Airline Liability for Damaged Luggage and Section 65(2) of the Consumer Protection Act, 2008

1 Introduction

A public spat between an aggrieved passenger and South African airline FlySafair has raised the issue of who is liable for damage caused to the baggage of the airline's passengers (Mackenzie "Damaged Luggage – Where Does the Liability Lie?" (24 January 2024) https://www.tourismupdate.co.za/article/damaged_luggage_where_does_liability_lie (accessed 2024-01-25)). According to the report, the passenger alleged that her brand-new, expensive suitcase was destroyed when she received it after her FlySafair flight to Cape Town International Airport. Upon approaching the airline for compensation for the damages, the passenger was advised that her claim was declined under the terms and conditions of the consumer agreement entered into between the parties.

The stance of the airline is that it is not able to accept liability for damage to luggage when such luggage, although received by the airline, must be surrendered to the system that manages luggage at the airports. Luggage is sorted, screened and transported by parties that the airline does not employ or manage – that is, the airline has no control over the parties involved in processing luggage at the airports. The terms and conditions of the airline provide that the airline will not be liable for damage to any checked luggage unless such damage is caused by their negligence while the luggage was within their control or custody.

Air travel is a much-regulated form of travel, which complicates the process of ascribing liability for damage to luggage. When it comes to determining the liability of airlines for damaged luggage in South Africa, a distinction needs to be made between international air travel to which the 1999 Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention) applies, and domestic travel, which is carriage performed completely within South Africa, as different rules regulate each of these forms of air travel (Vrancken "Travel Law" in Vrancken and Tait (eds) *Tourism and the Law in South Africa* 2ed (2020) par 14.3 and par 14.27). To add to an already complicated situation, the Consumer Protection Act (68 of 2008) (CPA) contains provisions, such as section 65(2), that may play a role in assigning liability in a situation where a passenger's baggage is damaged. This provision imposes liability on suppliers in possession of a consumer's property to compensate the consumer for any losses resulting from the supplier not acting in accordance with the prescripts of the section.

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This note considers the rules regulating the liability of airlines for damaged baggage in terms of the Montreal Convention and those applicable to domestic air travel, referring to the terms and conditions of FlySafair specifically. Thereafter, section 65(2) of the CPA is considered within the context of domestic air travel to determine whether this provision applies to damaged baggage and the consequences such application may hold for both consumer and service provider, respectively. The aim is to provide a view as to whether an airline, under its duty of care provided for in section 65(2) of the CPA, is liable for damage to baggage when the airline has taken possession of a passenger's baggage even when the baggage is handled by parties other than the airline itself before it is delivered to the passenger at the airport of destination.

2 Regulation of air travel as it relates to damaged baggage

As stated, different rules apply to international and domestic air travel, and that includes the rules pertaining to liability for damaged baggage. This part first considers the rules applicable to international carriage as provided by the Montreal Convention, whereafter the general terms and conditions used by the International Air Transport Association (IATA) are explained. A consideration of the terms and conditions of FlySafair follows thereafter.

2 1 The Montreal Convention

The Montreal Convention was signed at Montreal on 28 May 1999 and was subsequently incorporated into South African law by the Carriage by Air Amendment Act (15 of 2006), which amended the Carriage by Air Act (17 of 1946).

The Montreal Convention in article 1(1) provides that it "applies to international carriage of persons, baggage or cargo performed by aircraft for reward". Article 1(2) defines the concept of "international carriage" as

> "any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party."

An interesting aspect of this definition is that it means that on the same flight, there may be passengers to whom the Montreal Convention applies and passengers to whom the Convention does not apply (see Vrancken *Tourism and the Law* (2020) par 14.14–14.15 and the discussion by Wildenboer in *LAWSA II Aviation and Air Transport* (2015) par 467.)

When it comes to the responsibilities of an airline in respect of baggage, the Convention states in article 3(3) that the airline must provide the passenger with a baggage identification tag for each piece of checked luggage. Furthermore, passengers must be given notice in writing that, where the Convention is applicable, it may limit the liability of carriers for the destruction, loss or damage to baggage (art 3.4).

As far as liability for damage to baggage is concerned, article 17(2) of the Convention is most instructive and provides as follows:

> "The carrier is liable for damage sustained in case of loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked luggage was in the charge of the carrier. However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault or that of its servants or agents."

The liability of the airline is excluded if the damage to the baggage resulted from the negligence or other wrongful actions of the passenger (art 20).

From article 17(2), it appears that as far as checked baggage is concerned, the carrier will be liable for damage to such baggage only if the damage occurred on board the aircraft or during any period within which the checked luggage was in the charge of the carrier. It would seem then that article 17(2) establishes a form of strict liability on the part of the carrier for damage or loss that occurs while the baggage is on board or in its charge (see also *Muoneke v Compagnie Natl Air France*, No 08-20227 (5th Cir 2009) https://law.justia.com/cases/federal/appellate-courts/ca5/08-20227/08-20227.0.wpd-2011-03-16.html (accessed 2026-01-28)). To establish the liability of an airline, a passenger will need to establish the extent of the damage and that the damage occurred at a time when the baggage was on board or in the charge of the airline. To escape liability for such damage, the carrier will have to establish that the damage did not occur on board or while it was in the carrier's charge, or that the damage occurred owing to an inherent defect or vice of the baggage, or through the passenger's own actions.

