# THE AIR CARRIER'S RESPONSIBILITY FOR THE PASSENGER'S HAND BAGGAGE

BY

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## I. INTRODUCTION

There is relatively little legal material concerning the air carrier's liability for the passenger's hand bagagge. Such baggage may, nevertheless, easily perish or be damaged or delayed under circumstances that give rise to the question of the air carrier's liability. Hand baggage may contain valuable objects such as jewels, bonds or cash; in fact, passengers are encouraged by the airlines to carry such valuables on board with them rather than put them in their registered (checked in) baggage. Considerable inconvenience, damage and even injury may result also from the delay of hand baggage, if it contains, for instance, important legal documents, medicines, samples or spare parts.

In comparison with its liability for cargo and registered baggage, the air carrier's responsibilities in relation to hand baggage are regulated only vaguely in the original text of the Warsaw Convention for Unification of Certain Rules Relating to International Transportation by Air (the Warsaw Convention of 1929). The same is true of the Warsaw Convention as amended in The Hague in 1955. More recent revisions of the Convention, in particular the Guatemala Protocol of 1971 and the Montreal Protocol No. 3 of 1975, have brought a change in this respect, but they have not yet entered into force. The existing case law and legal writings concerning hand baggage are very limited and what there are reveal that opinions on the subject are largely divided.

## II. THE PROVISIONS OF THE WARSAW CONVENTION

The original text of the Warsaw Convention of 1929, which still applies unamended between certain countries, contains only two explicit references to hand baggage. Art. 4(1) stipulates that the carrier must deliver a baggage check for the transportation of baggage "other than small personal objects of which the passenger takes charge himself". Art. 22(3) prescribes a liability limit of 5,000 gold francs per passenger "as regards objects of which the passenger takes care himself".

The Hague Protocol of 1955 replaced the formulation of the original art. 4(1) with the words "In respect of the carriage of registered baggage, a baggage check shall be delivered ...". The liability limit concerning hand baggage remained unchanged.

The Guatemala Protocol of 1971, if and when it enters into force, will result in important changes regarding hand baggage. All luggage will be subjected to basically the same rules, making it normally unnecessary to distinguish between hand baggage and registered baggage. According to art. 17(3) in its Guatemala wording, the term "baggage" in the Warsaw Convention, as amended in Guatemala, means—unless otherwise specified—both checked baggage and objects carried by the passenger. This will, first of all, affect the interpretation of the Guatemala wording of art. 17(2), which provides that the carrier is liable for damage sustained in case of destruction or loss of, or damage to, baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or in the course of any of the operations of embarking or disembarking or during any period within which the baggage was in charge of the carrier. This strict liability rule, similar to that applicable to passengers and fundamentally different from the liability rule regarding cargo, is mitigated only to the extent that the carrier is not liable if the damage resulted solely from the inherent defect, quality or vice of the baggage. At the same time, the Guatemala Protocol introduces in art. 22(1)(c) a new maximum limit of liability for baggage (15 000 francs for each passenger) and stipulates in art. 24(2) that this limit may not be exceeded under any circumstances. If and when the Guatemala Protocol enters into force, art. 17(3) will apply also to the interpretation of art. 19, which stipulates that the carrier "shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage or goods". Art. 19 remains unchanged since Warsaw, but there have been different views as to whether it covers also the delay of hand baggage (see *infra*).

The Montreal Additional Protocols of 1975 do not, as such, affect the carrier's liability for hand baggage, except by replacing the Poincaré gold franc with Special Drawing Rights as the monetary unit regarding the liability limits. However, the ratification of the Montreal Protocol No. 3 results automatically in the acceding state's being bound by the provisions of the Guatemala Protocol (see *supra*). This is probably the manner in which these provisions will eventually become binding, within the foreseeable future it is to be hoped.

