stated that the plain language of the provision directs that liability is lifted only if all three particulars are missing.⁹⁵

b. The Circuit Court's Opinion

American proposed several arguments as to why the Court should uphold the lower court's opinion and interpret the Warsaw Convention in its favor. First, American argued that using the plain language of the provision, airlines are not required to comply with all three particulars set forth in Article 4(4).⁹⁶ The Court, however, refused to accept this interpretation of the provision.⁹⁷ The Court recognized that the district

88. *Cruz*, 193 F.3d at 527-30.

89. *Cruz*, 193 F.3d at 527.

90. *Id.*

91. *Id.*

92. *Id.* at 528.

93. *Id.*

94. *Cruz*, 193 F.3d at 528 (emphasis added).

95. *Id.* at 528-29.

96. *Id.* at 529.

97. *Id.*

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court's interpretation is linguistically possible, but did not think it was a *reasonable* construction.⁹⁸ "It is rather clear to us that the word 'and' means that Article 4(4) of the Convention obliges a carrier to comply with each of the three particulars."⁹⁹

Second, American argued that the Cruzes were not prejudiced by the airline's failure to weigh the luggage because bags that are not weighed were deemed to weigh 100 pounds.¹⁰⁰ The Court stated that this argument is simply another way of stating that Article 4(3)(f)'s requirement makes little real sense.¹⁰¹ After considering the purpose in weighing baggage, the Court held that "the language of the Convention is unyielding and we have no warrant to dispose with portions we might think purposeless."¹⁰²

Third, American used the reasoning set forth in *Martin* to indirectly argue the "primary purpose" of the Warsaw Convention, which is to limit air carrier liability.¹⁰³ American attempted to adopt the language set forth in *Martin*, that an airline's failure to record luggage weight is a technical and insubstantial omission that should not act to extend an airline's liability.¹⁰⁴ The *Cruz* Court rejected this argument stating that "calling the requirement technical does not reduce its obligatory force—if a carrier wishes to assert the Convention's liability limitations."¹⁰⁵

Fourth, American argued the need for "uniformity" in construing treaties so that the Court may be authorized to ignore the requirements of Article 4(4).¹⁰⁶ The Court then cited two cases where the requirements set forth in Article 4(4) were ignored.¹⁰⁷ The Court, however, emphasized several cases where strict compliance with the requirements of Article 4(4) was necessary in order for the airlines to benefit from the limited liability provisions set forth in Article 22(2).¹⁰⁸ The Court rejected American's argument, stating that it could just as easily be argued that uniformity would be served by accepting the Cruzes' position.¹⁰⁹ Asserting the authority of the United States Supreme Court, the appellate court stated: "[E]ven had all federal courts that had considered the issue

98. *Id.* (emphasis added).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*; *Martin*, 563 F. Supp. at 141.

104. *Cruz*, 193 F.3d at 529; *Martin*, 563 F. Supp. at 141.

105. *Cruz*, 193 F.3d at 529.

106. *Id.*

107. *Id.* (citing *Republic Nat'l Bank*, 815 F.2d at 238; *Abbaa*, 673 F. Supp. at 992-94).

108. *Cruz*, 193 F.3d at 529-30 (citing *Spanner*, 177 F.3d at 1175-76; *Tchokponhove*, 953 F. Supp. at 79; *Da Rosa*, 796 F. Supp. at 1509-10; *Gill*, 620 F. Supp. at 1456; *Maghsoudi*, 470 F. Supp. at 1278-80).

109. *Cruz*, 193 F.3d at 530.

decided that they had the authority to ignore the Treaty's language, we would not have joined them. If there are circuit conflicts, it is for the Supreme Court to supply uniformity."¹¹⁰

Finally, American asserted that Montreal Protocol No. 4 clarifies the Warsaw Convention's language.¹¹¹ The Court also rejected this argument, stating that Montreal Protocol No. 4 clearly amends prior law, and it cannot be given retroactive effect as American would like.¹¹²

