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Air Carriers' Liability Under The Warsaw Convention After Franklin Mint V. Twa

NOTES

AIR CARRIERS' LIABILITY UNDER THE WARSAW CONVENTION AFTER *FRANKLIN MINT V. TWA*

The Warsaw Convention of 1929[1] (Warsaw Convention, Convention) establishes rules of liability and limitations of liability for international air carriage.[2] The Convention's authors promulgated the Convention to establish uniform rules insuring adequate and reliable recovery for injury to persons or property[3] and to protect the infant airlines industry

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (United States ratification effective as of October 29, 1934) [hereinafter cited as Warsaw Convention].

[2] *See* Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498-99 (1967) (Warsaw Convention created to establish uniform system of international aviation law and to limit potential liability of carriers in case of accidents). *See generally* Warsaw Convention, *supra* note 1, arts. 1-39, *reprinted in* A. LOWENFELD, AVIATION LAW CASES AND MATERIALS: DOCUMENTS SUPPLEMENT 941-52 (1981) [hereinafter cited as DOCUMENTS SUPPLEMENT]. The Warsaw Convention was the product of two international conferences, one held in Paris in 1925 and the other in Warsaw in 1929. *See* Lowenfeld & Mendelsohn, *supra*, at 498. Although the United States sent an observer to the Warsaw Convention, the United States was not one of the Convention's charter members. *See id.* at 501-02 (Convention's seven charter members). Shortly after the Convention became effective, however, the State Department determined that the provisions of the Convention would benefit American carriers and passengers and transmitted approval to President Franklin Roosevelt. *See id.* at 502. (airlines' strong support of Warsaw Convention prompted State Department to advocate adherence to Convention). In 1934, President Roosevelt submitted the Convention to the Senate for its advice and consent. *Id.*; *see* SENATE COMM. ON FOREIGN RELATIONS, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A CONVENTION FOR THE UNIFICATION OF CERTAIN RULES, S. EXEC. DOC. NO. G, 73d Cong., 2d Sess. 3-4 (1934), *reprinted in part in In re* Aircrash in Bali, Indonesia on April 22, 1974, 684 F.2d 1301, 1307-08 (9th Cir. 1982) (letter from Secretary of State Cordell Hull recommended ratification of Convention because Convention's liability limitations would aid development of American airlines industry) [hereinafter cited as Hull Letter]; *infra* note 4 (discussion of Hull Letter); *see also* U.S. CONST. art. II, § 2 (President must submit treaties to Senate for Senate's advice and consent). After the Senate ratified the treaty by voice vote, President Roosevelt filed notice of the United States' adherence to the Convention with the Polish government, pursuant to Article 38 of the Convention. 49 Stat. 3000, T.S. No. 876 (1934) (United States adheres to Convention); *see* Warsaw Convention, *supra* note 1, art. 38(2) (Article 38 provides that country becomes party to Warsaw Convention by filing notice of adherence with Polish government); DOCUMENTS SUPPLEMENT, *supra*, at 964-67 (130 nations that are currently signatories to Warsaw Convention). *See generally* Note, *The Revised Warsaw Convention and Other Aviation Disasters*, 8 CUM. L. REV. 763 (1978) (history of Warsaw Convention).

[3] *See* Reed v. Wiser, 555 F.2d 1079, 1090 (2d Cir.) (authors of Warsaw Convention desired to establish uniform body of liability rules governing international aviation that would supersede conflicting domestic laws), *cert. denied*, 434 U.S. 922 (1977); *see also*

from ruinous damage suits.[4] Article 22 of the Convention (Article 22) limits a carrier's liability to 250 gold francs per kilogram for damage to or loss

