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Notes

INTERPRETATION OF THE THREE DAY NOTICE REQUIREMENT OF ARTICLE 26(2) OF THE WARSAW CONVENTION

Article 26[1] of the Warsaw Convention,[2] and specifically the three day notice requirement of section 2, was recently the subject of litigation for the first time in a United States court.[3] Article 26(2) provides in part that: "In case of damage [to baggage], the person entitled to the delivery must complain to the carrier forthwith after the discovery of the damage, and at the latest, within 3 days from the date of receipt in the case of baggage. . . ."[4] In

[1] 49 Stat. 3020, T.S. No. 876 (1934) provides:

(1) Receipt by the person entitled to the delivery of baggage or goods without complaint shall be *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of transportation.

(2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. In the case of delay the complaint must be made at the latest within 14 days from the date on which the baggage or goods have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000 et seq., T.S. No. 876 (1934) [hereinafter cited as Warsaw Convention or Convention]; *see* D. GOEDHUIS, NATIONAL AIR-LEGISLATIONS AND THE WARSAW CONVENTION (1937), for a critical analysis of the Convention.

[3] Sofranski v. KLM Royal Rutch Airlines, 68 Misc.2d 402, 326 N.Y.S.2d 870 (N.Y. Civ. Ct. 1971).

[4] 49 Stat. 3020, T.S. No. 876 (1934). The Hague Protocol to the Warsaw Convention, signed on September 28, 1955, altered article 26(2) by changing three, seven and fourteen days mentioned therein to seven, fourteen and twenty-one days respectively. These modifications were never accepted by the United States. Therefore, the limits remained unaltered whenever a case was brought in the United States. The Montreal Agreement that was adopted by the United States did not change the limits of article 26(2). Article 26(2) is not changed in the proposed Guatemala Protocol. ICAO Doc. No. 8932 (1971). *See also* Mankiewicz, *The 1971 Protocol of Guatemala City to Further Amend the 1929 Warsaw Conven-*

Sofranski v. KLM Royal Dutch Airlines,[5] plaintiff brought an action under the Warsaw Convention alleging that her baggage suffered water damage during an international flight. The carrier moved to dismiss because plaintiff failed to notify the carrier by a written complaint within three days of the receipt of the allegedly damaged baggage as required by article 26(2). The New York City Civil Court determined that plaintiff had not received adequate notice of the three day limitation as required by articles 3 and 4 of the Convention; therefore, the court held that plaintiff could not have been expected to have been aware of the short period of limitation within which a claim for alleged damage to baggage must be filed.[6] *Sofranski* is an example of United States courts'[7] continuing struggle to interpret and apply the Warsaw Convention.[8] Although the court in *Sofranski* held the three day notice limitation inapplicable to the facts of the case, it did not exhaust alternative lines of reasoning that lead to similar or even opposite conclusions. A court faced with a question of first impression concerning the proper interpretation and application of article 26(2) can resort to: (i) analogies between similar articles of the Convention that have previously been interpreted by other courts and/or (ii) common law contract analyses.

I. HISTORICAL BASIS

The Warsaw Convention of 1929 was signed when the aviation

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tion, 38 J. AIR L. & COM. 519 (1972); Mankiewicz, *Warsaw Convention: The 1971 Protocol of Guatemala City*, 20 AM. J. COMP. L. 335, 336 (1972). For another interpretation of the Guatemala Protocol, *see* 5 N.Y.U. J. INT. L. & POLITICS 313 (1972).

[5] 68 Misc.2d 402, 326 N.Y.S.2d 870 (N.Y. Civ. Ct. 1971).

[6] *Id.* at 872.

[7] The courts of the State of New York have decided the majority of the Warsaw Convention cases brought in the United States. The inherent problems of interpreting the Warsaw Convention, however, are common to all circuits.

[8] *See, e.g.*, Molitch v. Irish Int. Airlines, 436 F.2d 42 (2d Cir. 1970) (interpreting article 29); Lisi v. Alitalia-Linee Aerre Italiane, S.p.A., 253 F. Supp. 237 (S.D.N.Y. 1966), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd per curiam*, 390 U.S. 455 (1968), *rehearing denied*, 391 U.S. 929 (1968) (interpreting articles 3 and 4); Mertens v. Flying Tiger Line, Inc., 341 F.2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965) (interpreting article 3); Parker v. Pan American World Airways, Inc., 447 S.W.2d 732 (Tex. Civ. App. 1969) (interpreting articles 3 and 4); Parke, Davis and Co. v. British Overseas Airways Corp., 11 Misc.2d 811, 170 N.Y.S.2d 385 (N.Y. City Ct. 1958) (interpreting article 26).

industry was in its infancy.[9] The objectives of the agreement were: (i) to establish a uniform system of legal procedures and remedies in the expanding area of international air transportation and (ii) to provide the industry with protection against unlimited tort liability by setting limits on the air carriers' liability for passengers and baggage.[10] As the aviation industry expanded, serious objections arose, particularly from the United States, concerning the low limits on liability contained in the Convention.[11] This led to a number of conflicting interpretations of the treaty by both state and federal courts.[12] Their decisions focus on the basic problem of balancing the realities of present day air travel against the underlying objectives and purposes of the treaty.