The Court then stated that the district court's interpretation of Article 4(4) was in error, and the airline's failure to comply with Article 4(3)(f) precluded it from invoking the \$9.07 per pound limit provided in Article 22(2).¹¹³ The Court held that the Cruzes would be entitled to recover for the actual value of their lost luggage.¹¹⁴

c. Strict Interpretation of the Warsaw Convention

Both the *Cruz* and the *Spanner* Courts discuss *Chan v. Korean Air Lines* in order to reject the airlines' arguments concerning interpretations of the Warsaw Convention—interpretations that were permitting airlines to limit passengers' recoveries regardless of the airlines' failures to comply with the baggage check procedures in the Warsaw Convention.¹¹⁵ In *Chan*, the Supreme Court held: "We must thus be governed by the text—solemnly adopted by governments of many separate nations—whatever conclusions might be drawn from the intricate drafting history that petitioners and the United States have brought to our attention. . . . [W]here the text is clear . . . we have no power to insert an amendment."¹¹⁶

In *Spanner*, the Court found that United could not overcome the clear text of Article 4 of the Warsaw Convention.¹¹⁷ The Court went on to state that it would be difficult to imagine textual commands of greater clarity.¹¹⁸ Finally, the Court stated that reading into Article 4 a condition that the passenger can recover full value only if the passenger is prejudiced is, under *Chan*, an impermissible Amendment of Article 4.¹¹⁹

In *Siben v. American Airlines*, the Court stated that courts in the Second Circuit and in New York State, when applying the Warsaw Con-

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*; see also *American Airlines, Inc. v. Cruz*, 120 S. Ct. 2025, 2025 (2000) (United States Supreme Court's denial of American Airline's Petition for Writ of Certiorari).

115. *Cruz*, 193 F.3d at 529; *Spanner*, 177 F.3d at 1176; *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989).

116. *Chan*, 490 U.S. at 134.

117. *Spanner*, 177 F.3d at 1176.

118. *Id.*

119. *Id.*

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vention to non-commercial passengers, have interpreted the Convention strictly.¹²⁰

d. Retroactivity of the Warsaw Convention's Provisions

In *Perri v. Delta Air Lines*, while recognizing the substantive change in law with respect to the recording of the number and weight of a passenger's baggage, the Court held that because the airline had failed to comply with Article 4(3)(f), and the plaintiff's claims were brought before Montreal Protocol No. 4 went into effect, the airline could not claim limited liability as it was set forth in Article 22(2) of the Warsaw Convention.¹²¹ The Court agreed with the *Cruz* Court that had rejected American's argument that Montreal Protocol No. 4 was a "clarification" of the Warsaw Convention's language, and thus should have applied retroactively to the Cruzes' claims.¹²² The *Perri* Court found that "Montreal Protocol No. 4 amended Article 4 and that this substantive change in the law cannot be applied retroactively in this case."¹²³

2. *Caselaw Addressing Articles 4(3)(d) and 4(3)(h)*

Under the Warsaw Convention, a passenger-plaintiff could also have attempted to proceed with a claim for failure to comply with one of the other baggage check provisions, specifically, failure to record the number of the passenger ticket on the baggage check.¹²⁴ In *Tchokponhove v. Air Afrique*, the Court noted that:

[T]he number of the passenger ticket as required by subsection (d) is not a technical or insubstantial omission from a baggage receipt. The number of the passenger ticket identifies the passenger to whom the baggage belongs and is the principal means of returning baggage to the passenger from whom it was received. The omission from the baggage receipt of the number of the passenger ticket clearly prejudices the passenger whose luggage goes astray.¹²⁵

Although the notice of applicability statement and number of the passenger ticket had to have been printed on the "baggage check," the

120. *Siben v. Am. Airlines, Inc.*, 913 F. Supp. 271, 277 (S.D.N.Y. 1996)(quoting *Vekris*, 707 F. Supp. at 678; *Gill*, 620 F. Supp. at 1456; *Kupferman*, 438 N.Y.S.2d at 192 (regarding non-compliance with 4(3)(f)); see also *Chukwuma v. Groupe Air France*, 767 F. Supp. 43, 47 (S.D.N.Y. 1991)(adopting the standard, but finding that 4(4) did not apply in light of the facts of the case), *aff'd*, 962 F.2d 2 (2d Cir. 1992)); but see *Onyeanusu*, 952 F.2d at 793 (holding that human remains met the definition of "goods," reasoning that in order to further the goals of uniformity and liability limitation, the Warsaw Convention's provisions must be construed broadly).

121. *Perri*, 104 F. Supp. 2d at 167-68.

122. *Id.* at 168; *Cruz*, 193 F.3d at 530.

123. *Perri*, 104 F. Supp. 2d at 169.