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MINUTES, SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW, October 4-12, 1929, WARSAW, 35 (R. Horner and D. Legrez trans. 1975) (statement of British delegate) (major reason for Convention was creation of uniform system of liability) [hereinafter cited as MINUTES]; *id.* at 64 (statement of Italian delegate) (emphasized importance of arriving at uniform liability rule); *id.* at 87 (statement of French delegate) (Convention's aim is to achieve unity of law in international air transport). The Convention's authors believed that establishment of a uniform system of liability would protect plaintiffs from the vagaries of foreign legal systems and thus insure that aggrieved plaintiffs receive adequate compensation. *See id.* at 40-41 (statement of French delegate) (creation of uniform system of liability rules guarantees adequate recovery to passengers and shippers); *id.* at 46 (statement of Italian delegate) (establishment of uniform liability rules necessary to protect passengers). Confronted with a maze of conflicting foreign laws, the authors devised a uniform system of liability rules governing the fundamental aspects of international air disaster litigation. *See Reed*, 555 F.2d at 1092; *see also* Warsaw Convention, *supra* note 1, art. 1. Article 1 of the Warsaw Convention provides that the Convention applies to all international transportation of persons, baggage, or goods performed by aircraft for hire. *Id.* Under Article 17, a carrier is liable for any injuries a passenger sustains while embarking or disembarking from the carrier. *Id.* art. 17. Under Article 18, a carrier is liable for all damage to goods occurring during transportation by air. *Id.* art. 18. *See generally id.* art. 20 (burden of proof); *id.* art. 22 (damage awards); *id.* art. 25 (standard of negligence); *id.* art. 28 (venue).

[4] Dunn v. Trans World Airlines, 589 F.2d 408, 410-11 (9th Cir. 1978); *see* Warsaw Convention, *supra* note 1, art. 22 (Convention's liability limitation); Hull Letter, *supra* note 2, at 3. In a letter from Warsaw to the United States Senate, Secretary of State Hull emphasized the importance of the liability limitation provision in the Warsaw Convention. *See id.* Hull stated that Article 22 would benefit passengers and shippers because the liability limitation would afford a definite basis of recovery and thus lessen litigation. *Id.* The liability limitation would also aid the development of international air transport by affording air carriers a more definite and equitable basis on which to obtain insurance rates. *Id.* Hull presumed that the certainty would result in lower operating expenses, thereby benefiting both travellers and shippers with reduced transportation costs. *Id.*

Article 22 provides that a carrier's liability cannot exceed 250 Poincaré gold francs per kilogram in cases involving damage to or loss of goods and 125,000 Poincaré gold francs per passenger in cases involving death or injury to passengers. *See* Warsaw Convention, *supra* note 1, art. 22. The Poincaré gold franc was a French monetary unit that contained a fixed amount of gold and was convertible into any national currency. *See* Asser, *Golden Limitations of Liability in International Transport Conventions and the Currency Crisis*, 5 J. MAR. L. & COM. 645, 645 (1974) (1928 French law set gold value of franc at 65.5 milligrams of gold of millesinal fineness of nine hundred); *see also* Lowenfeld & Mendelsohn, *supra* note 2, at 499 n.10 (125,000 Poincaré gold francs equaled approximately $4,900 in 1929). A carrier only may limit liability for a passenger's injuries if the ticket the carrier delivers to the passenger clearly states that the transportation is subject to the Convention's liability limitations. *See* Warsaw Convention, *supra* note 1, art. 3. *Compare* Seth v. British Overseas Airways Corp., 329 F.2d 302, 307 (1st Cir. 1964) (court limited carrier's liability because passenger received ticket explaining Convention's provisions) *with* Warren v. Flying Tiger Line, Inc., 352 F.2d 494, 498 (9th Cir. 1965) (court refused to limit carrier's liability because passengers that received tickets on plane lacked opportunity to read tickets before plane departed). A carrier also cannot take advantage of the Article 22 liability limitations if the carrier's willful misconduct caused the injury to the passenger or the damage to the goods. *See* Warsaw Convention, *supra* note 1, art. 25(1); *see also* Bank of Nova Scotia v. Pan American World Airways, 16 AV. CAS. (CCH) 17,378, 17,380 (S.D.N.Y. 1981) (carrier could not limit liability because loss of gold was reasonably forseeable conse-

of goods and 125,000 gold francs per person for injury to passengers.[5] The authors chose gold as the monetary unit establishing the liability limitations because gold's official price formed the basis for the international

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quence of employee's recklessness); Olshin v. EL AL Israel Airlines, 15 Av. Cas. (CCH) 17,463, 17,464 (S.D.N.Y. 1979) (elements of willful misconduct). Finally, a carrier cannot contract for a limit of liability lower than the limit established by the Convention. *See* Warsaw Convention, *supra* note 1, art. 23(2); *see also* Saiyed v. Transmediterranean Airways, 509 Supp. 1167, 1169 (W.D. Mich. 1981) (tariff void under Article 23 because tariff relieved carrier of liability for damages otherwise recoverable under Article 22); *infra* text accompanying note 74 (Article 23).