A. *Public Policy Considerations*

Americans have been dissatisfied with the monetary limitations of the Warsaw Convention as evidenced by various United States courts' disregarding the procedural and monetary limitations of the Convention in order to protect the American citizen from an excessively low limitation on recovery for death of passengers or damage to baggage.[13] This is evident when death or grievious in-

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[9] The Warsaw Convention was opened for signature on October 12, 1929 and entered into force as a treaty on February 13, 1933. The Convention was ratified by the United States on October 29, 1934. For a list of the countries that are parties to the Warsaw Convention, *see* 3 CCH AV. L. REP. ¶ 27,054 (1970).

[10] The liability of the carrier to each passenger is approximately $8,300; liability for damage or loss to baggage is approximately $331 as provided by article 22 of the Convention. Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498-99 (1967). For a more complete description of the history of the Warsaw Convention and subsequent related agreements, *see* D. BILLYOU, AIR LAW (2d ed. 1964); C. SHAWCROSS AND K. BEAUMONT, AIR LAW (3d ed. 1969); Orr, *The Warsaw Convention*, 31 VA. L. REV. 423 (1945).

[11] *See* Beaumont, *Liability of International Air Carriers*, 97 L.J. 643 (1947); Rhyne, *International Law and Air Transportation*, 47 MICH. L. REV. 41, 54-61 (1948).

[12] Lisi v. Alitalia-Linee Aerre Italiane, S.p.A., 253 F. Supp. 237 (S.D.N.Y. 1966), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd per curiam*, 390 U.S. 455 (1968), *rehearing denied*, 391 U.S. 929 (1968); Egan v. Kollsman Instr. Corp., 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039 (1968). *Compare* Parker v. Pan American World Airways, Inc., 447 S.W.2d 731 (Tex. Civ. App. 1969).

[13] United States dissatisfaction has been considerable as noted by the United States' denunciation of the Warsaw Convention, *see* Dep't of State Press Release No. 268 (15 Nov. 1965); Lisi v. Alitalia-Linee Aerre Italiane, S.p.A., 370 F.2d 508, 513 (2d Cir. 1966); Egan v. Kollsman Instr. Corp., 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039 (1968); So-

juries have been sustained; to confine recovery to the limitations of article 22[14] in these instances imposes a great burden on the injured party.[15] While courts avoid direct mention of public policy considerations, they are present in every decision involving the recovery limitations prescribed by the Convention. For example, in *Sofranski,* the three day time limitation of article 26(2) was found to be "far too short a period to expect anyone to learn about the contents of the Warsaw Convention,"[16] and thus, plaintiff's cause of action was not defeated by a literal reading and application of the article. If American public policy considerations are followed when interpreting articles of the Convention, however, it minimizes

franski v. KLM Royal Dutch Airlines, 68 Misc.2d 402, 326 N.Y.S.2d 870 (N.Y. Civ. Ct. 1971).

[14] *See* note 10 *supra.* 49 Stat. 3019, T.S. No. 876 (1934) provides:

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

[15] *See, e.g.,* Seth v. British Overseas Airways Corp., 329 F.2d 302 (1st Cir. 1964), *cert. denied,* 379 U.S. 858 (1964). In this case the court held the passenger had adequate notice of the limitations on liability as contained in his ticket and liability for baggage loss was limited to $331 even though plaintiff claimed a $10,000 loss. Ross v. Pan American World Airways, Inc., 77 N.Y.S.2d 257 (Sup. Ct. 1948), *aff'd,* 80 N.Y.S.2d 755 (1st Dept. 1948), 85 N.E.2d 880 (N.Y. Ct. App. 1955). In this case the court held that the passenger should have known of the limitations on liability even if she had not seen the ticket before boarding the plane. Thus, the liability of the carrier was limited to a maximum of $8,300 although plaintiff's medical expenses were much more than the $8,300 limit.

