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AVIATION LAW REPORT

CARL E. B. MCKENRY*

This report reviews recent litigation under the Warsaw Convention of 1929.¹ The most important litigation deals with the liability limitation in the calculation of damages under Article 22 of the Convention. This litigation has arisen because of monetary developments since 1929 which have altered the value of gold.

The first three provisions of Article 22 relate to the limitation on the amount of recovery, valued in French francs, in the case of injury to passengers, checked baggage and goods, and hand articles carried aboard.² The fourth provision of Article 22 provides for a conversion standard: "(4) The sums mentioned 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."³

This standard presented no difficulties for nearly fifty years. Monetary developments since 1929, however, have made it difficult to determine the appropriate conversion rate under Article 22. In 1929, an ounce of gold was worth approximately twenty U.S. dollars. In 1934, the United States established an official gold price of thirty-five dollars an ounce because of the devaluation of the dollar. This official gold price remained in effect until the establishment of the International Monetary Fund (IMF) in 1944. United States' action, both individually and as a party, to certain IMF agreements resulted in abolishing a fixed "official" price of gold against the dollar. The consequence of releasing the fixed price of gold is that the free-market price of gold has fluctuated against the U.S. dollar.⁴

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1. *Convention for the Unification of Certain Rules Relating to International Transportation by Air* (Warsaw Convention of 1929) 49 Stat. 3000, T.S. No. 876, U.S. adopted July 31, 1934.

2. Warsaw Convention, Article 22(1)(2) and (3), *supra*, note 1.

3. Warsaw Convention, Article 22(4), *supra*, note 1.

4. For a comprehensive review of the events leading up to the present released or "free market" relationship of gold to the U.S. dollar, see Boehringer Mannheim Diagnostics, Inc.

When the United States abandoned its official price for gold, however, the Civil Aeronautics Board (CAB) took no action to require revised tariffs. The practical effect is that during a time in which the free-market price of gold has risen to more than \$400 an ounce, the CAB has allowed airline carriers to calculate their limitation of liability based on the artificial figure of \$42.22 an ounce which was once the U.S. "official price."

The limitation of the carrier's liability for damages as set out in Article 22 of the Warsaw Convention, 250 French gold francs per kilogram, can be converted to U.S. dollars with reference to four different standards: (1) the free-market price of gold, (2) the last official price of gold in the United States (\$42.22 per ounce), (3) the Special Drawing Right (SDR) used by IMF members as a unit of account, or (4) the exchange value of the current French franc.

A. *The "Gold" Cases*

Three U.S. District Court cases were reported in late 1981 and early 1982 touching upon the appropriate conversion rate to be utilized under Article 22 of the Convention.⁵

In *Boehringer Mannheim Diagnostics Inc. v. Pan American World Airways*,⁶ the U.S. District Court for the Southern District of Texas, in an action for damages to a cargo shipment, ruled that the conversion of the amount of damages to U.S. dollars should be with reference to the current free market price of gold. However, in *Franklin Mint Corp. et al v. Trans World Airlines*,⁷ the Southern District of New York, in the case of a lost shipment of four bags of valuable coins, ruled that in converting the Warsaw limitation into U.S. dollars, the last official price of gold in the United States, and not the current market price is the appropriate measure. The most recent case to be reported was a wrongful death action under the Warsaw limitation, *In Re Air Crash Disaster at Warsaw, Poland, On March 14, 1980*.⁸ The court, after citing both of the above cargo

v. Pan American World Airways, 531 F. Supp 344 (S.D. Tex. 1981).

5. *Franklin Mint Corp. v. T.W.A.*, 525 F. Supp. 1288 (S.D. N.Y. 1981), 16 AVI 18,024; *Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways*; 531 F. Supp. 344 (S.D. Tex. 1981), 16 AVI 18,177; *In re Air Crash Disaster at Warsaw, Poland on March 14, 1980*; February 16, 1982 (E.D. N.Y.), 16 AVI 18,249.

6. 531 F.Supp. 344 (S.D. Tex 1981).

7. 525 F.Supp. 1288 (S.D. N.Y. 1981).

8. 16 AVI 18,249 (E.D. N.Y. 1982).

cases, elected to follow the *Franklin Mint* choice utilizing the last official price of gold. An additional complication in this wrongful death action was the application of the Montreal Agreement. The Montreal Agreement does not apply to cargo and baggage and was established as a device to avoid the lower limitation on recovery in exchange for the United States withdrawing its denunciation of the Convention.⁹ The Montreal Agreement operates under Article 22 (1)¹⁰ which allows the passenger and the carrier by special contract to agree to a higher limit of liability. The Montreal Agreement limits the amount of liability to \$75,000 U.S. dollars. Article 23, however, provides in part: "Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void. . . ."¹¹

Thus, if a free market standard for gold is selected in a passenger case, it will, in all probability, result in a recovery in excess of the Montreal limit of \$75,000, thereby negating the Montreal Agreement's application because such application would constitute a violation of Article 23. Undoubtedly, the *Boehringer* case will come under review by the fifth circuit and the New York cases by the second circuit, perhaps paving the way for an ultimate Supreme Court review if each circuit elects to support their respective trial courts.