Although article 17(4) provides that "baggage" includes both checked and unchecked baggage, article 17(2) draws a clear distinction between checked and unchecked baggage when it comes to liability for damage, with the airline being liable for unchecked baggage only if fault on its part caused the damage.

It has been stated that the carrier can escape liability by establishing any of the defences provided for in article 18(2) (see Wildenboer *LAWSA II* (2015) par 483 and 496). These are the following:

> "(a) inherent defect, quality or vice of the cargo;
> (b) defective packaging of that cargo performed by a person other than the carrier or its servants or agents;
> (c) an act of war or armed conflict;
> (d) an act of public authority carried out in connection with the entry, exit or transit of cargo."

Article 18 is headed "Damage to cargo" and refers specifically to the carriage of cargo and not to passengers and their baggage, which is dealt with in article 17. If article 18 applies to the baggage of passengers, the provision that an inherent defect, quality or vice of the baggage excludes the liability of the carrier need not be stated in article 17(2), as it is listed in article 18(2).

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The fact that other provisions of the Convention, such as articles 3 and 4, also make a clear distinction between baggage and cargo, appears to mitigate against the view that the defences provided for in article 18(2) are necessarily available to the carrier for damage to baggage. However, the purpose of this note does not require further consideration of this aspect.

The situation can then be summarised as follows: the carrier is strictly liable for checked baggage, on condition that the damage occurred on board the aircraft or during any period within which the checked luggage was in the charge of the carrier. There will be no liability for the airline if the damage is the result of inherent defects, quality or vice of the baggage, or if the damage was caused by the passenger. For unchecked baggage, the carrier will only be liable if the damage was caused through the fault of the airline or its servants or agents.

An important aspect for purposes of this note relates to the qualification contained in article 17(2) of the Convention providing that the carrier is "liable for damage sustained in case of loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place *on board the aircraft or during any period within which the checked luggage was in the charge of the carrier*" (emphasis added). The pertinent question for current purposes is when exactly is a carrier in charge of a passenger's baggage? The Convention does not provide details on the time at which the carrier is placed in charge of the passenger's baggage and when "being in charge" terminates. It may be argued that a clear distinction is made between two periods of time: the time when the baggage is on board the aircraft, and the time when the baggage is in the charge of the airline when not aboard the aircraft. Could it be that the latter period refers to the time from accepting the baggage until it is placed on board, and again, the time from when it is offloaded to the moment it is delivered to the passenger? It may be that the Convention considers that the airline remains in charge of the baggage not only when it is on board the aircraft (when it is most definitely in the charge of the airline), but also when the baggage is not on board but has been received from the passenger and until it is delivered back to the passenger.

An airline's liability for lost or damaged baggage was initially limited to 1 000 Special Drawing Rights (SDR) per passenger unless, when the baggage was checked, a special declaration of interest in the delivery at the destination was made and an additional sum was paid, if required. In such a case, the airline will be liable for a sum not exceeding the declared amount unless the airline can prove that the sum is less than the actual interest of the passenger in the damaged baggage (art 22(2) of the Convention).

The initial maximum claimable amount has been increased to the current amount of 1 288 SDR (Franklin "How the Montreal Convention Protects Your Luggage When Traveling Internationally" (22 May 2024) https://www.forbes.com/advisor/credit-cards/travel-rewards/montreal-convention-luggage/ (accessed 2025-04-27)). In *SL v Vueling Airlines SA* (C-86/19 ECLI:EU: C:2020:538 par 8), the court explained:

> "In accordance with the procedure laid down in Article 24 of the Montreal Convention, the limit of liability laid down in Article 22(2) thereof was increased to 1131 Special Drawing Rights ('SDRs') per passenger for damage

> to baggage as from 30 December 2009. That amount was increased to 1288 SDRs with effect from 28 December 2019."

According to the International Monetary Fund, the value of one SDR in South African Rand on 15 April 2025 was R25.425000. This means that the Rand value of 1 288 SDRs at that date was approximately R32 747 ("Exchange Rate Archives by Month" (26 April 2025) https://www.imf.org/external/np/fin/data/param_rms_mth.aspx (accessed 2025-04-27)).

The Convention allows an airline to set higher limits than those provided by the Convention or no limits of liability (art 25). Any provision in a contract between an airline and passengers seeking to avoid the airline's liability or to set lower limits of liability than those prescribed by the Convention is void (art 26). In terms of the Convention, an airline may refuse to contract for the supply of a service of carriage, waive any of the defences afforded an airline under the Convention, or impose any conditions provided they do not conflict with the Convention (art 27). It is interesting to note that a claim under the Convention becomes prescribed two years after the date of arrival at a destination, or two years from the date on which the carriage stopped. The calculation of the period of prescription is determined according to the law of the court with jurisdiction where the action is brought (art 35).

Article 22(5) provides that the carrier's liability will not be limited to the maximum amount indicated if it is established that the damage resulted from

> "an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment."