[16] 68 Misc.2d 402, 326 N.Y.S.2d 870, 872 (N.Y. Civ. Ct. 1971).

the status of the treaty as a true international agreement.[17] Therefore, if the courts in the United States allow recovery in excess of the Convention's limits, the treaty becomes Americanized and tailored to fit the American notion of what is just compensation in a Warsaw situation.[18] To undermine the Convention by public policy considerations of one signatory country, would lead to the weakening and eventual demise of the treaty as an effective means of regulating air carrier liability in international air transportation.

B. *Treaty Interpretation Considerations*

The status of the Warsaw Convention as a treaty[19] can determine how a court approaches and subsequently interprets an article of the Convention. In general, the concept of treaty interpretation as expounded by the United States Supreme Court is based on the proposition that treaties are to receive a fair and liberal interpretation according to the intention of the contracting parties.[20] The majority of courts in the United States have given the Convention a liberal interpretation.[21] The question arises, however, whether the underlying principles of the Convention have been subordinated by these liberal interpretations of the treaty. Although United States courts have consistently interpreted the Convention liberally, they must also look beyond the form of the treaty to its history, background and any other pertinent information that might indicate the drafters' intentions in adopting a specific article.[22] Also, the courts cannot add to or detract from the provisions[23] of a treaty regardless

[17] An English judge exclaimed in the case of Samuel Montagu and Co. v. Swiss Air Transport Co., [1966] 2 Q.B. 306, 1 All E.R. 814 (C.A.), that "it would be fantastic if the success of an action on a contract of carriage depended on whether it was brought in the courts of the United States or the courts of this country." *See generally* 33 J. AIR L. & COM. 698 (1967).

[18] *Id.*

[19] A treaty is the supreme law of the land. U.S. Const. art. IV.

[20] I KENT'S COMMENTARIES (14th ed. 1896) 208; 5 MOORE, DIGEST OF INTERNATIONAL LAW (1906) 252, 253; Hauenstein v. Lynham, 100 U.S. 483 (1879).

[21] Boryk v. Aerolineas Argentinas, 332 F. Supp. 405 (S.D.N.Y. 1971); Egan v. Kollsman Instr. Corp., 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039 (1968); Stolk v. Compagnie Nationale Air France, 58 Misc.2d 1008, 299 N.Y.S.2d 58, *aff'd*, 64 Misc.2d 859, 316 N.Y.S.2d 455 (1970); Sofranski v. KLM Royal Dutch Airlines, 68 Misc.2d 402, 326 N.Y.S.2d 870 (N.Y. Civ. Ct. 1971).

[22] Bacardi Corp. v. Domenech, 311 U.S. 150 (1950); Valentine v. United States, 299 U.S. 5 (1936); Santovicenzo v. Egan, 284 U.S. 30 (1931); United States v. Winans, 198 U.S. 371 (1905).

[23] Valentine v. United States, 299 U.S. 5 (1936).

of the resultant inconvenience to the parties.[24] When these guidelines for treaty interpretation are combined with American public policy considerations, they provide an adequate basis for a detailed inquiry into the proper interpretation and application of the three day notice requirement of article 26(2) of the Warsaw Convention.

II. FIRST IMPRESSION ALTERNATIVES

A. *Analogies with Similar Articles of the Warsaw Convention*

1. *Articles 3 and 4*

In early cases, courts adhered literally to the terms of the Convetion; thus, plaintiffs were unable to avoid the low liability limits imposed by the Convention.[25] Later, as a result of public criticism of the Convention's unrealistically low recovery limits,[26] American courts began undermining the Convention by resorting to a broad interpretation of the "notice" requirements of articles 3[27] and 4.[28]

[24] *In re* Zalewski's Estate, 177 Misc. 384, 30 N.Y.S.2d 658 (Surr. Ct. 1941).

[25] *See* cases cited note 15 *supra.*

[26] For a statistical chart comparing passenger awards in Warsaw and non-Warsaw suits, *see* Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 554 (1967).

[27] 49 Stat. 3015, T.S. No. 876 (1934) provides:

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
(a) The place and date of issue;
(b) The place of departure and of destination;
(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;
(d) The name and address of the carrier or carriers;
(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

[28] 49 Stat. 3015-16, T.S. No. 876 (1934) provides:

(1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

This interpretation allowed the courts to circumvent the monetary limits of article 22.[29] In *Lisi v. Alitalia-Linee Aerre Italiane, S.p.A.*,[30] the Second Circuit Court of Appeals held that the notice provided in the carrier's ticket had to be carefully worded and printed in a reasonably sized type to insure that passengers had adequate notice of the Convention's application and effect.[31] The court in *Lisi* concluded that a carrier could not avail itself of the monetary limitations contained in article 22 unless adequate notice was given.[32] This decision started the circumvention of the Convention's limita-

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(a) The place and date of issue;
(b) The place of departure and of destination;
(c) The name and address of the carrier or carriers;
(d) The number of the passenger ticket;
(e) A statement that delivery of the baggage will be made to the bearer of the baggage check;
(f) The number and weight of the packages;
(g) The amount of the value declared in accordance with article 22(2);
(h) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if 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.