## III. THE LIABILITY REGIME

The Montreal Protocol No. 3 and/or the Guatemala Protocol will clarify and seemingly simplify the liability of the carrier for hand baggage. As to destruction, damage or loss, the carrier will usually be responsible, since the event causing the damage practically always takes place on board the aircraft or in

the course of embarking or disembarking. If the carrier attempts to avoid liability by asserting that the damage resulted solely from the inherent defect, quality or vice of the baggage, the burden of proof will *prima facie* lie on him. According to the Guatemala wording of art. 21, the carrier shall be partially or wholly exonerated from his liability if he proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation (usually the passenger). This will normally be difficult to prove, but it may be possible when the passenger e.g. violates the carrier's instructions as to where and how hand baggage should be stored, carelessly sits or steps on his own spectacles, forgets his wallet in one of the toilets, etc. Case law will have to develop concerning the passenger's duty of care, e.g. whether he may leave his valuables in the bag under his seat while sleeping or visiting the toilet. It is of little relevance whether the hand baggage is under the control of the passenger alone or is entrusted to a flight attendant, except of course that the passenger runs a somewhat smaller risk of contributing to the damage when the object is in the safekeeping of the carrier's staff. It is of interest to note that according to the Guatemala rules the carrier is *prima facie* liable also for damage or loss the causes of which are unknown. He is also liable for damage or loss caused by a passenger to another passenger's hand baggage, although the carrier may have a right of redress against the wrongdoer.

It is certain that the original Warsaw provisions, and the Warsaw provisions as amended in The Hague, will for many years continue to be applied in relation to and between countries bound neither by the Guatemala Protocol nor the Montreal Protocol No. 3. Within the foreseeable future, the older rules from Warsaw and The Hague might even remain the prevailing system in this field, in spite of the eventual entry into force of the Guatemala rules. The provisions of the original Warsaw Convention and of the Warsaw Convention as amended in The Hague thus deserve a closer look.

However, it has been a subject of controversy whether the Warsaw Convention in its 1929 and 1955 versions applies at all to hand baggage, with the exception, of course, of the explicit reference in art. 22(3) providing for the liability limit and of the general provisions such as those concerning time limitation and the jurisdiction of courts.

It must, indeed, be noted that under certain conditions the Convention holds the carrier liable for damage sustained in the event of the death or wounding of a passenger (art. 17) or in the event of destruction or loss of, or damage to, checked baggage or cargo (art. 18), but it contains no corresponding provision concerning the loss or destruction of, or damage to, hand baggage. Art. 19, prescribing that the carrier shall be liable for the damage occasioned by delay in the transportation of "passengers, baggage, or goods",

speaks of baggage in general, but it could be asserted that it was intended to cover delays of registered baggage only, since it might appear unreasonable to regulate liability for delay while omitting to regulate liability for loss or destruction.

The fact that the Convention thus says nothing about the carrier's responsibility for hand baggage (except, perhaps, as far as delay is concerned) has, therefore, been interpreted by certain writers to mean that the Convention does not intend to regulate such responsibility. It is, on the other hand, clear that the Convention's silence does not mean that the carrier is not responsible, since the liability limit in art. 22(3) would otherwise have very little meaning. It could thus be argued that the Convention leaves the question of the carrier's responsibility for the destruction or loss of, or of damage to, hand baggage to be regulated by domestic law, subject only to the liability limit of art. 22(3). The question whether this domestic law is the *lex fori* or the proper law of the contract or tort is an open one, but it need not be dealt with here.

Some support for the view that the Convention does not cover the carrier's liability for hand baggage can be derived from the *travaux préparatoires* of the Swedish Carriage by Air Act of 1937 (No. 73), which was based on the original Warsaw Convention of 1929. The Convention was here said to leave such liability to be regulated by "general private law". Even if some of the articles are formulated in such a way that they could be considered to be applicable to hand baggage as well, the *travaux préparatoires* conclude that the most correct interpretation of these provisions should be restrictive on this point.[1] This statement seems to involve the interpretation of art. 19 too, meaning that not even the provision on the carrier's liability for delay of "passengers, baggage, or goods" is considered to apply to hand baggage. Most legal writers who consider that the Convention does not regulate the carrier's liability for the destruction or loss of, or damage to, hand baggage, are, however, of the opinion that art. 19 applies also to hand baggage.[2]

There are, on the other hand, also those who assert that the rules on the carrier's liability for hand baggage should be, or are, found in the Convention even in other respects than delay. According to this view, the applicable rules should be looked for not in the various domestic legal systems but, by means of analogy, in the Convention's provisions concerning the carrier's liability for damage to passengers, or to checked baggage and cargo. Litvine, for example, has expressed the opinion that the word "checked" in art. 18, dealing with liability for checked baggage and goods, is simply the result of a mistake made

[1] See in NJA II, 1938, p. 340.