2 2 IATA General Conditions of Carriage (Passengers and Baggage)

IATA is not an intergovernmental organisation but an association of international airlines, with membership being open to all international airlines that have the nationality of a state that is party to the 1944 Chicago Convention (Convention on International Civil Aviation). The main objective of IATA is to promote the interests of international air carriers by providing, among other matters, standard conditions of carriage to be incorporated in the agreements between airlines and consumers of the services of the airlines (Vrancken *Tourism and the Law in SA* par 14.7). Airlines operating in South Africa, including Airlink, Cem Air, FlySafair and South African Airways, are all members of IATA ("Current Airline Members" (undated) https://www.iata.org/en/about/members/airline-list/?page=27&search=&ordering=Alphabetical (accessed 2024-03-23)). In the dispute involving FlySafair, the carrier had relied on the provisions of IATA's general conditions of carriage, which informed the contract between carrier and passenger for purposes, among others, of limiting the liability of the carrier for damage to passengers' baggage. It is necessary, therefore, to

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consider the IATA General Conditions of Carriage (Passenger and Baggage) (as cited in https://www.scribd.com/document/435931177/IATA-General-Conditions-of-Carriage (accessed 2024-03-24)) (IATA General Conditions of Carriage).

IATA reports that annually, more than four billion bags are carried by airlines globally; of these, 99,57 per cent arrive with their owners on time. Between 2007 and 2017, the mishandling of baggage was reduced from 18.88 bags per 1 000 passengers to just 5.57 per 1 000 passengers ("Travel & Baggage" (undated) https://www.iata.org/en/youandiata/travelers/baggage/ (accessed 2024-01-26)).

The IATA General Conditions of Carriage apply to all carriage by air of passengers and baggage performed by the carrier for reward (cl 2.1.1). A number of these conditions are considered relevant for the purposes of this note and are set out below.

Clause 1 describes "baggage" to mean "such articles, effects and other personal property of a passenger as are necessary or appropriate for wear, use, comfort or convenience in connection with the trip. Unless otherwise specified, it includes both checked and unchecked baggage of the passenger." Checked baggage refers to baggage of which the carrier has taken sole custody and for which the carrier has issued a baggage check, which is the portion of the ticket relating to the carriage of the passenger's checked baggage. Unchecked baggage, in turn, is baggage of the passenger other than checked baggage.

A carrier may refuse carriage of any passenger or passenger's baggage primarily for reasons of safety. Other reasons for refusal include that the carrier, in the exercise of its reasonable discretion, determines that it is necessary to comply with the laws of any state, or a passenger refuses to submit to a security check (cl 8.1). Items unacceptable as baggage include items falling outside the definition of baggage, and items constituting a danger to the aircraft, passengers or property on board (cl 9.1). Passengers' checked baggage may not include fragile or perishable items, money, jewellery, precious metals, silverware, negotiable papers, securities or other valuables, business documents, passports and other identification documents or samples (cl 9.1.3). The carrier has the right to refuse the carriage of such prohibited items (cl 9.2). It is a specific condition contained in clause 16.3.7 that a carrier is not liable for damage to these prohibited items in checked baggage. A carrier may also refuse to carry as baggage any item rejected for its size, shape, weight or character (cl 9.2.2).

Clause 9.2.4 provides that a carrier "may refuse to accept baggage as checked baggage unless it is properly packed in suitcases or other suitable containers to ensure safe carriage with ordinary care in handling."

The IATA General Conditions of Carriage provide that upon delivery to the carrier of the baggage to be checked, the carrier must take custody thereof and issue a baggage identification tag for each piece of checked baggage (cl 9.4.1).

Clause 9.5 provides for a free-baggage allowance in terms of which passengers may carry free-of-charge baggage as specified, but subject to the conditions and limitations of the specific carrier. In this regard, it may be

relevant to consider that FlySafair specifically does not allow for a free-baggage allowance, and additional charges apply with respect to checked baggage.

An obligation is placed on the passenger to collect their baggage as soon as it is available for collection at the destination (cl 9.9.1). Clause 9.9.4 determines that "acceptance of baggage by the bearer of the baggage check without complaint at the time of delivery is *prima facie* evidence that the baggage has been delivered in good condition and in accordance with the contract of carriage." Further to this, the IATA General Conditions of Carriage contain certain time limits for the pursuance of claims against a carrier for damaged baggage. Clause 17.1 provides that no action shall lie in the case of damage to checked baggage unless the person entitled to delivery complains to the carrier forthwith after the discovery of the damage and, at the latest, within seven days from the date of receipt thereof. Also, any right to damages prescribes if the claim is not instituted within two years from the date of arrival at the destination or if the carriage has stopped (cl 17.2).

Clause 16 deals with liability for damage, and clause 16.1 determines that carriage under the IATA General Conditions of Carriage "is subject to the rules and limitations relating to liability established by the Convention unless such carriage is not international carriage to which the Convention applies."

Important for current purposes is the provision in clause 16.2.1, which provides that, in the event of carriage that is not international carriage to which the Convention applies, the carrier is liable for damage to a passenger or their checked baggage only if such damage has been caused by the negligence of the carrier, and if the passenger's negligence contributed to the damage then the carrier's liability is subject to the applicable law relating to contributory negligence. The IATA General Conditions of Carriage further provide (irrespective of whether or not the Convention applies) that the carrier is not liable for unchecked baggage unless damage thereto is caused by the negligence of the carrier (cl 16.3.2).

The liability of the carrier for damage to checked and unchecked baggage is limited to a maximum specified amount per kilogram for checked luggage and a specified amount per person for unchecked baggage, unless the damage was caused by acts or omissions done with intent to cause damage, or recklessly and with knowledge that damage would probably result, in which case liability will be for the full amount of actual damage suffered (cl 16.3.4). A carrier's liability in any event will not exceed the amount of proved damages, and a carrier is not liable for indirect or consequential damages (cl 16.3.5).

