

Hague Protocol of 1955

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HAGUE PROTOCOL OF 1955, NOT ORIGINAL WARSAW CONVENTION GOVERNS AIR SHIPMENT BETWEEN HONG KONG AND CALIFORNIA

Continental Insurance Company v. Federal Express Corp.

454 F.3d 951 (9th Cir. 2006)

FedEx and Comet Electronics entered into a contract of carriage, under which FedEx agreed to carry electronic components by air from Hong Kong to California, with delivery to Viken Electronics, the owner of the goods. Four packages shipped under four air waybills never arrived, and Continental, Viken's subrogated insurer, filed suit against FedEx in California state court, alleging causes of action for loss of cargo under the Warsaw Convention. FedEx removed the case to District Court and sought partial summary judgment that its liability was limited as to air waybills 3045 and 3137 under the amended version of the Warsaw Convention presently in force between Hong Kong and the United States, which it alleged either to be The Hague Protocol of 1955 or the Montreal Protocol No. 4 (1975). While FedEx's motion was pending, Continental broadened the scope of its suit to include two additional air waybills – 3067 and 3056.

The Original Warsaw Convention presumes liability of the carrier for goods lost or destroyed while entrusted to the carrier, but limits the carrier's liability unless a higher value is declared and the air carrier is paid a supplementary sum according to the declared value of the shipment. Also, to limit its liability, the air carrier must include certain things on the air waybill, including the weight, the quantity, and the volume or dimensions of the goods. By contrast, The Hague Protocol only requires notice of stop-over destinations on the air waybill, and the Montreal Protocol No. 4 eliminates the cargo documentation provisions of the Original Warsaw Convention entirely, permitting limitation of liability even in the absence of an air waybill.

Because air waybills 3045 and 3137 complied with all the requirements of the Original Warsaw Convention, including the weight requirement, FedEx stated that for purposes of its motion, it would concede that the Original Warsaw Convention governed. Thus, the District Court granted partial summary judgment for FedEx on those two air waybills. The *sender's copies* of air waybills 3067 and 3056 admitted in evidence, however, did not contain the weight of the goods shipped; therefore, the District Court denied partial summary judgment as to those shipments.

FedEx filed a second motion for partial summary judgment directed to air waybills 3067 and 3056. This time it introduced evidence of the *billing copies* of the air waybills, which included the cargo weights. FedEx again conceded only for purposes of its motion that the Original Warsaw Convention applied. However, the District Court ruled that air waybills 3067 and 3056 were technically deficient under the Original Warsaw Convention because the *sender's copies* had omitted the cargoes' weight.

The District Court later held, relying on FedEx's concessions, that the Original Warsaw Convention applied and that the applicability of the Original Warsaw Convention was the law of the case, thereby barring further consideration at trial of what treaty governs. To posture the

case for appeal, the parties stipulated to damages and entered into a consent judgment in which they explicitly reserved their rights of appeal. FedEx appealed.

The Ninth Circuit held that the District Court abused its discretion in applying the law of the case doctrine because (1) FedEx had conceded that the Original Warsaw Convention applied only for purposes of its motions, not for the purpose of trial, and (2) the District Court erred by applying the Original Warsaw Convention. The Ninth Circuit ruled that the latest treaty ratified by both origin and destination countries (i.e., Hong Kong and the United States) supplies the governing law. The most recent common treaty in force between Hong Kong and the United States is not the Original Warsaw Convention, but The Hague Protocol.

Prior to the People's Republic of China resuming exercise of sovereignty over Hong Kong from the United Kingdom in July 1997, the U.K. ratified the Hague Protocol on Hong Kong's behalf. That ratification was unchanged by the People's Republic's resumption of sovereignty. The U.S., however expressly ratified the Hague Protocol on Dec. 14, 2003, after the subject loss. The Ninth Circuit nonetheless concluded (as have other courts) that by ratifying the Montreal Protocol No. 4, on March 4, 1999, the later of the two amendments to the original Warsaw Convention, the U.S. "acceded to the Warsaw Convention as amended by the Hague Protocol [in 1955] on the same date. Thus, at the time of the loss (April 1999), both Hong Kong and the U.S. had ratified The Hague Protocol and it governed. The Ninth Circuit vacated the stipulated judgment and remanded the case to the District Court for further proceedings consistent with the liability provisions of The Hague Protocol.