[29] *See* note 14 *supra*. The first case to reflect the courts' new approach to the Convention was Mertens v. Flying Tiger Line, Inc., 341 F.2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965). The court in *Mertens* held the delivery requirement of article 3(2) to mean that the passenger should have a "reasonable opportunity" prior to take off to protect himself above the limits of article 22. This opportunity included notice of the limits by printing on the ticket that was both noticeable and readable. Here, the printing on the ticket was held both unnoticeable and unreadable especially when the passenger had been handed his ticket after he had boarded a plane that was about to take off. Warren v. Flying Tiger Line, Inc., 352 F.2d 494 (9th Cir. 1965) emphasized that the purpose of the delivery of a ticket pursuant to article 3 was to warn the passenger of the low limits on liability provided in the Convention and therefore provide him an opportunity to purchase additional insurance covering the flight.

[30] 253 F. Supp. 237 (S.D.N.Y. 1966), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd per curiam*, 390 U.S. 455 (1968), *rehearing denied*, 391 U.S. 929 (1968). For a discussion of this case, *see* 33 J. Air L. & Com. 698 (1967).

[31] *Id.* at 514; *see* note 27 *supra*.

[32] *See* note 30 *supra*. The court termed the notice contained in the ticket and baggage check as being in "Lilliputian print" and doubted that a person would be able to understand the meaning of the language even if one could read it. 370 F.2d at 514 n.10.

tions on recovery; now, each clause of the ticket or baggage check is subjected to close scrutiny for clarity and readability.[33] A majority of the courts have followed this interpretation.[34] A few, however, have refused to affirm the *Lisi* rationale and have continued to strictly interpret and apply the Convention.[35] Courts relying on the *Lisi* decision have held that failure to comply with the notice requirements of articles 3 and 4 waives the liability limitations of the Convention making the carrier subject to unlimited recovery.[36]

By analogy, when the notice requirements of articles 3 and 4 are not complied with, not only are the limitations contained in article 22 waived by the carrier but the three day notice requirement in article 26(2) is also waived. A plaintiff whose baggage is injured can allege that the ticket or baggage claim was not delivered or printed in the proper manner, therefore, the delivery and notice requirements of articles 3 and 4 could not have been fulfilled. If a passenger does not have adequate notice of the three day time limitation, the carrier cannot limit the time period in which the passenger must file a complaint for damaged baggage.

This type of analysis, however, defeats one of the main goals of the Convention: uniform interpretation of the articles among signatory countries.[37] Were the goal of uniform interpretation of the Convention rejected, the Convention would cease to be a viable international agreement; instead, it would become a plethora of unilateral statements from each signatory country. This would lead

[33] *Accord*, Egan v. Kollsman Instr. Corp., 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039 (1968). In *Egan*, the court found that the ticket had failed to comply with article 3 since it could not be reasonably deciphered. Therefore, the carrier could not avail itself to the monetary limitations contained in article 22.

[34] Boryk v. Aerolineas Argentinas, 332 F. Supp. 405 (S.D.N.Y. 1971) (size of type and form of notice in ticket not adequate); Egan v. Kollsman Instr. Corp., 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039 (1968) (non compliance with article 3); Stolk v. Compagnie Nationale Air France, 58 Misc.2d 1008, 299 N.Y.S.2d 58, *aff'd*, 64 Misc.2d 859, 316 N.Y.S.2d 455 (1970) (inadequate notice by articles 3 and 4); Bayless v. Varig Airlines Inc., 10 Av. Cas. 17,881 (1968) (not adequate delivery by article 3).

[35] Parker v. Pan American World Airways, Inc., 447 S.W.2d 731 (Tex. Civ. App. 1969). The court held that even though the printing on the baggage check and ticket was small there was adequate notice of the Convention's limitations; *see also* Manufacturers Hanover Trust Co. v. American Airlines, Inc., 43 Misc.2d 856, 259 N.Y.S.2d 277 (App.Div. 1965) (citing Seth).

[36] *See* cases cited note 34 *supra*.

