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Warsaw Convention's Limitation on Liability: How to Translate Convention Judgments

Franklin Mint Corp. v. Trans World Airlines

690 F.2d 303 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3554 (U.S. Jan. 15, 1983) (No. 82-1186)

In March 1979, Franklin Mint Corporation (Franklin) and Trans World Airlines, Inc. (TWA) contracted for the carriage by air of certain packages from the United States to England. The packages failed to reach their destination and Franklin brought suit against TWA to recover their full value, which Franklin fixed at \$250,000.¹ TWA conceded its liability for the loss, and both parties agreed that the action was governed by the terms of the Warsaw Convention² (the Convention). Article 22 of the Convention provides for the limitation of a carrier's liability for checked baggage and goods, and for the utilization of gold as the standard unit for converting judgments into any national currency.³ Since the drafting of the Convention however, gold's posture in the international monetary system has undergone radical changes. Consequently, countries have recently been forced to employ alternative "units of account"⁴ in order to translate Convention judgments into their national currencies. The United States District Court for the Southern District of New York found that "the last official price of gold in the U.S." was to be the basis for converting article 22 judgments into United States dollars.⁵ On appeal, the United States Court of Appeals for the Second Circuit, *held*, affirmed: (1) Congress has explicitly abandoned the unit of conversion specified by the Convention, and, because any substitution would require ei-

1. Although these packages were said to contain a large quantity of valuable coins, Franklin Mint Corp. made no special declaration of their value at the time they were delivered to T.W.A. 690 F.2d at 304.

2. 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. [hereinafter cited as *Warsaw Convention*.]

3. *Warsaw Convention*, Article 22(2) and (4), *supra*, note 2.

4. The terms "unit of account" and "unit of conversion" refer to the standard reference of gold for Article 22 judgment calculations.

5. *Franklin Mint Corp. v. T.W.A.*, 525 F. Supp. 1288, 1289 (S.D.N.Y. 1981).

ther treaty approval or passage of legislation, both political questions unfit for judicial resolution, the Convention's limits on liability for loss of cargo are unenforceable in United States courts. (2) This ruling is prospective and will apply only to events creating liability occurring sixty days from the issuance of this mandate. Such a prospective effect is compelled so that parties to transactions covered by the Convention are afforded sufficient time to adjust their affairs to this determination. (3) Until the effective date of this ruling, based on Civil Aeronautics Board (CAB) policy that it is the best standard, and because of its uniform use by domestic carriers, "the last official price of gold in the U.S." will be used to convert Convention judgments into U.S. dollars. *Franklin Mint Corp. v. Trans World Airlines*, 690 F.2d 303 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3554 (U.S. Jan. 15, 1983) (No. 82-1186).

This Note examines the historical and legal development of the Warsaw Convention's limitation of carrier liability,⁶ and how the current international monetary system has mandated a re-evaluation of the conversion of Convention judgments into national currencies. It concludes with an analysis of the *Franklin* court's findings, and of the decision's potential ramifications, both national and international.

Although the field of international civil aviation was still in its infancy in the 1920's, prospects for increased international transportation,⁷ and for commercial interaction, gave rise to a growing concern over the need for preceptual uniformity.⁸ The result of this growing concern was the Warsaw Convention. The Convention's signatories attempted to achieve commercial stability by both restricting air carrier defenses, and limiting air carrier liability. By doing this, the drafters hoped to provide "a more definite basis of recovery, a lessening of litigation, and an aid in the development and maintenance of international air transportation."⁹

6. If the plaintiff can show a fact situation indicating that the carrier has been guilty of willful misconduct, this will be sufficient to remove the protective limits of liability under Article 22. *Warsaw Convention*, Article 25, *supra*, note 2.

7. "International transportation" is defined as transportation between two contracting countries or, when the origin and destination are in the same contracting country, transportation with an agreed stopping place outside the country. *Warsaw Convention*, Article 1, *supra*, note 2.

8. The Warsaw Convention was the result of two international conferences held in Paris in 1925 and Warsaw in 1929, and of the work done by the *interim Comité International Technique d'Experts Juridique Aériens* created by the Paris Conference.

9. Haskell, *The Warsaw System and the U.S. Constitution Revisited*, 39 J. AIR L. &

At that point in time, gold formed the basis for the international monetary system. As a result, gold became the standard through which judgments were converted under the Warsaw Convention.¹⁰ Gold was utilized in order to avoid fluctuations in currency values, and to guard against the effect of unilateral actions by the government whose currency was used.¹¹ While its stature as a common monetary denominator¹² continued for some time, a series of ongoing events marked a radical shift in gold's posture.