A carrier is not liable for any damage to a passenger's baggage caused by property contained in such passenger's baggage, or for damage to another passenger or passenger's baggage or the property of the carrier, and the passenger must indemnify the carrier for all losses and expenses incurred by the carrier because of such damage caused (cl 16.3.6).

Nothing contained in the IATA General Conditions of Carriage waives any exclusion or limitation of liability of a carrier provided for by the Convention

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or applicable laws (cl 16.4). In the event of an inconsistency between the IATA General Conditions of Carriage and the carrier's regulations, the IATA General Conditions of Carriage will prevail (cl 2.5).

The IATA General Conditions of Carriage therefore make it clear that, in the case of domestic travel, the carrier is liable for damage to a passenger or their checked or unchecked baggage only if such damage has been caused by the negligence of the carrier.

2 3 Domestic air carriage

As a member of IATA, FlySafair incorporates IATA's General Conditions of Carriage in its contract with consumers of its services. Its contract reflects the provisions of the Montreal Convention in respect of international travel to which the Convention applies, but also IATA's terms and conditions in respect of purely domestic carriage. Purely domestic carriage is governed by the common law, which may be modified by agreement in the terms and conditions of carriage of the specific carrier (*LAWSA II* par 461).

Appendix G (Glossary of Terms) of the "FlySafair Terms and Conditions of Booking and Carriage" (Revision No. 045/25, effective 10/10/2025) https://www.flysafair.co.za/about-us/legal-ts-cs/terms-of-booking-carriage (accessed 2026-2-03) (hereafter "FlySafair Terms and Conditions") defines "luggage" as "any items a traveller intends to carry with them during their journey regardless of whether such items remain on the traveller's person, or are stowed in the hold or cabin of the aircraft." It is submitted that this definition corresponds in all material respects to the definition of "baggage" contained in clause 1 of IATA's General Conditions of Carriage quoted above. (It should be noted that the FlySafair Terms and Conditions considered in this note are the terms and conditions of the service provider at the time of writing and not the terms and conditions that would have been applicable to the specific instance mentioned in the opening paragraph of this note. The current terms and conditions only became effective on 10 October 2025, whereas the dispute between FlySafair and the unhappy consumer was reported in early 2024.)

The FlySafair Terms and Conditions (see especially cl 25, and cl 34–40) contain similar provisions to IATA's terms concerning the refusal of carriage of passengers and baggage, as well as items unacceptable for carriage in baggage. The latter includes items not suitably packed in suitcases or other containers allowing for safe transport and handling; luggage containing illegal substances; items in luggage that are deemed dangerous goods; items considered unsuitable for carriage by reason of their weight or size; or fragile or perishable items not properly packed and insulated.

Clause 67 makes it clear that the FlySafair Terms and Conditions, together with its appendices, constitute the whole agreement between the airline and the consumer. The FlySafair Terms and Conditions under a heading "Important Legal Stuff" state that the airline "reserves the right to limit all liabilities" (cl 62). This statement on its own is of course somewhat misleading as a service provider cannot limit liability when such liability, for instance, is imposed by legislation and the legislation prohibits the exclusion of such liability by agreement. However, the general statement is seemingly

qualified by what follows in the clause when it refers to specific limitations outlined in Annexure F. The clause specifically draws the consumer's attention to the provisions of Annexure F and refers to liability for damage to luggage, among other issues. Whether this exclusion of liability is adequately drawn to the attention of the consumer as required by section 49 of the CPA may be debatable (see in this regard *Van Wyk t/a Skydive Mossel Bay v UPS SCS South Africa (Pty) Ltd* [2020] 1 All SA 857 (WCC); *Stearns v Robispec (Pty) Ltd* [2020] ZAGPJHC). This particular aspect – namely, whether the exclusion-of-liability clause in the FlySafair Terms and Conditions complies with the requirements of sections 48 and 49 of the CPA – falls outside the scope of this note and is not considered here.

Appendix F is titled "Limitations of Liability" and sets out how the airline's liability is limited in instances of death or injury to passengers, damage to luggage, and delays. The position of the airline in respect of these limitations is indicated both in the case where the Conventions apply and where the Conventions are not applicable. (The term "Conventions" includes the Warsaw and Montreal Conventions. See FlySafair Terms and Conditions Appendix G: Glossary of Terms.) The discussion focuses only on the provisions of the FlySafair Terms and Conditions pertaining to the liability of the airline for damage to luggage.

Appendix F is divided into three basic parts. Although not specifically so titled, the first part provides the terms and conditions pertaining to the limitation of the airline's liability in situations where the Conventions apply; the second part sets out the limitation of the airline's liability when the Conventions do not apply; and the third part provides for prescription periods for claims.

The introductory part of Annexure F includes a statement that the FlySafair Terms and Conditions (including its exclusions and limitations of liabilities) apply to the same extent to the agents, operators, employees and representatives of the airline as it does to them; and furthermore, that the total amount recoverable by a consumer from the airline or any of the mentioned persons cannot exceed the total amount of the liability of the airline.