[5] *See* Warsaw Convention, *supra* note 1, art. 22; *see also infra* notes 19-23 and accompanying text (legislative history of Article 22). The authors of the Warsaw Convention purposefully established a low liability limitation to protect the infant aviation industry from the excessive damages that might result from a catastrophic accident. Lowenfeld & Mendelsohn, *supra* note 2, at 499; *see supra* note 4 (Article 22). In the 1950's, however, the parties to the Convention expressed dissatisfaction with the low liability limitations that Article 22 had established. *See* DEPARTMENT OF STATE, REPORT ON TWO RELATED PROTOCOLS TO THE CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL CARRIAGE BY AIR, 95th Cong., 1st Sess. 3, 5 (1976) [hereinafter cited as STATE DEPARTMENT LETTER]. In 1955, the parties to the Convention convened in Hague to consider a United States proposal to raise the Convention's liability limitations. *Id.* at 5. Although the Hague Protocol doubled the Article 22 liability limitation to approximately $16,600, the United States Senate refused to ratify the Protocol because the Senate believed that the Protocol's liability limitation remained too low. *Id.*; *see* Hague Protocol to Amend the Warsaw Convention, 478 U.N.T.S. 371 (1955), *reprinted in* DOCUMENTS SUPPLEMENT, *supra* note 2, at 955-69 [hereinafter cited as Hague Protocol]. The United States subsequently attempted to raise the Article 22 liability limitation to $100,000 per passenger. STATE DEPARTMENT LETTER, *supra*, at 6. Other countries, however, resisted the United States' efforts to raise the liability limitation. *Id.* The United States, therefore, filed a notice of denunciation of the Warsaw Convention in 1966 to become effective six months after the filing date. *Id.*; *see* Warsaw Convention, *supra* note 1, art. 39 (party to Convention may denounce Convention on six months notice); 50 DEPT STATE BULL. 923, 924 (1965) (notice of denunciation).

To avoid the United States' denunciation, the parties to the Warsaw Convention met in Montreal and enacted an agreement that provided for a passenger liability limit of $75,000 per passenger in cases of personal injury or death on all international flights into or out of the United States. *See* Montreal Agreement, approved by Exec. Order No. 23680, 31 Fed. Reg. 7302 (1966), *reprinted in* DOCUMENTS SUPPLEMENT, *supra* note 2, at 971-72 [hereinafter cited as Montreal Agreement]; STATE DEPARTMENT LETTER, *supra*, at 6 (United States withdrew denunciation after Montreal Agreement became effective). The Montreal Agreement is an inter-carrier arrangement that operates under a provision in Article 22 allowing a carrier to contract with a passenger for a higher limitation of liability than the limitation established in the Convention. *See* Warsaw Convention, *supra* note 1, art. 22[2]; DOCUMENTS SUPPLEMENT, *supra* note 2, at 972-73 (list of airlines that have signed Montreal Agreement). In raising the ceiling on plaintiff's recovery in personal injury cases, the Montreal Agreement created a system of no-fault liability. *See* Montreal Agreement, *supra*, at 971 (carrier cannot absolve itself from liability by showing that carrier took all necessary measures to avoid passengers injuries). The Montreal Agreement, however, did not change the liability limitations established by the Convention for cases involving loss of injury to cargo. *See id.*

The parties to the Warsaw Convention modified the Convention's liability limitations twice after the Montreal Agreement became effective. *See* STATE DEPARTMENT LETTER, *supra*, at 6-7. In 1971, Warsaw parties adopted the Guatemala City Protocol, which raised the liability limitations for cases involving passengers to approximately $100,000. *See*

monetary system at the time.[6] Currently, gold lacks an official price and

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Guatemala City Protocol, International Civil Aviation Organization (ICAO) Doc. No. 8932 (1971), *reprinted in* DOCUMENTS SUPPLEMENT, *supra* note 2, at 975-84. The Guatemala City Protocol amended Article 22 and replaced the Poincaré gold franc as the Convention's unit of conversion with the price of gold at the date of judgment. *Id.* at 978. The United States signed but never ratified the Guatemala City Protocol. *See* STATE DEPARTMENT LETTER, *supra*, at 6; Matusco-Matte, *Should The Warsaw System Be Denounced or Integrated?*, 5 ANNALS AIR & SPACE L. 201, 216 (1980) (majority of parties to Warsaw Convention have refused to ratify Guatemala City Protocol).