[37] Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498-99 (1967).

to the diversity of self-serving interpretations the Convention was originally designed to prevent.[38]

2. *Article 29*

Another approach to the interpretation of aritcle 26(2) is to analogize its three day limitation to the two year limitation contained in article 29[39] of the Convention. The application of article 29 is uniformly held to be unaffected by proof of non-delivery of a passenger ticket or delivery of a ticket that fails to contain proper notice of the Convention's limitations on recovery.[40] In *Bergman v. Pan American World Airways, Inc.*,[41] the New York appellate division of the supreme court found the print on the carrier's ticket to be too small to notify the passenger of the limitations of article 29. The court held, however, the suit to be barred since the two year limitation in which to bring the action had elapsed.[42] The

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[38] Even after the *Lisi* decision that broadened the notice and delivery requirements of article 3, the United Kingdom continued to cite as good law the decision of Preston v. Hunting Air Transp. Ltd., [1956] 1 Q.B. 454. *Preston* was based on a strict interpretation of article 3. *See also* Grey v. American Airlines Inc., 95 F. Supp. 756 (S.D.N.Y. 1950), *aff'd*, 227 F.2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956).

[39] 49 Stat. 3021, T.S. No. 876 (1934) provides:

(1) The right to damages shall be extinguished if an action is not brought within 2 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 transportation stopped.

(2) The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

[40] In Molitch v. Irish Int. Airlines, 436 F.2d 42 (2d Cir. 1970), defendant airline appealed from a ruling that the limitations in article 29(1) of the Convention "excluded or limited" the carrier's liability within the meaning of article 3(2); therefore, it could not be invoked to bar the action if the carrier failed to provide adequate notice of the limitations in the passenger ticket. The appellate court distinguished *Lisi* on the ground that it would be both meaningless and unjustified to extend and interpret article 29 as being analogous to article 22. Even if the passenger had known about the statute of limitations before the flight, he could not have protected himself against the statute with additional insurance. Bapes v. Trans World Airlines, 209 F. Supp. 380 (N.D. Ill. 1962); Jaffe v. British Overseas Airways Corp., 34 A.D.2d 527, 309 N.Y.2d 58, *lv. to app. den.* 27 N.Y.2d 796, 315 N.Y.S.2d 856, 264 N.E.2d 349 (1970); Bergman v. Pan American World Airways, Inc., 32 A.D.2d 95, 299 N.Y.S.2d 982 (1969); Sackos v. Compagnie Air France, 9 Av. Cas. 17,673 (1965); S. D. Tehrani and Co. v. KLM Royal Dutch Airlines, 9 Av. Cas. 17,344 (1964).

[41] 32 A.D.2d 95, 299 N.Y.S.2d 982 (App.Div. 1969).

[42] *Id.* at 984. The court further reasoned that the statute of limitations never limits liability nor does it exclude it, however, it renders existing liability unenforceable. The court distinguished article 22 from article 29 and concluded that

majority of courts follow the *Bergman* conclusion and interpret article 29 to be an absolute bar to initiating a suit for damages against a carrier once the two year statute has expired.[43]

By drawing an analogy between the two year limitation contained in article 29 and the three day notice limitation of article 26(2), a carrier-oriented argument can be proposed. First, it can be argued that article 26(2) is similar to article 29 since both articles do not exclude or limit liability but render existing liability unenforceable if a suit is not filed within the limitation periods as contained in each respective article. Secondly, there is no provision in the Convention forbidding or excusing the application of the time limitations contained in article 26(2) or article 29. Thirdly, even if the passenger did not have proper notice of the three day limitation before the flight, he could not have protected himself against this limitation prior to the damage to his baggage. Finally, the passenger has sufficient time to learn about the three day limitation and comply with the notice requirements after the damage occurs.

These lines of reasoning are logical but are subject to an equally logical rebuttal. For example, a court may reason that article 26(2) does exclude or limit liability[44] of the carrier and, therefore, is more closely aligned with article 22 that requires adequate notice to be binding on the passenger rather than the arbitrary two year statute of limitation contained in article 29. If this reasoning is accepted, it would not be difficult for a court to apply the *Lisi* rationale and conclude that the failure of a carrier to provide adequate notice of the Convention to the passenger would result in the airline waiving the article 26(2) notice of complaint requirement. This argument is further buttressed by the intent of the original framers of the Convention that the period of two years for taking action under article 29 was independent of the article 26(2) requirements.[45] Therefore, to analogize article 26(2) to article 29 would expand

article 29 did not limit liability as did article 22. Also, the court could find no provision in the Convention that forbade or excused the application of the limitations contained in article 29. Therefore, the two year limitation was applied and the action was dismissed. *Id.* at 984-85.