Regarding time limits for the filing of a claim or the bringing of an action, the FlySafair Terms and Conditions provide (Appendix F: cl 14) that, in the case of both domestic and international flights, the acceptance of luggage without complaint at the time of delivery is sufficient evidence that the luggage has been delivered in good condition and in accordance with the contract of carriage, unless the consumer proves otherwise. Should a consumer wish to file a claim in respect of damage to checked luggage, the airline must be notified in writing as soon as the damage is discovered but not later than seven days after receipt of the baggage.

In line with both the provisions of the Montreal Convention and the IATA General Conditions of Carriage, the FlySafair Terms and Conditions provide that any right to damages shall become extinguished if not instituted within two years of the date of arrival at destination, or the date on which the

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aircraft was scheduled to arrive, or the date on which the carriage stopped (Appendix F: cl 15).

As far as the liability of the airline for damage to luggage is concerned in situations where the Conventions apply, the airline excludes liability for damage to unchecked luggage, unless caused by the negligence of the airline or its agents (Appendix F: cl 2(a)). This clause reflects the Montreal Convention's provisions that the airline is liable only for damage to unchecked luggage in the event the airline or its agents are at fault in causing the damage. In the case of checked luggage, the airline will be liable, with some exceptions, for any damage caused to the luggage, provided the event causing the damage occurred while the luggage was on board or in the charge of the airline.

Liability for damages to luggage is limited to 1288 SDR, except where the damage resulted from an act or omission on the part of the airline or its agents when either causing the damage intentionally, or recklessly and with knowledge that damage will probably result (Appendix F: cl 2(b)).

The airline will not be liable for damage where damage is caused by the consumer's luggage, and the consumer will be liable for damage caused to the property of the airline or other passengers (Appendix F: cl 2(d) and (e)).

The airline also will not be liable for any damage to or loss of items included in either checked or unchecked luggage which items are prohibited from being included under clause 40 of the FlySafair Terms and Conditions. These items include fragile or perishable items, items with special value such as money, jewellery, precious metals, computers and personal electronic devices, and valuable documents such as passports (Appendix F: cl 2(f) and (g), which refer to cl 39, but this is clearly an incorrect cross-reference, and the reference should be to cl 40.)

Finally, under clause 2 of Appendix F, the airline "shall not accept liability for damage such as scratches, stains, dents, cuts and dirt resulting from the normal wear and tear or water damage to non-waterproof luggage, damage or loss of protruding parts such as wheels, straps, pull handles or other items that are attached to luggage or items lost as a result of badly packaged luggage."

In the second part of Appendix F, under the heading "Where the Conventions are not applicable", the limitation of liability of the airline is spelled out in the situations of purely domestic carriage. Clause 2, under the heading "Where the Conventions are not applicable", contains the key provision:

> "FlySafair will not be liable for damage to passengers or any checked-in luggage or unchecked-in luggage unless such damage is caused by our negligence and such passenger or such luggage was within our control or custody."

Other provisions stipulate that, where the airline is liable for damages in respect of luggage, such liability shall be limited to US $20 per kilogram and not the monetary value of the loss, to a maximum of US $400. Where the weight of the luggage is not recorded on the luggage identification tag, it will be presumed that the weight does not exceed 15 kilograms. The airline also

will not be liable for damage resulting from compliance with applicable regulations and for damage caused by the consumer's luggage (see "Where the Conventions are not applicable", cl 5 and 7). (Note that the numbering used in Appendix F is not consistent, making referencing to specific provisions in the document inelegant.)

Still under the heading "Where the Conventions are not applicable", clause 12 provides that the agreement applies to the airline's authorised agents, employees and representatives to the same extent as it applies to the airline. This is an almost verbatim repeat of what was stated earlier in the introductory part of Appendix F. The current clause does not include the term "operators", which does appear in the version of this provision in the introductory part.

Having indicated the relevant terms and conditions in the agreement between airline and passenger, referring particularly to the limitation of liability of the airline for damage to baggage, the next question to be considered is the potential role of section 65(2) of the CPA in this context.

3 The Consumer Protection Act

A contract for carriage of a passenger and the latter's baggage combines essentially two different contracts: a contract for the letting and hiring of a service (*locatio conductio operis*) in respect of the conveyance of the passenger, and a contract of deposit in which the passenger entrusts baggage to the service provider's care (*LAWSA III Carriage* par 88).

3 1 Application of the CPA

When considering the provisions of section 5 of the CPA and relevant definitions such as "agreement", "consumer", "service", "service-provider" and "transaction", it is clear that generally an agreement for the supply by an airline, in the ordinary course of its business and for consideration, of a service for the transportation of a passenger and their baggage, constitutes an agreement for purposes of the CPA. Both the agreement and the service provided in terms thereof will be subject to the provisions of the Act. Therefore, the FlySafair Terms and Conditions, which constitute the standard terms and conditions of an agreement between the carrier and its passengers, are subject to the CPA, as is the actual service provided by the airline.

3 2 Section 65(2) of the CPA and the supplier's duty to account for the consumer's property

Eiselen ("Section 65" in Naudé and Eiselen (eds) *Commentary on the Consumer Protection Act* Revision Service 10 (2024) 65–3) points out that

> "[t]he scope of s 65 includes payment of prepaid certificates, vouchers and credits or prepaid services and access to facilities made in terms of ss63 and

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> 64, …, but it goes further because it also includes situations where the supplier takes physical control or possession of goods belonging to a consumer. This is typically the case where goods have been returned to the supplier for repair, where goods are taken to the supplier for inspection, servicing or alteration, where goods are deposited with the supplier for safekeeping or where goods are delivered to the supplier for transportation."