[2] See e.g. W. Guldimann, *Internationales Lufttransportrecht*, Zurich 1965, pp. 108 f; R.H. Mankiewicz in *Juris-Classeur. Droit international*, Fasc. 565 B of September 1976, para. 196; C.N. Shawcross & K.M. Beaumont, *Air Law*, 4th ed., issue 14, London 1984, para. VII(173).

by the editing committee at the Warsaw Conference in 1929.[3] Matte is of the view that the general tenor of the Convention, as well as the existence of art. 22(3), speaks in favour of such a broad interpretation that would include also hand baggage.[4] Two well-known authorities in the field of air law have recently changed their minds and now adhere to this opinion as well. Mankiewicz wrote the following in 1976:[5]

> Dès lors que les bagages à main ne sont pas mentionnés dans les articles 17 et 18, le fondement de la responsabilité du transporteur pour ces bagages est régi par le droit national de la responsabilité civile ...

In a supplement issued in 1982, however, he stated that[6]

> Bien que l'article 18 ne mentionne pas les bagages à main, il semble plus correct étant donné que leur transport est accessoire au transport du passager ... d'admettre que l'action en réparation du dommage causé par leur perte, destruction ou retard est fondée sur la responsabilité contractuelle du transporteur et, en conséquence, régie par la Convention ...

From the mention of art. 18, it appears that Mankiewicz is inclined to equate the liability for hand baggage with the liability for checked baggage or cargo. The other experts who have changed their minds are the present authors of Shawcross & Beaumont, who wrote in 1984 that the carrier's liability for hand baggage would exist at common law on proof of negligence, the only case of loss, destruction or damage covered by the Convention being an accident which also kills or injures a passenger (it seems any passenger, not necessarily the one in charge of the baggage). This last-mentioned exception was considered to follow from the wording of art. 17, according to which the carrier shall be liable for "damage sustained in the event of the death or wounding of a passenger".[7] In the 1985 issue, Shawcross & Beaumont find no convincing policy reason for restricting the carrier's liability under the Warsaw rules in respect of hand baggage to those cases in which there is also some personal injury:[8]

> Suppose that a passenger seat were to collapse, crushing baggage stowed beneath it; it would be strange if the owner of that baggage could claim under the Act if the seat had been occupied, its occupant sustaining bruises or shock, but would be left to claim in negligence at common law if the seat collapsed while unoccupied and

[3] See M. Litvine, *Droit aérien. Notions de droit belge et de droit international*, Brussels 1970, pp. 228 f.
[4] See N. Mateesco Matte in *International Encyclopedia of Comparative Law*, vol. XII, Chapter 6 (International Air Transport), para. 96.
[5] See Mankiewicz, *op.cit.*, Fasc. 565 B of September 1976, para. 196.
[6] See Mankiewicz, *op.cit.*, Fasc. 565 B, Supplement of February 1982, para. 196.
[7] See Shawcross & Beaumont, *op.cit.*, issue 14, para. VII(173).
[8] See Shawcross & Beaumont, *op.cit.*, issue 18, London 1985, para. VII(173).

> injured no-one ...; the scope of the Convention's applicability to unregistered baggage should be co-extensive with its coverage of injuries to the person, as the objects would be under a passenger's control, but all this means is that the loss of or damage to the baggage must occur within the period identified by art. 17, i.e. on board the aircraft or in the course of any of the operations of embarking or disembarking.

Indeed, one has to agree that it would not be reasonable to make the carrier's liability for hand baggage depend on the existence of a personal injury to a passenger. This does not, however, necessarily speak for subjecting the liability for hand baggage to art. 17 even when there is no such injury; it might as well be argued that the original interpretation by Shawcross & Beaumont of art. 17 was incorrect and that hand baggage falls beyond the field of application of this article, regardless of whether there is a personal injury or not. There are, however, several other writers who would like to apply art. 17 to hand baggage as well, at least when it comes to determining the span of time during which the carrier is responsible ("if the accident which caused the damage ... took place on board the aircraft or in the course of any of the operations of embarking or disembarking").[9]

The case law is very meagre. There is, nevertheless, one recent decision in point, namely *Alixandra C. Baker* v. *Lansdell Protective Agency, Inc. et al.* of 1984.[10] In this case, Ms Baker sued to recover the value of certain jewelry which she claimed had been removed from the hand baggage while she was passing through a security checkpoint before boarding a flight from New York to London. Ms Baker alleged that approximately $ 200 000 worth of jewelry had disappeared from her bag between the time she handed the bag to a security agent for passage through an X-ray scanner and the time the bag was returned to her on the other side of the screening area. The defendant security agency, which had performed the security check as an agent of the air carrier, motioned for partial summary judgment limiting its liability in accordance with the Warsaw Convention to $ 400. The court reasoned in the following way:[11]