124. Warsaw Convention, *supra* note 1, art. 4(3)(d).

125. *Tchokponhove*, 953 F. Supp. at 84.

baggage check could have been and was often incorporated into the passenger ticket.¹²⁶ Therefore, passengers were not likely to advance these claims because airlines could easily prove compliance with these provisions by showing that they incorporated the passenger ticket number and notice of applicability into the passenger's ticket.

A passenger-plaintiff could also have attempted to proceed under the Warsaw Convention for failure to provide notice of the applicability of the Warsaw Convention. A passenger must have notice of the applicability of the Warsaw Convention in order for the Warsaw Convention to be binding on the passenger.¹²⁷ Article 4, Section (3)(h) provides that a baggage check must contain a statement that the transportation is subject to the provisions of the Warsaw Convention.¹²⁸ "That notice not only serves to make the passenger aware of the Convention and its effects, but gives him the opportunity to declare that the value of checked baggage is in excess of the standard limits and thereby to increase recovery under the Convention to the declared value."¹²⁹

In *Lisi v. Alitalia-Linee Aeree Italiane*, the Court held that the defendant was not entitled to avail itself of the liability limitations of the Warsaw Convention, in part, because it had failed to comply with Article 4(3)(h).¹³⁰ The defendant did not adequately give notice of the applicability of the Warsaw Convention concerning limited liability for lost or damaged baggage.¹³¹ The Court thought that one look at the tickets and checks compelled its decision:

The footnotes printed in microscopic type at the bottom of the outside front cover and coupons, as well as condition 2(a) camouflaged in Lilliputian print in a thicket of "Conditions of Contract" crowded on page 4, are both unnoticeable and unreadable. Indeed, the exculpatory statements on which defendant relies are virtually invisible. They are ineffectively positioned,

126. *Da Rosa*, 796 F. Supp. at 1509 n.3 (citing *Republic Nat'l Bank*, 815 F.2d at 235 (finding the Warsaw Convention applied where notice was printed on the passenger's ticket); *Seth v. British Overseas Airways Corp.*, 329 F.2d 302, 307 (1st Cir. 1964)(noting that the baggage check may be incorporated into the passenger ticket), *cert. denied*, 379 U.S. 858 (1964); *Gill*, 620 F. Supp. at 1455 n.1 (referring to plaintiff's ticket as his "claim check").

127. *Gill*, 620 F. Supp. at 1454.

128. Warsaw Convention, *supra* note 1, art. 4(3)(h).

129. *Gill*, 620 F. Supp. at 1454 (citing Warsaw Convention, Article 22(2)).

130. *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 253 F. Supp. 237, 239-40, 243 (S.D.N.Y. 1966), *aff'd*, 390 U.S. 455 (1968); *see also Egan v. Kollsman Instrument Corp.*, 234 N.E.2d 199, 202-03 (N.Y. 1967)(wrongful death suit where court compares facts to *Lisi* case with respect to failure to give notice of the Warsaw Convention's liability limitations concerning death and personal injury, pursuant to Article 3 concerning passenger tickets), *cert. denied*, 390 U.S. 1039 (1968); *but see Chan*, 490 U.S. 122 at 125-127 (court holds that carrier does not lose benefit of damages limitation of Warsaw Convention by failing to provide notice of limited liability concerning death or personal injury on the passenger ticket, but noted distinction between Articles 3 and 4 of the Warsaw Convention).

131. *Lisi*, 253 F. Supp. at 239-40, 243.

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diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that they are so artfully camouflaged that their presence is concealed.¹³²

In *Stolk v. Compagnie Nationale Air France*, the defendant argued that the plaintiff knew or should have known of the limitations of the Warsaw Convention because plaintiff read or should have read the notice of such limitations for loss of baggage, which was set forth in the passenger's ticket and baggage check.¹³³ The defendant further asserted that the notice of the Warsaw Convention's limitations on liability relating to death and personal injury, printed in ten-point type, was sufficient to give the plaintiff notice of the applicability of the Warsaw Convention's limitations concerning lost baggage.¹³⁴ The Court held that the plaintiff was under no obligation to read the statement of limitations of liability.¹³⁵ "[T]he very specific requirement of Art[icle] 4 makes it mandatory for the carrier to include a statement of the applicable limitations in the Baggage Check if it wishes to limit its exposure for loss or damage to baggage."¹³⁶ The Court concluded that the ten-point type notice relating to death and personal injury liability did not meet the Article 4 baggage check requirements, and the defendant thus could not avail itself of the liability limitations.¹³⁷

B. THE CONVENTION SUPERSEDING THE WARSAW CONVENTION AND ITS AMENDMENTS TO THE BAGGAGE CHECK PROVISIONS

Under Article 17(2) of the Convention, the airline is strictly liable for damages to checked baggage.¹³⁸ Therefore, a plaintiff whose claims arose or will arise after March 4, 1999 can base his or her lawsuit on an

132. *Id.* at 243.