Section 65(2) of the CPA states:

> "When a supplier has possession of any prepayment, deposit, membership fee, or other money, or any other property belonging to or ordinarily under the control of a consumer, the supplier–
> *(a)* must not treat that property as being the property of the supplier;
> *(b)* in the handling, safeguarding and utilisation of that property, must exercise the degree of care, diligence and skill that can reasonably be expected of a person responsible for managing any property belonging to another person; and
> *(c)* is liable to the owner of the property for any loss resulting from a failure to comply with paragraph *(a)* or *(b)*."

For current purposes, paragraphs *(b)* and *(c)* are relevant. Section 65(2)(*b*) imposes a legal duty on a supplier or service provider who has possession of the property of a consumer, to exercise a degree of care, diligence and skill that can reasonably expected when handling the property of another in the process of handling or safeguarding the property of the consumer, while section 65(2)(*c*) holds the supplier or service provider liable for making good to the consumer any damage resulting from a breach of this duty.

In terms of the common-law rules on *depositum,* the person holding the property (depositary) must exercise due care and diligence in looking after the property. The depositary will be liable to the depositor for any damage to the property resulting from a negligent breach of the duty of care. Where the depositary is unable to restore the property of the depositor undamaged, the former bears the onus to prove that this liability is not owing to their negligence. This rule applies generally to all contracts involving the assumption of a duty of care in respect of property handed to another (*LAWSA XV Deposit* par 229 and *LAWSA III* par 97). Eiselen explains the common-law liability of the depositary as follows:

> "In terms of these rules the depositary must exercise due care and diligence in taking care of such goods and becomes liable to the depositor if it failed to do so. In the absence of an owner's risk clause, the depositary is liable to the depositor for damages resulting from the loss of or damage to the thing through its negligence while it is in its custody, and the onus is upon the depositary to show on a balance of probabilities that such loss or damage occurred despite the exercise by it of due diligence". ("Section 65" in Naudé and Eiselen (eds) *Commentary on the Consumer Protection Act* Revision Service 10 (2024) 65–4 (footnotes omitted))

It is submitted that the same rule regarding the onus will apply in respect of a consumer agreement in respect of which section 65(2) applies, since the subsection imposes a duty of care on the supplier. In support of this submission, reference can be made to section 2(10) of the CPA, which states that "[n]o provision of this Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law." This section is to be understood in the context of the presumption that the

legislature does not intend to change the common law unless clearly provided in the specific statute (De Stadler and Du Plessis, updated by Eiselen "Section 2" in Naudé and Eiselen (eds) *Commentary on the Consumer Protection Act* Revision Service 12 (2025) 2–11).

Of course, the problem with the common-law rules of deposit is that the protection they offer can be, and often is, negated by way of contractual provisions excluding the liability of the depositary. It has been pointed out above that the common law can be modified by agreement in the terms and conditions of carriage of the specific carrier. Eiselen states that "[i]t has become customary for depositaries to exclude or severely restrict the rights of depositors in their standard agreements" ("Section 65" in Naudé and Eiselen (eds) *Commentary on the Consumer Protection Act* Revision Service 10 (2024) 65–5).

It is in this regard that section 65(2) arguably provides better protection to a consumer (depositor) than the common law, especially as the rights provided by the CPA cannot be excluded by agreement (see Eiselen "Section 65" in Naudé and Eiselen (eds) *Commentary on the Consumer Protection Act* Revision Service 10 (2024) 65–6). Section 51(1)(*b*) of the CPA prohibits a supplier from including a term in a consumer contract purporting to waive or deprive a consumer of a right provided for in the CPA. The significance of this is that if section 65(2) of the CPA applies to the agreement and the service of the airline in transporting a consumer's baggage, the airline will not be able to exclude its liability for a breach of its duty of care. Furthermore, the onus will be on the airline to prove on a balance of probabilities that the damage did not result from a negligent breach of its duty of care, rather than on the consumer to prove such negligence. This of course depends upon whether section 65(2) finds application in this context.

An argument for the application of section 65(2) is likely to be met, depending on the facts, with a contention that the airline did not have possession for purposes of section 65(2) of the luggage – as was indeed the case in the matter referred to in the opening paragraph of this note. The question to be answered then is whether section 65(2) of the CPA can be said to apply to a situation even where the baggage of passengers, or consumers, is not continuously in the physical possession of the airline but is also handled by other parties, such as the ground-handling crews, over whom the airline may not have direct control. As is clear from section 65(2), for a supplier such as the airline to be held liable for damage in terms of the section, the supplier must have possession of the property of the consumer.