> The Convention also places a ceiling of 5 000 francs, or approximately $ 400, on a carrier's liability for "objects of which the passenger takes charge himself" without

[9] See e.g. E. Suherman, "Le transport aérien des bagages à main", in *Revue française du droit aérien* 1965, pp. 293–99, at p. 298; H. Wessels, "Einige Zweifelsfragen bei der Haftung des Luftfrachtführers für Handgepäck gemäss Warschauer Abkommen und deutschem Recht", in *Zeitschrift für Luftrecht* 1958, pp. 209–16, at pp. 214–16.

[10] 18 Avi. 18,497 (United States District Court for the Southern District of New York, June 27, 1984). Cf. also *Tremaroli* v. *Delta Airlines and Ogden Security, Inc.*, 17 Avi. 18,294 (Civil Court of the City of New York, Queens County, January 5, 1983), which concerned a domestic flight within the U.S.A.

[11] Quoted from 18 Avi. 18,498.

> expressly defining the scope of the carrier's responsibility for the loss of or damage to such objects ... However, because it is envisioned that these objects will ordinarily be within the passenger's possession or control, it is both logical and consistent with the Convention's overall framework to interpret the scope of the Convention's applicability to these items as being coextensive with its coverage of injuries to the person. Indeed, because there is no indication that the scope of a carrier's responsibility for a passenger's personal effects is intended to be otherwise than the extent of its responsibility for the passenger's person, the Convention must be read as applying only to the loss of or damage to these personal items which occurs on board the aircraft or in the course of any of the operations of embarking or disembarking.

The central issue, according to the court, was whether the Convention applies to incidents occurring while a passenger is in a pre-boarding security area. To resolve this question, it was necessary to determine whether Ms Baker was "in the course of any of the operations of embarking" at the time the jewelry was allegedly removed from her bag. The court took into consideration that although the security checkpoint was not located immediately at the flight gate, it was located in an area to which only passengers, and not the general public, were permitted access. Moreover, throughout the course of the security check Ms Baker was under the direction of the defendants. The security check was a legally mandated prerequisite to boarding the plane. Under these circumstances, the court found it was appropriate to characterize Ms Baker as being in the course of one of the operations of embarking. Accordingly, the security agency's motion for partial summary judgment limiting its liability to $ 400 was granted, subject to Ms Baker's opportunity to demonstrate at trial that her loss occurred as a result of the security agency's wilful misconduct.[12] The judgment can thus be interpreted to mean that the Warsaw Convention regulates also the carrier's liability for loss of or damage to hand baggage, the applicable rule being art. 17 dealing with bodily injuries suffered by a passenger.

It is submitted that although the authors of the Warsaw Convention probably did not intend to deal with the destruction or loss of, or damage to, hand baggage,[13] it is more reasonable to apply the Convention by analogy than to look for solutions in the provisions of the various domestic legal systems. The purpose of all the Warsaw rules is to uphold a uniform system of the carrier's liability, as independent as possible of the vicissitudes of the variety of domestic laws. The basis of the carrier's responsibility for destruction of, loss of, or

[12] See art. 25 of the Warsaw Convention, according to which the carrier shall not be entitled to avail himself of the Convention's liability limits if the damage is caused by his wilful misconduct or equivalent default (the original version of the Convention, which is the only one ratified by the United States).

[13] See e.g. Wessels, *op.cit.*, p. 209.

damage to, hand baggage should be art. 17, since the time span of such responsibility should be the same as that of the carrier's responsibility for the death or bodily injury of the passenger, who takes personally charge of his hand baggage and carries and guards it himself practically all the time. If a passenger stumbles and breaks both his foot and the camera hanging around his neck, it is reasonable to subject both types of damage to art. 17, according to which the carrier shall be liable if the accident causing the damage took place on board the aircraft or in the course of any of the operations of embarking or disembarking. This is, incidentally, the main principle of the solution adopted in 1971 in Guatemala (see *supra*). The provisions in article 18 on checked baggage and cargo are not suitable for hand baggage, since they assume that the baggage is in charge of the carrier.