In 1934, the U.S. devalued the dollar and established an official gold price of thirty-five dollars per ounce.¹³ This thirty-five dollar rate was employed by the International Monetary Fund (IMF) nations in their gold transactions with each other.¹⁴ During this period of time, there was little variation in the price of gold on the open market. In 1968, however, "the IMF countries stopped buying and selling gold on the free market at the 'official' thirty-five dollars an ounce rate."¹⁵ A "two-tiered"¹⁶ gold market was thus created, and the free market price for gold rapidly exceeded its previous value of thirty-five dollars an ounce. In 1971, the United States announced that it would no longer convert the dollar into gold reserves.¹⁷ The U.S. then implemented the Par Value Modification Act of 1972¹⁸ and 1973¹⁹ in order to devalue the dollar while simultaneously increasing gold's official price to \$42.22.

Com., 483, 484 (1973).

10. Provision (4) provides for a conversion formula: "(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." *Warsaw Convention*, Article 22(4), *supra*, note 2.

11. 690 F.2d at 306.

12. Gold was "given this official status by the International Monetary Fund created by the Bretton Woods Conference in 1944." *In re Air Crash Disaster at Warsaw, Poland* on March 14, 1980, 535 F. Supp. 833, 840-1 (E.D.N.Y. 1982); *See generally* Bretton Woods Agreements Act, ch. 339, § 2, 59 Stat. 512 (1945) (codified at 22 U.S.C. § 286 (1976)). (Approval by Congress of United States' participation in IMF in 1945).

13. Gold Reserve Act of 1934 ch. 6, § 12, 48 Stat. 342 (1934) (repealed 1973).

14. The International Monetary Fund is an agency of the United Nations established to stabilize international exchange to promote balanced international trade.

15. *See generally* *Boehringer Mannheim Diagnostics v. Pan Am*, 531 F. Supp. 344, 351 (S.D. Texas 1981) (for a more detailed examination of the historical developments which lead to the current condition of the international monetary system).

16. Asser, *Golden Limitations of Liability in International Transport Conventions and the Currency Crisis*, 5 J. MAR. L. & Com., 645, 650 (1974).

17. 531 F. Supp. at 351.

18. Par Value Modification Act of 1972, Pub. L. No. 92-268, § 2, 86 Stat. 116 (1972) (repealed 1978) *Id.* at n.30.

19. Par Value Modification Act of 1973, Pub. L. No. 93-110, § 1, 87 Stat. 352 (1973) (repealed 1978) *Id.* at n.31.

The IMF amendments, abolishing the concept of an official price of gold, were ratified by the United States in 1976,²⁰ and became effective in 1978.²¹ The last official gold price in the United States was \$42.22 an ounce. Clearly, this fundamental change of gold's place in the international monetary system called for a re-examination of gold's capacity to perform its intended function under the Convention.

Much of the litigation concerning the Convention has involved the extent to which a carrier may limit its liability for the loss of cargo. Not surprisingly, the recent focal point of this controversy has been the debate over what unit of account should be employed when converting Convention judgments into national currencies.²²

Four standards have been advanced as possible units of account: (i) the last official price of gold in the United States; (ii) the free market price of gold; (iii) the Special Drawing Right (SDR), a unit of account established by the IMF; and (iv) the exchange value of the current French franc.

The district court in *Franklin*²³ held that "the last official price of gold in the U.S." was the appropriate unit of conversion. The court of appeals reluctantly acquiesced with the district court's findings, acknowledging that "every proffered solution appears to have a devastating argument against it."²⁴ The court, however, went on to announce a decision which could potentially have far reaching consequences. The court declared that as a body, it was, in effect, *ultra vires* (i.e. without power) to select a new unit of account. "While the Convention has not been formally abrogated, enforcement by national judicial tribunals is impossible without their picking and choosing among alternative units of conversion according to their view of which is best as an initial policy matter."²⁵ Accordingly, the court refused to render a political determination, and thus declared the Convention's limitation of liability prospectively unenforceable in the United States. The court based its findings on four postulates that follow logically in progression.

First, Congress has explicitly abandoned the unit of conver-

20. Act of Oct. 19, 1976, Pub. L. No. 94-564, 90 Stat. 2660 (1976) *Id.* at n.32.

21. This "ended the forty three-year link between the dollar and gold." *Id.*

22. *Aviation Law Report*, 14 LAW. AM. 113 (1982).