[43] *See* cases cited note 40 *supra.*

[44] Sofranski v. KLM Royal Dutch Airlines, 68 Misc.2d 402, 326 N.Y.S.2d 870 (N.Y. Civ. Ct. 1971).

[45] Beaumont, *Need for Revisions and Amplification of the Warsaw Convention*, 16 J. AIR L. & COM. 395, 409 (1949).

the meaning and application of article 26(2) beyond the original scope intended by the drafters of the Convention.[46]

3. *Article 26*

Although the three day notice limitation of article 26(2) had not been a subject of litigation until the *Sofranski* case, the seven day limitation applicable to damaged goods contained in article 26(2) had been litigated.[47] *Parke, Davis and Co. v. British Overseas Airways Corp.*[48] involved an action for the loss of a shipment of goods. The New York City court held that the failure of the plaintiff to complain to the carrier within the seven day time limit as required by article 26(2) barred the action.[49] The court reviewed briefly the short notice requirements of article 26(2) and concluded that the article was binding on the parties even though the time limits specified were much shorter than those normally allowed by the carriers who are members of the International Air Transport Association.[50] The New York City court held the seven day provision of article 26(2) to be applicable in this fact situation; the plaintiff's failure to give notice within the prescribed time limit was not excused. Although *Parke* provides the closest possible analogy to the interpretation of the three day time limitation, its decision was not mentioned by the court in *Sofranski.* With the scarcity of cases interpreting article 26(2), resort to analyzing and applying the article through the use of common law contract theories as applied by United States courts is helpful.

B. *Common Law Contract Analyses*

In American common law contract cases, a contract in whole or in part is declared invalid if it is "unconscionable" or if the contract contains terms that are hidden or unclear.[51] This type of analysis

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[46] *See* cases cited note 34 *supra.* In these cases, the courts have expanded the meaning and application of articles 3 and 4 despite the fact that this interpretation is seemingly contrary to the original drafters' intentions.

[47] Parke, Davis and Co. v. British Overseas Airways Corp., 11 Misc.2d 811, 170 N.Y.S.2d 385 (N.Y. City Ct. 1958). For other cases interpreting the Convention in relation to air freight, *see* Orlove v. Philippine Air Lines Inc., 257 F.2d 384 (2d Cir. 1958); L. and C. Mayers Co. v. Koninklijke Luchtvaart Maatschappij N.V., 108 N.Y.S.2d 251 (Sup. Ct. 1951).

[48] 11 Misc.2d 811, 170 N.Y.S.2d 385 (N.Y. City Ct. 1958).

[49] *Id.* at 388.

[50] *Id.* at 387-88; *see* note 45 *supra.*

[51] J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 56 (1970) [herein-

was applied in the *Sofranski* case[52] when the court relied on *Jessel v. Lockwood Textile Corp.*[53] to support its position that the three day limitation of article 26(2) was too short to be applied in that particular situation. The court in *Jessel* indicated that although parties were able to set a debarment deadline on claims by the terms of their contract, the effectiveness of this limitation must be determined by a reasonable interpretation and application of the contract.[54] This rationale is analogous to the reasoning found in common law contract cases involving standardized contracts made between parties of unequal bargaining strength.[55] Thus, courts have utilized a standard of reasonableness when confronted with limitation clauses that are hidden, unclear or unexpected.[56] A further analysis of contract law reveals several instances when passengers on international flights can claim there is no valid contract of carriage and therefore, they are not bound by the various articles of the Convention contained therein.

It is a generally accepted proposition of contract law that no contract can be formed unless the offeree knows of the offer at the time of his alleged acceptance.[57] Therefore, if a passenger accepts a ticket that clearly states the rights of the parties, the passenger is

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after cited as CALAMARI & PERILLO]. *See also* Smith v. Kennedy, 43 Ala. App. 554, 195 So.2d 820 (1966), *cert. denied*, 280 Ala. 718, 195 So.2d 289 (1966) (contractual exemption from tort liability); Gerhardt v. Continental Ins. Co., 48 N.J. 291, 225 A.2d 328 (1966) (rejecting fine print); Steven v. Fidelity and Casualty Co. of N.Y., 27 Cal. Rptr. 172, 377 P.2d 284 (1962) (clauses of a contract which limit liability between parties of unequal bargaining strength are void if clauses are unclear, unexpected or inconspicuous); Joseph v. Sears Roebuck & Co., 224 S.C. 105, 77 S.E.2d 583, 40 A.L.R.2d 742 (1953) (no mutual assent).