The possibilities of the carrier to exonerate himself from his liability for hand baggage should be governed by arts. 20 and 21 of the Convention.[14] Since the hand baggage is most of the time under the passenger's control, art. 21 is of particular importance; it stipulates that the carrier may exonerate himself partly or wholly by proving that the damage was caused by or contributed to by the negligence of the passenger.

Articles 20 and 21 may naturally be applied also to the carrier's liability for delay of hand baggage, governed by art. 19 (see supra). Some writers have asserted that the delay of transportation of hand baggage can hardly entitle the passenger to compensation in addition to what the carrier has to pay for delay of transportation of the person of the passenger.[15] This is true, especially since the hand baggage normally contains personal objects which the passenger prefers to have close by, such as his passport, medicines, spectacles, camera, etc. In fact, a delayed passenger usually appreciates that his hand baggage is delayed with him. A carriage according to schedule of his hand baggage would increase his discomfort and damage. There are exceptions, though. It may happen that the greatest damage is caused by the delay of the hand baggage, quite regardless of the delay of the passenger, who may be a mere messenger or a courier carrying important legal documents to be signed before a certain date or life-saving medicine urgently needed by a sick patient. The airlines encourage passengers to carry such specially important or valuable objects in their hand baggage rather than in the registered suitcases, and it is thus reasonable that they should be responsible. In these cases, the damage caused by the delay of the hand baggage should be computed separately and subjected to the liability limit imposed by art. 22(3), whereas the possible additional damage

[14] See e.g. R.H. Mankiewicz, *The Liability Regime of the International Air Carrier*, Deventer 1981, para. 196.
[15] See e.g. Mankiewicz, *op.cit.*, para. 196.

caused by the delay of the person of the passenger should be subject to the limit stipulated in art. 22(1).

## IV. WHAT IS "HAND BAGGAGE"?

The definition of hand baggage, as opposed to checked baggage and cargo, is not so simple as it might seem to be.

As far as the difference between baggage in general and goods is concerned, it has been asserted that only objects intended for the passenger's personal use can be denoted baggage, so that e.g. samples of goods for sale, spare parts for machinery or even a musical instrument carried by a professional musician are not baggage but cargo.[16] The General Conditions for Carriage of Passengers and Baggage, issued by S.A.S. and based on the General Conditions elaborated within I.A.T.A., state in art. 1 ("Definitions") that baggage means

> such articles, effects and other personal property of a passenger as are necessary or appropriate for wear, use, comfort or convenience in connection with his trip. Unless otherwise specified, it shall include both checked and unchecked baggage of the passenger.

The Warsaw Convention does not contain any definition of baggage, but it might seem that its original text of 1929 also makes a distinction depending on the use of the objects included in the baggage, at least as far as hand baggage is concerned. Art. 4(1), which has been quoted before, speaks of "small personal objects" of which the passenger takes charge himself. It could be argued that e.g. spare parts or legal documents relating to business are not personal objects in this sense. It is, nevertheless, submitted that the intended use of the object should be disregarded. Who owns the object is equally irrelevant, despite the definition in the General Conditions, speaking of "personal property of a passenger". It would be obviously illogical if the carrier, who has usually no possibility of finding out who owns the camera hanging on the passenger's neck or of checking whether the passenger is a professional photographer or a mere tourist, would be deprived of the protection provided by the liability limits in art. 22 because he omitted to issue a baggage check or an air waybill. It is thus reasonable that art. 9(4) of the General Conditions states that if carrier accepts as baggage articles which do not constitute baggage as defined in art. 1 of the same Conditions (see *supra*), the carriage thereof shall nevertheless be subject to the charges, limitations of liability and other provisions of the Conditions applicable to the carriage of baggage. Even in absence of this

[16] See e.g. Matte, *op.cit.*, para. 95.

stipulation, the only reasonable method of distinguishing baggage from cargo and registered baggage from hand baggage appears to be to accept the intentions of the parties, in particular of the carrier, when accepting to carry the object in question.[17]