In 1975, the Warsaw parties met in Montreal and again reconsidered the Convention's liability limitation. *See* STATE DEPARTMENT LETTER, *supra*, at 7. The Montreal Conference determined that gold was an unsatisfactory unit of conversion and substituted the Special Drawing Right (SDR) as the Convention's unit of conversion in the Montreal Protocols. *See* Montreal Protocols 3 and 4, art. II, VII, *reprinted in* DOCUMENTS SUPPLEMENT, *supra* note 2, at 985-1001 [hereinafter cited as Montreal Protocols]; *infra* note 6 (gold's status as international unit of conversion diminished during 1970's); *infra* note 13 (SDR); *infra* notes 29-34 and accompanying text (Montreal Protocols). The SDR is an international reserve asset that the International Monetary Fund (IMF) created to replace gold as a unit of conversion. *See infra* note 13 (SDR); *infra* note 14 (IMF); *see also* Tobolewski, *The Special Drawing Right in liability conventions: An acceptable solution?*, 1979 LLOYD'S MAR. & COM. L.Q. 169, 176 (one SDR equaled approximately $1.20 in 1975). The Montreal Protocols raised the Article 22 liability limitation to approximately $120,000 in personal injury cases and $21 per kilogram in cargo cases. *See* SENATE COMM. ON FOREIGN RELATIONS, MONTREAL AVIATION PROTOCOLS 3 AND 4, S. EXEC. REP. NO. 45, 97th Cong., 1st Sess. 4-5 (1981) [hereinafter cited as MONTREAL REPORT]; *supra* note 2 (discussion of Montreal Protocols). The United States Senate, however, rejected ratification of the Montreal Protocols on March 8, 1983. *See* 29 CONG. REC. § 2279 (daily ed. March 8, 1983) (50 to 42 vote in favor of Montreal Protocols was 12 votes short of two-thirds majority required for ratification); *see also* U.S. CONST. art. II, § 2 (treaty not ratified unless two thirds of Senators present vote in favor of treaty); *infra* notes 36-38 and accompanying text (legislative history of Protocols' rejection). The Montreal Agreement, as opposed to the Montreal Protocols, thus currently establishes air carriers' liability limitations in the United States in cases involving injuries to passengers on international flights. The Warsaw Convention still establishes the limitation of carriers' liability in cases involving damage to or loss of goods.

[6] *See* Heller, *The Value of the Gold Franc—A Different Point of View*, 6 J. MAR. & L. COM. 73, 94-95 (1974) (countries used gold as standard for measuring value of national currencies in 1929). When the United States joined the Warsaw Convention in 1929, an ounce of gold was worth approximately $20. *See* Lowenfeld & Mendelsohn, *supra* note 2, at 499 n.10 (125,000 Poincaré gold francs equaled approximately $4,900 in 1929). In 1934, however, the official price of gold in the United States rose to $35 an ounce because the United States devalued the dollar. *See* Gold Reserve Act of 1934, Pub. L. No. 73-87, § 12, 48 Stat. 337, 342 (repealed 1976). The price of gold remained at $35 an ounce until the early 1970's, chiefly because the United States joined the International Monetary Fund (IMF) in 1945. *See* Bretton Woods Agreement Act, Pub. L. No. 790-171, § 2, 59 Stat. 512, ____ (1945) (codified at 22 U.S.C. § 286 (1976)) (authorized United States' entry into IMF). The IMF is an international organization that assists members in financing payment deficits and monitors members' exchange rates and policies. *See* Southard, *The Evolution of the International Monetary Fund*, 5 N.C.J. INT'L L. & COM. REG. 425, 439 (1980) (IMF created to monitor changes in exchange arrangements between members); *infra* note 14 (discussion of IMF). When the United States joined the IMF, the United States promised to maintain the value of United States dollars in terms of gold. *See* Bretton Woods Agreement Act, Pub. L. No. 790-171, § 62, 59 Stat. 512, ____ (1945) (codified at 22 U.S.C. § 286 (1976)). The price of gold remained stable because IMF nations used the $35 rate in gold transactions

is an ordinary commodity subject to market price fluctuations.[7] Despite the market fluctuations in the price of gold, the parties to the Warsaw Convention have not replaced gold with another unit of conversion to determine air carriers' liability limitations.[8] The parties' failure to amend the Warsaw Convention to take account of the change in gold's status thus raises the question of what unit of conversion a court should use to convert Convention judgments into United States dollars.[9]

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in the open market and because the Gold Reserve Act of 1934 prohibited citizens from buying and selling gold. *See* Asser, *supra* note 4, at 664 (IMF countries stabilized gold price at $35 per ounce); *see also* Gold Reserve Act of 1934, Pub. L. No. 73-87, § 3, 48 Stat. 340, ___ (repealed 1976).