Although the FlySafair Terms and Conditions do not state exactly when the carrier takes possession of the checked baggage, it can be accepted that generally, that would happen the moment the baggage is accepted by the airline's ground staff by way of the issuing of a baggage identification tag in respect of each piece of checked baggage. This approach is supported by the IATA General Conditions of Carriage, which, in terms of its clause 9.4.1, provides that upon delivery to the carrier of the baggage to be checked, the carrier must take custody thereof and issue a baggage identification tag for

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each piece of checked baggage. This is the moment that the duty of care commences, and it continues until the duty is terminated by delivery of the baggage to the consumer, when the consumer retrieves the baggage from the carousel. It is instructive to refer to the situation in terms of the Montreal Convention, which provides that the airline is strictly liable for damage to checked luggage that occurred on board the aircraft or during any period within which the checked luggage was in the charge of the carrier. It was suggested earlier by the author that the Convention be understood to provide that the airline remains in charge of the baggage not only when it is on board the aircraft but for the duration of time commencing with the airline's receipt of the baggage from the passenger and ending with its delivery back to the passenger. From the perspective of the consumer, the airline has possession of the baggage during that time. The consumer has contracted with the airline and not with any other party. Airlines are in a much better position to manage, insure and allocate risk between themselves and ground operators by way of ground-handling agreements concluded between airlines and ground operators; the latter are for all intents and purposes acting as agents of the airline.

Furthermore, and although in a different context, a parallel may be drawn with the situation where a guest at a hotel brings property into the hotel but keeps it in their room. For purposes of the application of the praetorian edict *de nautius, cauponibus et stabulariis,* the courts have held that the hotel has possession of this property even though the property is held by the guest in their room (*Davis v Lockstone* 1921 AD 154). Similarly, one may argue that even if the airline does not have physical custody of the luggage during certain periods (such as during loading), it nevertheless retains possession, or remains in charge of the luggage from the moment the luggage is checked until it is delivered to the consumer. It is submitted that this approach is aligned with the interpretational process set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* (2012 4 SA 593 (SCA)), where the Supreme Court of Appeal stated

> "Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document" (par 18).

Also, if the airline were able to escape liability by inserting a term excluding liability because the baggage is (also) handled by other parties, there is practically very little chance for the consumer to ascertain where or when, or by which other party, any damage was caused. The consumer will, for practical reasons, be left without a remedy, which runs counter to the express imperative of the CPA to interpret and apply the Act in a manner that provides protection to consumers. If a consumer can simply be met with a defence that "it wasn't us and we do not know who damaged it", the consumer is in an impossible situation, which undermines the purpose of the CPA. Such a situation may well be the type that section 65(2)(*b*) is aimed at preventing. It is therefore submitted that once baggage has been checked,

the duty of care in terms of section 65(2) commences and only terminates when the baggage is delivered to the consumer at the airport of destination.

One is conscious of the fact that the purpose of the CPA is not to protect consumers at all costs, but is also to provide for fair business practices; section 3(1)(*c*) implies a balancing of the interests of the service provider with those of the consumer. Imposing additional liability on the airline may lead to higher prices and result in the business model becoming unprofitable, resulting in less consumer choice (De Stadler and Du Plessis, updated by Eiselen "Section 2" in Naudé and Eiselen (eds) *Commentary on the Consumer Protection Act* Revision Service 12 (2025). The cost associated with insuring against such damage is likely to be passed on to the consumer. This may be to the detriment of consumers generally, but it may equally be to the benefit of consumers in that they then have the assured protection of recovering material damage to baggage. The airline will be at some risk, but that risk may be split with the other party or parties involved in the handling of airlines' baggage at airports – a service for which the airlines must pay – thus placing the airline in a much better position to mitigate the risks than the consumer will ever be. Such matters are in any event likely to be regulated by way of ground-handling agreements between airlines and other parties such as ground operators, (It is recognised that FlySafair provides consumers with an option to insure checked baggage, and indeed it encourages passengers to do so. However, this is a separate matter and irrelevant to the question of whether section 65(2) applies to checked baggage for the entire period from the time it was handed to the airline until it is received by the passenger at the destination. Such additional insurance may only be necessary then in respect of cases where damage to luggage occurred despite the airline complying with its duty of care. Insuring against a reduced risk of damage should entail a cost-saving benefit for the consumer which, in turn, may at least offset a significant part of the potential cost increase referred to above.)

One must also bear in mind that section 65(2)(*b*) only requires that the service provider exercise a degree of care that can reasonably be expected in the circumstances. One may thus argue that it is not reasonable to expect the service provider to prevent all damage to baggage. By the very nature of the transport and handling of large quantities of baggage, certain damage is probably unavoidable. The FlySafair Terms and Conditions provide that the airline

> "shall not accept liability for damage such as scratches, stains, dents, cuts and dirt resulting from the normal wear and tear or water damage to non-waterproof luggage, damage or loss of protruding parts such as wheels, straps, pull handles or other items that are attached to luggage or items lost as a result of badly packaged luggage" (Appendix F cl 2).

One may well agree that these types of damage are examples that indeed can be reasonably expected in the current context, and that it does not constitute a breach of the duty of care. However, where baggage, which can include a suitcase, is "destroyed", then one is dealing with something that falls outside the ambit of damage that can be reasonably expected and there

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may be a breach of the airline's duty of care. (It is interesting to note that the European Court of Justice in *Walz v Clickair SA* (Case C-63/09 ECLI:EU:C:2010:251 [2010] *ECR 2010 I-04239* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62009CJ0063 (accessed 2026-01-28)) has ruled that the term "damage", which underpins article 22(2) of the Montreal Convention, which in turn "sets the limit of an air carrier's liability for the damage resulting, *inter alia*, from the loss of baggage, must be interpreted as including both material and non-material damage" (par 40).)