The most important criterion for distinguishing hand baggage from checked baggage is whether the parties at the point of departure agreed, explicitly or implicitly, that the object shall during the transportation be under the immediate control of the carrier or of the passenger.[18] The General Conditions define in art. 1 "checked baggage" as baggage of which carrier takes sole custody *and* for which carrier issued a baggage check, whereas all baggage other than checked baggage is called "unchecked baggage". According to the 1929 and 1955 versions of the Warsaw Convention, the carrier is not entitled to avail himself of the maximum liability limits stipulated in art. 22(2) if he has failed to deliver a proper baggage check for checked (registered) baggage (art.4) and it would be obviously unreasonable if he were permitted to avoid this obligation by creating a definition of checked baggage whose consequence would be that he is obliged to issue a baggage check only for such baggage for which he has in fact issued a baggage check. The fact that the carrier has not delivered the baggage check is thus, as such, not relevant for the classification of the baggage as "checked" ("registered"). It is the other criterion used in the General Conditions that should be decisive: the baggage is "checked" if the carrier has taken sole custody of it, whereas it is "unchecked", i.e. hand baggage, if it remains in the sole custody of the passenger. The non-existence of a baggage check may, however, serve as indication of the intentions of the parties, but it can hardly be conclusive.

The intermediate situations, where the issue of custody is open to different interpretations, deserve a special comment. Several relatively recent decisions have dealt with the situation that arises when the passenger entrusts his hand baggage to the care of the carrier (the flight attendant) during the flight . If such baggage gets lost or suffers damage, what rules will govern the liability of the carrier?

The first relevant case is a West German one, decided by the *Bundesgerichtshof* (the Federal Supreme Court) on November 28, 1978.[19] The plaintiff was a passenger on a flight from Germany to Spain, operated by the defendant carrier. Because of technical problems, the aircraft was forced to make an emergency landing, during the preparation of which the attendants collected, in accordance with emergency landing regulations, the valuables carried by

[17] See e.g. Mankiewicz, *op.cit.*, para. 82; Wessels, *op.cit.*, pp. 213 f.
[18] See e.g. Suherman, *op.cit.*, p. 294; Wessels, *op.cit.*, pp. 212 f.
[19] The case is reported in *Zeitschrift für Luft- und Weltraumrecht* 1979, p. 137, and 1980, p. 52.

passengers and locked these objects in the toilet cabin. After a successful emergency landing the objects were returned to the passengers in a waiting room at the airport, when it turned out that a very expensive watch valued at 4,500 DM and spectacles worth 185 DM belonging to the plaintiff had disappeared. The carrier refused to pay more than 1,070 DM, invoking the liability limit imposed by art. 22(3) of the Warsaw Convention, and was sued by the plaintiff for the difference (3,615 DM). The court held for the defendant airline, since the delivery of the objects by the passenger to the flight attendant had not converted them into checked baggage. The parties had not intended to change their contract in such a way and the limit stipulated in art. 22(3) of the Convention remained thus applicable. It could be disregarded only if the damage had been caused by the carrier's default of a particularly serious nature (art. 25 of the Convention). No such misconduct had, however, been shown.

The second relevant case is that of *Schedlmayer* v. *Trans International Airlines*, decided by New York City Civil Court, New York County, on February 22, 1979.[20] Mrs Schedlmayer, the plaintiff, sued the carrier in order to recover 1,000 U.S.$, representing cash which had disappeared from her hand baggage during a charter flight from Austria to New York. The circumstances had been as follows: There was a considerable delay in departure after the passengers were seated in the plane. When the plane was finally ready for departure, a stewardess asked some of the passengers, including the plaintiff, whether they could give her their hand baggage so that she could store it in the front of the plane. Mrs Schedlmayer testified that everything happened so quickly and that she was so tired and uncomfortable from the delay, that she agreed without thinking of the contents of her bag. During the flight she asked the crew members for her bag but was told that she could not retrieve it until she claimed her baggage in New York. Upon arrival she obtained her bag but found that the money was gone. The court found the carrier liable, holding that the carrier had assumed control over the luggage which had thus become checked baggage according to the Warsaw Convention. The fact that no baggage check had been issued was not relevant for the status of the bag as checked baggage, but it had as a consequence that the carrier was in accordance with art. 4(4) of the Convention not entitled to avail himself of the Convention limiting his liability. The carrier was, therefore, liable for the whole amount. The court held also that Mrs Schedlmayer had not been contributorily negligent by leaving money in her bag, since she had reasonably believed that the bag would be placed in the front room of the plane, which she could observe from her seat, and that she could retrieve it at any time. If that

[20] 15 Avi. 17,740.

had been the fact—the court added—the carrier would not have incurred custodial liability.