23. 525 F. Supp. at 1289.

24. 690 F.2d at 306.

25. *Id.*

sion specified by the Convention. The Par Value Modification Act²⁶ authorized the establishment of the par value of dollars in terms of gold at the equivalent of \$42.22 an ounce. The court reasoned that Congress' repeal of this Act was a legislative declaration that the existing gold price was no longer recognized by the United States. Congress' action, the court offered, "was based on a domestic and international conclusion that the official price of gold was wholly out of touch with economic and monetary reality."²⁷

Second, the substitution of a new unit of conversion for one explicitly specified by an international treaty was not within the purview of the judiciary. "Treaty advice and consent and proposal is the province of the executive and ratification is the exclusive province of the United States Senate."²⁸ The court noted the need for federal courts to be wary of usurping executive and legislative functions. In support of this proposition the court referred to the Supreme Court's decisions in *Baker v. Carr*²⁹ and *Goldwater v. Carter*.³⁰ In *Baker*, the Court declared that any determination of whether a controversy involving foreign relations is beyond judicial cognizance, must be analyzed according to "the particular question posed, in terms of the history of its management by the political branches, and to its susceptibility to judicial handling in the light of its nature."³¹ The *Goldwater* Court stated that the "political question doctrine"³² calls for mutual respect among the branches of Government, and that the judiciary should temper its actions when such restraint would avoid intra-governmental usurpation of functions. Based upon these considerations, the *Franklin* court deemed it inappropriate to, in effect, "modify" the terms of the Convention by selecting a unit of conversion.

The third line of argument presented by the *Franklin* court involves the prospective effect which will be given to its ruling. In *Chevron Oil Co. v. Huson*,³³ the Supreme Court identified three separate factors for considering questions of non-retroactivity. The first factor is that: "the decision to be applied non-retroactively

26. See *supra*, note 19.

27. 690 F.2d at 309.

28. *Id.* at 311.

29. *Baker v. Carr*, 369 U.S. 186, 211-12 (1961).

30. *Goldwater v. Carter*, 444 U.S. 996 (1979).

31. 369 U.S. at 211.

32. 444 U.S. at 998.

33. *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

must establish a new principle of law.”³⁴ The second factor involves looking to the prior history of the rule in question. Finally, “there is ample basis for a holding of non-retroactivity if a decision’s retroactive application would produce injustice or hardship.”³⁵ Based upon these criteria, the *Franklin* court reasoned that non-retroactivity was appropriate.

The final position announced by the court was that, for the instant case, and until the effective date of its ruling, the “last official price of gold in the U.S.” will be used to convert Convention judgments into U.S. dollars. The court evaluated each proposed formula. The court reasoned that both of the first two alternatives: “the free market price of gold” and the “French franc”, would contravene one of the Convention’s primary purposes; that of providing a uniform and definite liability limit for carriers.³⁶ The “free market price of gold” fluctuates daily and is impacted by the uncertain supply and demand variables that attach to any international commodity market.³⁷ The court further stated that the French franc would be inappropriate because of the inherent danger in allowing the definition of liability limitations to depend on the whims of a single country.³⁸

The third possible method of converting judgments is by using the “SDR”, the unit adopted by the International Monetary Fund. The SDR was “created by the IMF in 1969 to replace gold and foreign exchange as an international reserve asset.”³⁹ As such, the SDR has received a great deal of international support, and its substitution as the Convention’s unit of account has been proposed as part of the Montreal Protocols.⁴⁰ The court argues, however, that since the Senate has failed to ratify the Montreal Protocols, it would be inappropriate for the court “to adopt a unit of conversion variable at the whim of an international body distinct from the

34. *Id.* at 106.

35. *Id.* at 107.

36. *Reed v. Wiser*, 555 F.2d 1079, 1089 (2d Cir. 1977), *cert. denied*, 434 U.S. 922 (1977).

37. *See* 535 F. Supp. at 841 n. 6.

38. 690 F.2d at 306.

39. *Id.* at 308 n. 13.