[52] 68 Misc.2d 402, 326 N.Y.S.2d 870 (N.Y. Civ. Ct. 1971).

[53] 276 A.D. 378, 95 N.Y.S.2d 77 (App.Div. 1950).

[54] *Id.* at 78.

[55] CALAMARI & PERILLO § 25; For public policy considerations concerning the contract of carriage *see* Lisi v. Alitalia-Linee Aerre Italiane, S.p.A., 253 F. Supp. 237 (S.D.N.Y. 1966), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd per curiam*, 390 U.S. 455 (1968), *rehearing denied*, 391 U.S. 929 (1968); *see generally* cases cited note 51 *supra*.

[56] Sofranski v. KLM Royal Dutch Airlines, 68 Misc.2d 402, 326 N.Y.S.2d 870 (N.Y. Civ. Ct. 1971); *accord*, Lisi v. Alitalia-Linee Aerre Italiane, S.p.A., 253 F. Supp. 237 (S.D.N.Y. 1966), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd per curiam*, 390 U.S. 455 (1968), *rehearing denied*, 391 U.S. 929 (1968); Egan v. Kollsman Instr. Corp., 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039 (1968).

[57] 1 A. CORBIN, CORBIN ON CONTRACTS § 59 (1963); 1 S. WILLISTON, WILLISTON ON CONTRACTS § 33 (3d ed. 1957) [hereinafter cited as WILLISTON].

bound by his acceptance of the contract.[58] The terms of the "contract", however, must be expressly called to the passenger's attention if they are not reasonably expected to be contained in the ticket or if the terms of the "contract" are not readable because of fine print.[59] The question therefore revolves around whether the person receiving the ticket can be expected, as a reasonable man, to have read the terms of the proposed agreement.[60] The precise facts of each case become paramount in determining whether the print on the ticket is sufficient notice to bind the passenger to its terms.

There are other policy decisions that have been made to protect a party against his failure to read a ticket containing provisions that are deemed to be unfair under the circumstances.[61] This is particularly true of a contract of adhesion.[62] In the landmark case of *Henningsen v. Bloomfield Motors, Inc.*,[63] an exculpatory provision of an express warranty in a contract of sale that excluded claims against a dealer or manufacturer for personal injuries resulting from a defective car was held void as against public policy. The New Jersey Supreme court stated that "the task of the judiciary is to administer the spirit as well as the letter of the law. Part of this burden is to protect the ordinary man against the loss of important rights through what, in effect, is the unilateral act of the manufacturer."[64] Thus, the purchaser of the car in *Henningsen* can be analogized to the purchaser of an airline ticket; neither purchaser can participate in arms length bargaining concerning the terms in his contract. The purchaser must accept the contract as it is written

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[58] 1 WILLISTON § 90A-B; Restatement of Contracts § 70 (1932).

[59] 1 WILLISTON § 90C.

[60] 1 WILLISTON § 90D; RESTATEMENT OF CONTRACTS § 70 (1932); Poel v. Brunswick-Balke-Collender Co., 216 N.Y. 310, 110 N.E. 619 (1915).

[61] CALAMARI & PERILLO § 25 n.30.

[62] This term refers to a standardized contract prepared entirely by one party to the transaction for the acceptance of the other. This type of contract, because of a disparity in bargaining power between the draftsman and the second party, must be accepted or rejected by the second party on a "take it or leave it" basis without opportunity for bargaining and under conditions that the "adherer" cannot obtain the desired product or service save by acquiescing in the form agreement. Steven v. Fidelity and Casualty Co. of N.Y., 377 P.2d 284, 297 (1962); *see* Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943); Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072, 1075 & n.17 (1953).

[63] 32 N.J. 358, 161 A.2d 69, 75 A.L.R.2d 1 (1960).

[64] 161 A.2d at 94.

and therefore, unknowingly consent to the unrealistic limitations on liability of the seller or carrier contained therein.[65]

Application of the *Henningsen* rationale to an article 26(2) situation results in the three day notice limitation not being enforced in the absence of a plain and clear notification of the limitation to the passenger. The adequacy of notification is a question of fact based upon the totality of the circumstances surrounding the formation of the contract. A rigid application of the contract in borderline cases casts an unexpected burden upon the traveling public and shows judicial preference for the explicit terms of the contract without consideration of the particular facts of the transaction.[66]