One other aspect deserves mentioning. It has been indicated above that the Montreal Convention, the IATA General Conditions of Carriage and the FlySafair General Terms and Conditions provide that a claim against an airline for damage to luggage must be instituted within two years of date of arrival at the destination, or of the date on which the aircraft was scheduled to arrive, or the date on which the carriage stopped. On the other hand, the CPA provides that actions under the Act will become prescribed if not brought within three years (s 116(1)). As the Montreal Convention has been incorporated into South African law by amendment of the Carriage by Air Act by means of the Carriage by Air Amendment Act in 2006, there is clearly a conflict between the Carriage by Air Act and the CPA. The latter provides that if there is an inconsistency between a provision of the CPA and another Act, the provision that provides the greater protection to a consumer prevails over the alternative provision (s 2(9)(*b*)). It should be evident that the provision of the CPA provides the better protection; therefore, should the CPA be applicable, the three-year prescription period will apply. The CPA will clearly supersede the provisions of the FlySafair General Terms and Conditions where there is a conflict.

4 Conclusion

This note considers whether section 65(2) of the CPA can be applied to the situation where a consumer's luggage is damaged during the time after it has been checked by the consumer with the airline and before it is retrieved by the passenger from the carousel at the destination airport, even though the baggage is not under the direct control of the airline the whole time. This is an important question because if the section does not apply, then the service provider can exclude liability for damage caused through its negligence. However, if the section does apply, then its protection cannot be excluded.

In respect of international travel to which the Montreal Convention applies, it is argued that the carrier is strictly liable for checked baggage, provided only that the damage must have occurred on board the aircraft or during any period within which the checked luggage was in the charge of the carrier. For unchecked baggage, the carrier will only be liable if the damage was caused through the fault of the airline. The Convention does not provide clarity on when the carrier starts being in charge of checked baggage and when this ends. It is suggested that the Convention be understood to provide that the airline remains in charge of the baggage not only when on board the aircraft but for the whole duration of time commencing with the airline receiving the

baggage from the passenger and ending when it is delivered back to the passenger.

In terms of the IATA General Conditions of Carriage, the carrier is liable for damage to a passenger's checked baggage of which it took custody, only if the damage has been caused by the negligence of the carrier. The carrier is also not liable for unchecked baggage unless damage thereto is caused by the negligence of the carrier.

FlySafair incorporates IATA's General Conditions of Carriage in its contract with consumers for its services. Purely domestic carriage is governed by the common law, which can be amended by agreement between the parties. For pure domestic travel, FlySafair excludes liability for the negligent causing of damage to checked baggage while that baggage was in the control or custody of the airline.

Section 65(2)(*b*) of the CPA imposes a legal duty on a service provider that has possession of a consumer's property to exercise a degree of care, diligence and skill that can reasonably be expected when handling another's property, while section 65(2)(*c*) holds the service provider liable for making good to the consumer any damage resulting from a breach of this duty. It is argued that the consumer is assisted in establishing a breach of this duty of care since the service provider bears the onus to prove that the damage is not owing to the negligence of such service provider.

The relevance of establishing whether section 65(2) of the CPA applies to the agreement and the service of the airline transporting the consumer's baggage is that if the section applies, then the airline will not be able to exclude its liability for damage caused to the baggage while it is in the possession of the airline. It should not be in question that section 65(2) applies to checked baggage while it is on board an aircraft of the airline. Less certain is whether the application of the section is interrupted for those periods of time when the airline may not be in direct control of the baggage and when it is handled by other parties, and where the airline's liability is excluded by an exemption-of-liability term in the agreement. Would the airline still be in possession of the baggage for purposes of section 65(2)? It is argued that section 65(2) should apply for the entire time – from when the airline takes possession of the baggage until such time as it is delivered to the passenger. Arguments in favour of the application of section 65(2) in this context include the imperative of the CPA to interpret and apply the Act in a manner that provides protection to consumers, and interpreting the CPA to exclude the application of section 65(2) would have the practical effect of denying the consumer any remedies. It is also submitted that parties handling baggage on behalf of the airline are agents of the airline and therefore the airline as principal cannot exclude its liability for a breach of the duty imposed by section 65(2). The airline may have recourse against the ground handler, but the consumer's claim against the airline should not be affected. The fair treatment of consumers does not require the protection of the consumer at all costs, but rather that a balance between the legitimate interests of the consumer and that of the supplier be struck (Delport "Problematic Aspects of the Consumer Protection Act 68 of 2008 in Relation

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to Property Transactions: Linked Transactions, Fixed Term Contracts and Unsigned Sale Agreements" 2014 35(1) *Obiter* 60 68–69). Section 65(2)(*b*) only requires that the service provider exercise a degree of care that can reasonably be expected in the circumstances, and therefore, one may argue that it may not be reasonable to expect the service provider to be held liable for all damage to baggage. Some damage to baggage can reasonably be expected, and airlines generally should not be liable for this. However, such liability is not excluded by dint of being excluded in the contract, but because of how section 65(2) is interpreted and applied in the process of balancing the legitimate interests of both parties. Where baggage is "destroyed", this falls outside the ambit of what damage can reasonably be expected, and there is a breach of the duty of care that cannot be excluded by agreement. To escape liability, the airline should bear the onus to establish that there was no breach of the duty of care imposed by section 65(2) of the CPA.

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