40. Modifies, respectively, the 1929 Convention and the Protocols of the Hague and Guatemala by replacing the standard of the gold poincare franc. Mankiewicz, *A galaxy of unified laws will replace the uniform regime created in 1929 in Warsaw or the death-blow to the uniform regime of liability in international carriage by air*, 1 AIR LAW no. 3, 157, 158 (1976). Note: On March 8, 1983, the U.S. Senate rejected the treaty known as the Montreal Protocols. The vote was 50-42 in favor of the treaty, but it lacked the necessary two-thirds vote. N.Y. Times, March 9, 1983.

parties to the Convention.”⁴¹

Finally, “the last official price of gold in the U.S.” is offered as a possible conversion unit. Although the court sees little logic in adopting this alternative as well,⁴² the court subsequently goes on to assert that the district court was justified in finding “the last official gold price” to be the appropriate standard. The court bases this determination on two observations. First, the last official gold price standard “has been espoused by the Civil Aeronautics Board.”⁴³ The significance of this, the court continues, is that the CAB is “the governmental agency most intimately concerned with the transaction at hand.”⁴⁴ Second, this standard was uniformly applied by all domestic carriers, including TWA, in calculating the dollar value of article 22 limitations.

The significance of *Franklin* inheres in its potentially far-reaching consequences. Although questions have previously arisen concerning the Convention’s liability limitation,⁴⁵ this is the first appellate court to declare the provisions unenforceable in the United States. The ramifications which abound from *Franklin* have both a national and international scope.

First, it should be noted that *Franklin* is a Second Circuit case on appeal from the United States District Court for the Southern District of New York. Normally, a circuit court of appeals has controlling authority within its own circuit, and its decision may or may not be of substantial influence outside of that circuit. New York, however, is an important international port, and a finding within the Second Circuit relating to international law carries meaningful weight.

Second, a uniform adherence to *Franklin*’s holding would result in significant economic consequences. Absent any limitation on liability, a carrier will have an uncertain basis upon which to obtain insurance. The inevitable result of higher insurance rates would increase a carrier’s operating expenses, causing a corresponding escalation of transportation charges to both travelers and shippers. Conceivably, airlines may even be forced to cut back on service. The Convention was originally intended to provide commercial stability, and to aid in the development of international air

41. 690 F.2d at 311.

42. *Id.* at 309.

43. *Id.* at 305.

44. *Id.*

45. 535 F. Supp. 833; 531 F. Supp. 344.

transportation. Both the short and long term economic impact of *Franklin* could frustrate these objectives.

Third, the general effect of the failure of trading countries to agree on some type of uniform conversion method will be to encourage the practice of forum shopping.⁴⁶ Since it would be possible for Convention judgments to vary greatly from country to country, depending on the unit of account employed therein, litigants would select forums in order to obtain the most advantageous settlements. This decision makes the United States the most desirable forum for plaintiffs.

The final and most significant concern raised by *Franklin* relates to the implications of a federal court's determination that part of a treaty entered into by the United States is unenforceable. In support of its decision not to select an appropriate unit of account, the court cites *Baker*⁴⁷ and *Goldwater*⁴⁸ to stand for the proposition that, in general, the judiciary is unfit to make determinations regarding "political questions".⁴⁹ While on its own this concept is sound, nevertheless, the logic of this argument in light of the instant decision, appears to be somewhat convoluted. Simultaneously, as it is stating the need for judicial temperance in the field of foreign relations, the *Franklin* court is declaring a vital provision of an international treaty unenforceable in the United States. It is of little consequence that the court in a footnote,⁵⁰ "expresses no view as to the severability of the limits of [liability] from the rest of the Convention."⁵¹

On January 15, 1983, a petition for certiorari was filed in the United States Supreme Court asking the Court to review *Franklin*. Aside from the possibility of observing a determination of the issues raised herein, it will be interesting to observe whether the Supreme Court will choose to hear this case. It is clear from the Second Circuit's decision, that the most desirable resolution of the

46. *Warsaw Convention*, Article 28, *supra*, note 2.

47. 369 U.S. 186.

48. 444 U.S. 996.

49. *Id.* at 998.

50. 690 F.2d at 311 n. 27.

51. Article 17 of the Convention provides that limitation on the amount of recovery imposed by the Convention may be invoked only by a carrier. The limitation does not apply to manufacturers of any equipment being used by a carrier. Therefore, plaintiff's counsel should consider the possibility of joining noncarrier-defendants to the action in order to effect full recovery. See generally 9 PEPPERDINE L. REV. no. 4, 891 (1982) (explaining procedure pursuant to Federal Rules of Civil Procedure).

problem at hand would be a legislative declaration on the matter.⁵² It may very well be that the Supreme Court will opt for this conclusion, either by denying certiorari, or by affirming the court of appeals decision.

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52. 690 F.2d at 311.