B. *Guatemala City Protocol*

Several non-U.S. courts have addressed the gold conversion issue but have not been consistent in result.¹² The second circuit touched briefly on this issue by way of *dicta* in *Reed v. Wiser*,¹³ but not in a manner dispositive of the issue. The court noted that under Article VIII of the Guatemala City Protocol to the Warsaw Convention "drafted at the insistence of the United States and

9. For full consideration of the Montreal Agreement and events leading up to its establishment, see Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 HARVARD LAW REV. 497 (1967).

10. *Supra* note 1.

11. *Id.*

12. See *Hornlinie v. Société Nationale des Petroles Aquitaine*, Decision of April 14, 1972 (N.J. 1972, 269) (Dutch High Council holding that the official price of gold should be used in applying the analogous limitation provisions of Shipowners' Liability Convention). See also Heller, *The Value of the Gold Franc - A Different Point of View*, 6 J. MAR. L. & COM. 73, 101-02 (1974).

13. *Reed v. Wiser*, 555 F.2d 1079, (2d Cir. 1977), *cert. denied*, 434 U.S. 922 (1977), 14 Air 17.

still awaiting consideration by the (U.S.) Senate" the liability limits per passenger, based upon a then (1977) free market U.S. dollar value of \$152.00 per ounce, would rise to over \$400,000 (US).¹⁴ This reasoning was based upon the amended language of Article 22 (4) of the Convention, which would be provided by Article VIII of the Guatemala City Protocol:

Art. 22(4). The sums mentioned in francs in this Article and Article 42 shall be deemed to refer to a currency unit consisting of sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment.¹⁵

The fact that the second circuit in *Reed v. Wiser* has viewed the Guatemala City Protocol as changing (i.e., raising) the liability limit suggests, although admittedly speculative, that it will view the present Article 22 limits as providing a conversion other than a free market standard of gold against the U.S. dollar. This speculation is further reinforced by the additional observation in *Reed v. Wiser*: "Nevertheless, at no time has this country ever abandoned the basic principle that, whatever the limits may be, air carriers should be protected from having to pay out more than a fixed and definite sum for passenger injuries sustained in international air disasters."¹⁶ The uniform application by U.S. courts of a free market standard for gold in interpreting Article 22 (4) could effectively remove the liability limitations of that Article in most cases, since recoveries could approach non-Warsaw verdicts even in the U.S. Moreover, a standard which fluctuates with the vicissitudes of the world gold markets and which results in the immediate increasing of a \$75,000.00 (US) limit on passenger liability under the Montreal Agreement to over one million dollars (based upon a free market value of gold at between \$300.00 and \$400.00 per ounce) can hardly be considered as fixed and definite.

Although it may be interpreted as providing a free market

14. *Id.* at 1089. See *supra* note 12.

15. Protocol to amend the convention for the unification of certain rules relating to international carriage by air signed at Warsaw on 12 October 1929 as amended by the protocol done at the Hague on 28 September 1955. Signed March 8, 1971 at Guatemala City, Guatemala.

16. 555 F.2d at 1089.

standard for gold vis-à-vis liability limitation, the Guatemala City Protocol recognizes the need for review of the limitation amount, by providing a review of passenger liability limits on a periodic basis through a new Article 42, which would specify convening a conference to review the limits established in revised Article 22 (1) (a) which covers the carriage of persons. These reviews would take place during the fifth and tenth years after the Protocol entered into force.¹⁷

C. *Montreal Protocols Nos. 3 & 4*¹⁸

Another solution is provided in the Montreal Protocols No. 3 and No. 4 to the Convention which were subsequent to the Guatemala City Protocol. Rather than reference to a French franc or other national monetary unit, the Montreal Protocols use the IMF "Special Drawing Rights." For example, Montreal Protocol No. 3 provides in Article II for a complete change in the Warsaw Convention's Article 22 including the following:

17. Article XV in the Guatemala City Protocol provides:

After Article 41 of the Convention, the following Article shall be inserted:-Article 42 - 1. Without prejudice to the provisions of Article 41, Conferences of the Parties to the Protocol done at Guatemala City on the eighth March 1971 shall be convened during the fifth and tenth years respectively after the date of entry into force of the said Protocol for the purpose of reviewing the limit established in Article 22, paragraph 1 a) of the Convention as amended by that Protocol. 2. At each of the Conferences mentioned in paragraph 1 of this Article the limit of liability in Article 22, paragraph 1 a) in force at the respective dates of these Conferences shall not be increased by an amount exceeding one hundred and eighty-seven thousand five hundred francs. 3. Subject to paragraph 2 of this Article, unless before the thirty-first December of the fifth and tenth years after the date of entry into force of the Protocol referred to in paragraph 1 of this Article the aforesaid Conferences decide otherwise by a two-thirds majority vote of the Parties present and voting, the limit of liability in Article 22, paragraph 1 a) in force at the respective dates of these Conferences shall on those dates be increased by one hundred and eighty-seven thousand five hundred francs.* 4. The applicable limit shall be that which, in accordance with the preceding paragraphs, is in effect on the date of the event which caused the death or personal injury of the passenger.

*[I.e., 1.5 x Warsaw or just under U.S. \$12,500.]

18. Montreal Protocols No. 3 and 4 1975, Montreal Protocol No. 3 - To Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air. Signed at Warsaw on 12 October 1929 as Amended by the Protocols Done at The Hague on 28 September 1955, and at Guatemala City on 8 March 1971. Montreal Protocol No. 4 - To Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on October 21, 1929, as Amended by the Protocol, Done at The Hague on September 28, 1955. Both Protocols signed on September 25, 1975 at Montreal, Canada.

4. The sums mentioned in terms of Special Drawing Right in this Article and Article 42 shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgment. The value of a national currency, in terms of the Special Drawing Right, of a High Contracting Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgment, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a High Contracting Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that High Contracting Party.

Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraphs 1 and 2(a) of Article 22 may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier in judicial proceedings in their territories is fixed at a sum of 1,500,000 monetary units per passenger with respect to paragraph 1(a) of Article 22; 62,500 monetary units per passenger with respect to paragraph 1(b) of Article 22; 15,000 monetary units per passenger with respect to paragraph 1(c) of Article 22; and 250 monetary units per kilogramme with respect to paragraph 2(a) of Article 22. A State applying the provisions of this paragraph may also declare that the sum referred to in paragraphs 2 and 3 of Article 42 shall be the sum of 187,500 monetary units. This monetary unit corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into the national currency concerned in round figures. The conversion of these sums into national currency shall be made according to the law of the State concerned.¹⁹

Montreal No. 4 is somewhat different but nonetheless follows the concept of Special Drawing Rights as the measure of conversion to be used.²⁰ However, anything approaching universal accept-

19. Montreal Protocol No. 3, Article II.

20. Any detailed consideration of the complex relationships between Montreal Protocol No. 3 and No. 4 is beyond the scope of this Report. Both were signed on September 25, 1975 at Montreal, but there are substantial differences between the two. For example, Montreal No. 3 is designed to include the Guatemala City Protocol. Its revisions to Article 22 of the

ance by major air traffic countries of one or more of the Protocols to the Warsaw Convention in the immediate future is doubtful at best, particularly in the case of the United States.²¹

Therefore, it rests squarely upon the U.S. Court of Appeals (and perhaps eventually the U.S. Supreme Court), at least at this writing, to determine which of the four possible standards to use in interpreting the limitation conversion under Article 22(4).

Convention are based upon the previous changes brought about by Guatemala City. On the other hand, Montreal No. 4 excludes Guatemala City, and bases its revisions on the previous changes of The Hague Protocol to the Warsaw Convention signed September 28, 1955. The equivalent of the Special Drawing Rights provision quoted in the body of this report from Montreal No. 3 is revision Article 22(b) to the Convention:

In Article 22 of the Convention-6. The sums mentioned in the terms of the Special Drawing Right in this Article shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgment. The value of a national currency, in terms of the Special Drawing Right, of a High Contracting Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgment, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a High Contracting Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that High Contracting Party.

Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 2(b) of Article 22 may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier in judicial proceedings in their territories is fixed at a sum of two hundred and fifty monetary units per kilogramme. This monetary unit corresponds to sixty-five and a half milligrammes of gold or millesimal fineness nine hundred. This sum may be converted into the national currency concerned in round figures. The conversion of this sum into the national currency shall be made according to the law of the State concerned.

21. Aside from the Montreal Protocols the possible judicial interpretation of the original Article 22(4) of the Warsaw Convention as allowing the use with IMF member nations of the Special Drawing Rights concept is not remote. Judge Knapp noted in *Franklin Mint*: "Were we writing on a clean slate, we would find the argument in favor of the first of TWA's suggestions (the Special Drawing Rights) most persuasive." 525 F. Supp. 1288, 1289, *supra*, note 5.