133. *Stolk v. Compagnie Nationale Air France*, 299 N.Y.S.2d 58, 59-60 (N.Y. Civ. Ct. 1969), *aff'd*, 316 N.Y.S.2d 455 (N.Y. App. Term. 1970).

134. *Id.* at 60 (emphasis added).

135. *Id.*; *see also* *Domangue v. E. Airlines, Inc.*, 722 F.2d 256, 259 n.15 (5th Cir. 1984) (noting that plaintiff's actual knowledge was not the issue, but rather, whether the airline afforded him the opportunity to learn of the Warsaw Convention's liability limitations on death and personal injury).

136. *Stolk*, 299 N.Y.S.2d at 61.

137. *Id.* at 62; *but see* *Parker v. Pan Am. World Airways, Inc.*, 447 S.W.2d 731, 735 (Tex. Ct. App. 1969) (court found that printing on the back of the ticket and baggage check, though small, was certainly readable); *Seth*, 329 F.2d at 307 (court held that the statement on the passenger's ticket gave the passenger clear notice that limitations on the carrier's liability for the loss of checked baggage are provided by the Warsaw Convention and that the carrier will avail itself of those limitations if it can); *Feeney*, 948 P.2d at 113 (holding that the trial court did not err in concluding that a combination of notices on the passenger ticket/baggage check and on the baggage claims was adequate to notify plaintiffs of the potential applicability of the Warsaw Convention's limitation provisions).

138. Convention, *supra* note 3 at *44-45, art. 17(2) at *88.

airline's failure to comply with two baggage check provisions of the Convention: (1) an airline's failure to deliver to the passenger a baggage identification tag for each piece of checked baggage; or (2) an airline's failure to give written notice to the passenger that the Convention governs and may limit the liability of carriers for destruction or loss of, or damage to baggage.¹³⁹ However, the Convention will limit the airline's liability regardless of whether the carrier complies with the baggage identification tag requirement and notice of applicability statement.¹⁴⁰ Article 22(2) of the Convention limits carrier liability for destruction, loss or damage to baggage to approximately \$1,350 per passenger unless the passenger declares a higher value.¹⁴¹

III. CONCLUSION

Prior to the amendments to the baggage check provisions of the Warsaw Convention, passengers often sought full recovery of the value of their baggage by asserting the airlines' noncompliance with Article 4(3)(f). This provision provides that an airline must record the weight and number of the passenger's bags on the baggage check, and based on this provision, the trend seemed to be moving toward court decisions in passengers' favors.¹⁴² Passengers also brought claims for failure to include the ticket number on the baggage check or failure to give a statement of the applicability of the Warsaw Convention concerning limited liability for lost or damaged baggage.¹⁴³

However, the Convention signed on May 28, 1999, which superseded the Warsaw Convention and its related instruments, effectively limits the types of claims passengers can proceed under. Further, regardless of airlines' compliance, passengers' recoveries will be limited.

Airlines are no longer required to record the weight and number of a passenger's bags, even though the purpose behind weighing the baggage was to enable passengers to calculate their recovery, should their bags be lost or damaged. This information was meant to help a passenger decide whether he or she would like to purchase insurance. Now, a passenger's recovery will be limited by a pre-determined fixed value, so airlines will presumably have less of an incentive to comply with baggage check procedures.

One of the purposes of the Warsaw Convention was to limit airlines' liability, and the 1999 Convention further achieves this purpose. How-

139. Convention, *supra* note 3, art. 3(3) and (4) at *80.

140. Convention, *supra* note 3, art. 3(5) at *80-81.

141. Convention, *supra* note 3 at *52.

142. Warsaw Convention, *supra* note 1, art. 4(3)(f).

143. Warsaw Convention, *supra* note 1, art. 4(3)(d) and (h).

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ever, the scale is now tipped in the industry's favor. Despite efforts to substantially reduce the number of entries required on baggage checks, clearing the way for more efficient check-in procedures, the baggage check amendments upset the important balance between airlines and passengers.