Failure to comply with the short three day limitation of article 26(2) can also be excused in light of the lack of willfulness of the breach by the passenger and the harsh forfeiture that results. This rationale enables the court, when the circumstances warrant it, to refuse to enforce the limitation when there is an unconscionable inadequacy of consideration.[67] Unfair surprise coupled with unequal bargaining power are essential criteria in determining whether a contract is unconscionable.[68] Thus, article 26(2) of the Convention can be challenged as unconscionable by parties of unequal bargaining power when the passenger has inadequate notice of the article.[69] In this situation, the airline can be denied the protection of the article 26(2) three day limitation. If a court, however, denies the application of the three day time limitation on the basis of unconscionability, the Warsaw Convention would be unilaterally modified without either the use of the amending process, as provided in the

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[65] The *Henningsen* court's interpretation of "consent" required an understanding consent by the consumer to any limitation on the seller's liability that was contained in the contract. *Id.* at 92.

[66] Steven v. Fidelity and Casualty Co. of N.Y., 377 P.2d 284, 298 (1962).

[67] RESTATEMENT OF CONTRACTS § 302 (1932); *See also*, CALAMARI & PERILLO § 31; RESTATEMENT (SECOND) OF CONTRACTS § 72, comment at 291 (Tent. Draft No. 1, 1964); Albrecht Chemical Co. v. Anderson Trading Corp., 298 N.Y. 437, 84 N.E.2d 625 (1949).

[68] CALAMARI & PERILLO § 56.

[69] This is contrary to a well established rule in the United States that the conditions set forth in properly filed tariffs are applicable to passengers even though unknown to them. *See* Robert v. Pan American World Airways, 12 Av. Cas. 17,734 (1972); Martin v. Trans World Airlines, Inc., 11 Av. L. Rep. 18,231 (Pa. Super. June 22, 1971); Mao v. Eastern Airlines, Inc., 310 F. Supp. 844 (S.D.N.Y. 1970).

Convention,[70] or the concurrance of the other parties to the international treaty.

III. CONCLUSION

When dealing with a question of first impression concerning the three day notice limitation of article 26(2), the courts should follow a strict interpretation of the Convention as exemplified in *Parke*.[71] A strict interpretation of each article has a valid basis in the Convention itself[72] and would prevent courts from indulging in judicial treaty-making when the language of the article is clear and concise on its face.[73] The wholesale adoption by the courts of the United States of a strict and literal interpretation of article 26(2) will lend uniformity and certainty to the article. Uniformity in interpretation and application will, in reality, provide the needed impetus to effect changes in the Convention. If article 26(2), when strictly and literally applied, proves to be unreasonable, inadequate or otherwise undesirable, it can be changed through the Convention's amending process.[74] For example, through the amending procedure the limits of recovery contained in article 22 of the Convention have been changed and increased whenever a majority of the signatory countries felt there was a legitimate need for this action.[75]

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[70] *See* D. BILLYOU, AIR LAW, at 580-84 (2d ed. 1964) and articles 39, 40, and 41 of the Convention. Article 41 provides:

> Any High Contracting Party shall be entitled not earlier than two years after the coming into force of this convention to call for the assembling of a new international conference in order to consider any improvements which may be made in this convention. To this end it will communicate with the Government of the French Republic which will take necessary measures to make preparations for such conference.

[71] 11 Misc.2d 811, 170 N.Y.S.2d 385 (N.Y. City Ct. 1958).

[72] *See* note 10 *supra*.

[73] *See* note 4 *supra; see also Lisi*, 370 F.2d at 515 (dissenting opinion).

[74] *See* note 70 *supra*.

[75] The liability of the carrier to each passenger was changed from $8,300 to $16,600 by the Hague Protocol of 1955. After the United States' denunciation of the Hague Protocol and threatened withdrawal from the Warsaw Convention, an interim arrangement between the United States and foreign carriers for a voluntary waiver of liability up to $75,000 was concluded at Montreal in 1966. Recently, the 1971 Protocol of Guatemala City to amend the Warsaw Convention established a $100,000 limit of liability of carriers for death or personal injury to a passenger. *See* Mankiewicz, *The 1971 Protocol of Guatemala City to Further Amend the 1929 Warsaw Convention*, 38 J. AIR L. & COM. 519 (1972); Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967).

By extending the amendment process to other articles, such as article 26(2), amendments can be enacted that will be universally accepted and uniformly applied. The constant amending and updating of the article by using the revision process provided by the Convention will realistically meet the ever changing needs of the present day international air traveler. Moreover, this procedure will allow the courts of the United States to apply the three day limitation of article 26(2) as it was written, and thus, eliminate the judiciary's struggle to balance the realities of air travel with the provisions of the Warsaw Convention.

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