The reasoning of the court in the *Schedlmayer* case was followed in the case of *Hexter* v. *Air France*, decided on December 20, 1982, by U.S. District Court of the Southern District of New York.[21] The Hexters boarded a Concorde flight in Paris, carrying with them an overnight bag containing jewelry with an estimated value of $ 123,000. At some point during the flight, the bag was given over to a flight attendant who placed it in a closet to the rear of the seats occupied by the Hexters. The bag was returned to them at the termination of the flight. While unpacking in their New York hotel, the Hexters discovered that the jewelry was missing. In the lawsuit that followed, the Hexters maintained that the bag was "accepted" by Air France when the flight attendant placed it in the closet, with the consequence that it was no longer in their charge and that Air France's failure to deliver a baggage check for the bag made the art. 22 liability limitations inapplicable. Air France, on the other hand, argued that any baggage that the passenger chose not to deliver to the carrier in exchange for a baggage check prior to boarding the flight constituted objects of which the passenger took charge himself, regardless of the disposition of the baggage during the flight, and that therefore it was entitled to partial summary judgment limiting its liability pursuant to the Warsaw Convention. To support this proposition, Air France invoked a passage from a book by Drion, asserting that baggage accepted on board an aircraft is accepted for storage and not for carriage and that therefore the liability limitations apply.[22] Nevertheless, the court held that when the airline "by its unilateral net" removes baggage from the passenger's charge, it thereby accepts the baggage within the meaning of art. 4(4) of the Convention, and must issue a baggage check to preserve its right to limited liability. The court added that the airline can, of course, take steps to ensure that limited liability is preserved. It can screen passengers prior to boarding and insist that baggage be checked if it might for one reason or another have to be removed from the passenger's charge. Alternatively, it can devise a system for issuing baggage checks on board the aircraft. Since the circumstances surrounding the taking of the bag and its subsequent disposition were disputed by the parties, in particular as to whether the Hexters retained access to their bag during the entire flight, the motion for summary judgment was denied.

In the above case of *Baker* v. *Lansdell Protective Agency, Inc.* of 1984,[23] Ms Baker contended, *inter alia*, that her carry-on bag was appropriately classified as checked baggage for the period of time it was in the hands of Lansdell

[21] 17 Avi. 18,054.
[22] See H. Drion, *Limitation of Liabilities in International Air Law*, The Hague 1954, pp. 303 f.
[23] See footnote 10, *supra*.

employees for the purposes of a pre-boarding security check. She further asserted that because she was not given a baggage check when she turned her bag over to the security guard, the Convention's limitations on liability cannot be relied upon even if the Convention were otherwise applicable to occurrences at the security checkpoint. The court was unimpressed by these arguments, which in essence would require a carrier to provide a baggage check for each item it subjects to a brief, pre-boarding X-ray examination. If carried to its logical extreme, the court remarked, the plaintiff's argument would require the issuance of a baggage check every time a carrier's agent takes physical control of a passenger's property, including, presumably, those routine situations in which a flight attendant takes temporary possession of a passenger's carry-on baggage while assisting the passenger into his seat. Such a result would according to the court be obviously unworkable. The court agreed with the conclusion in *Schedlmayer* and *Hexter* that so long as the carrier has taken control over the carriage of the bag, the carrier is obliged to issue a baggage check regardless of whether the baggage is accepted in the normal course prior to boarding or is instead taken from the passenger by the carrier or its agent after the passenger had already boarded the aircraft. However, where the passenger only briefly relinquishes physical possession of her hand-carried property for a necessary security check conducted in her presence, but retains responsibility for the transportation of that property, the plaintiff's failure to receive a baggage check does not strip the carrier's agent of the liability limitations of the Convention to the extent that those limitations are otherwise applicable.

Finally, mention should be made of the Canadian case of *Jean Potvin* c. *Eastern Airlines* of 1975.[24] On a flight from Acapulco to New York, the plaintiff was asked by the flight attendant to entrust her with his carry-on bag for storage. He objected and pointed out that the bag contained valuables including money and jewelry. The attendant assured the plaintiff that the bag would be kept in a locked compartment and that he would receive a receipt. These promises were not fulfilled. Upon arrival in New York, the bag was missing. Some days later, it was delivered to the plaintiff, half-empty and damaged. Without making any reference to any of the provisions of the Warsaw Convention, the court held that the carrier was responsible for the whole amount of the loss ($ 2,998) without being allowed to invoke any limits, since the damage could be exclusively attributed to the carrier's wilful misconduct (*faute grave*). It is not quite clear whether the court had in mind the limit regarding hand baggage or that stipulated for registered baggage; it is also unclear whether the failure of the attendant to issue the promised receipt (baggage check?) was decisive for the outcome.

[24] [1975] C.P. 50 (Montreal, January 13, 1975).

The decisions described may appear to be partly incompatible. According to the German Federal Court, hand baggage does not become checked baggage by its mere delivery into the custody of the carrier (the crew), whereas the American courts in the *Schedlmayer* and *Hexter* cases expressed the opposite view. The court in the *Baker* case adopted an intermediary position. It must be observed that the circumstances under which the baggage was handed over to the carrier's staff were very different in the German case and in the *Schedlmayer* and *Hexter* decisions. In the case before the German court, the objects were collected by the crew in view of an imminent emergency landing. The report mentions that this procedure was required by the carrier's rules concerning emergency landings ("*entsprechend den zur Vorbereitung einer Notlandung geltenden Bestimmungen der Beklagten*"). It was not discussed whether the purpose of these rules was the protection of the safety of the passengers or the safe-keeping of the objects as such, but it was not disputed that the collecting of the hand baggage was carried out in the interest of the passengers. It would have been manifestly unreasonable to require that the crew, in addition to preparing for the emergency landing and calming the passengers, should issue proper baggage checks for the collected items. On the other hand, in the *Schedlmayer* case there seems to have been no imperative reasons for the carrier to take charge of the passenger's hand baggage and the passenger appears not to have been properly informed that the attendant would remove the bag completely from the passenger's control for the whole duration of the flight. The circumstances in the *Hexter* case were disputed and the decision concerned only the carrier's motion for summary judgment. The judgment could, nevertheless, be interpreted to mean that the carrier, in order to preserve his right to limited liability, is quite generally obliged to issue baggage checks when it (the flight attendant) removes baggage from the charge of the passenger, at least if the removal takes place in the unilateral interest of the airline. The court in the *Baker* case considered what was practicable and distinguished between the cases where the carrier "accepts" the baggage for purposes of transportation and those cases where the passenger only briefly relinquishes physical possession but retains responsibility for the transportation of that property.

It is submitted that when the carrier, without issuing a baggage check, takes custody of the passenger's hand baggage, such baggage becomes checked baggage for which the carrier incurs unlimited liability, unless the taking of the possession of the baggage by the carrier can be considered to be a normal element in the handling of hand baggage to be reckoned with by a well-informed passenger already at the time of packing. When the bag is subjected to a security check by an agent of the carrier, when the attendant holds the bag in order to help the passenger to his seat or in order to put the bag in the baggage bin above the passenger's head, and even when the attendant in accordance

with the rules collects the bags in view of an emergency landing, it would not be reasonable to expect that the carrier should issue baggage checks. On the other hand, when the carrier takes the bag in order to store it elsewhere in the plane beyond the passenger's reach, a baggage check should be issued. This applies even if the reason for the removal of the bag is e.g. its excessive size, provided that the passenger was allowed to board the plane with it.

It should also be kept in mind that hand baggage very often contains valuables such as money and jewelry. If a bag is taken from the passenger for storage elsewhere, the passenger should be informed and given the opportunity to remove the valuables. Otherwise, the carrier might incur unlimited liability regardless of whether a baggage check has been issued or not, the reason being, *inter alia*, that under the described circumstances the passenger seldom has a genuine opportunity to make a special declaration of the value as provided for in art. 22(2) of the Convention. This is a situation similar to that where a passenger is at a very short notice forced to register a piece of baggage which he intended to carry as hand baggage but which he was not allowed to take on board, e.g. because of its size. Such baggage can often be expected to contain valuables, but the passenger has very little opportunity to remove them or to declare their value, especially when the passenger does not know about the possibility of making a declaration of value and is not informed of it by the carrier. Under such circumstances, the carrier has by some courts been held liable without limitation because of wilful misconduct or similar behaviour.[25]

[25] See Court of Appeals of Athens on February 15, 1974, reported by A. Yorakis in *Revue française du droit aérien* 1977, p. 143; *Beaulieu* v. *Air Canada*, [1977] C.P. 27 (Montreal, Division des petites créances, November 8, 1976). Cf. *Gill* v. *Lufthansa German Airlines*, 620 F.Supp. 1453 (United States District Court, Eastern District of New York, November 5, 1985). Cf., however, also *Randall* v. *Frontier Airlines, Inc., and American Airlines, Inc.*, 13 Avi. 18,175 (United States District Court, Western District of Arkansas, July 21, 1975).