The demise of the gold standard began in the 1950's when a persistent balance of payment deficit in the United States led to a shortage in American gold reserves. *See* P. SAMUELSON, ECONOMICS 690-91 (1970) (gold reserve dropped from $24 billion to $10 billion between 1955 and 1968). To diminish the effect of the depletion of the United States' gold reserve, IMF countries discontinued buying and selling gold on the free market in 1968. *See* Asser, *supra* note 4, at 650. By discontinuing the supply of gold to the free market, the countries created a two-tier system of gold pricing. *Id.* The IMF countries retained the official price of gold for transactions among central banks and at the same time established a free market price of gold that fluctuated according to supply and demand conditions. *Id.* The free market of price of gold increased dramatically and in 1971 the United States suspended its commitment to convert dollars to gold. *See* Proclamation No. 4074, 36 Fed. Reg. 11,437 (1971) (United States suspended conversion of dollars into reserve gold assets); *see also* SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, PAR VALUE MODIFICATION ACT, S. REP. No. 678, 92d Cong., 2d Sess. 1, 4 (suspension of convertible dollars aimed at slowing deterioration of United States gold reserves), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2209, 2212.

To curtail the rise in the free market price of gold, the United States devalued the dollar in 1972 and increased the official price of gold to $38 an ounce. *See* Par Value Modification Act, Pub. L. No. 92-268, § 2, 86 Stat. 116, 116 (1972) (repealed 1976). The United States again devalued the dollar in 1973 and the official price of gold increased to $42.22. *See* Par Value Modification Act, Pub. L. No. 93-110, § 1, 87 Stat. 352, 352 (1973) (repealed 1976). In 1976, however, Congress repealed the official price of gold, primarily because the disparity between the official gold price and the free market gold had grown to such an extent that the official gold price no longer reflected the true value of gold. *See* Bretton Woods Agreement Act, Pub. L. No. 94-564, 90 Stat. 2660 (1976) (codified at 22 U.S.C. § 286 (Supp. V 1981)) (repeal of Par Value Modification Act); *see also* SENATE FOREIGN RELATIONS COMMITTEE, BRETTON WOODS AGREEMENT ACT, S. REP. No. 564, 94th Cong., 2d Sess. 4 (Senate replaced gold with SDR as international unit of conversion), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS, 5935, 5938; *infra* note 13 (SDR).

[7] *See* Franklin Mint Corp. v. Trans World Airlines, 690 F.2d 303, 310 (2d Cir. 1982) (free market price of gold is daily fluctuating price of commodity), *cert. granted*, 51 U.S.L.W. 3883 (U.S. June 14, 1983) (No. 82-1186); *see also Gold Tumbles $100 in a Week*, Wash. Post, March 1, 1983, at D7, col. 3 (free market gold price dropped $100 in one week in 1983 because of mass unloading by speculators and investors).

[8] *See* Matusco-Matte, *supra* note 5, at 219 (Poincaré gold franc remains Warsaw Convention's unit of conversion because only seven countries have ratified Montreal Protocols); *supra* note 5 (Montreal Protocols); *see also* Martin, *The Price of Gold and The Warsaw Convention*, 4 AIR L. 70, 76 (1979) (ratification of Montreal Protocols is not imminent in near future).

[9] *See* Franklin Mint Corp. v. Trans World Airlines, 690 F.2d 303, 305-06 (2d Cir. 1982) (change in international monetary system since creation of Warsaw Convention presents

American courts have considered converting Convention judgments with reference to several different standards, including the last official price of gold,[10] the free market price of gold,[11] the current exchange value of the French franc,[12] and the Special Drawing Right (SDR).[13] The SDR

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problem of how to enforce Article 22), *cert. granted*, 51 U.S.L.W. 3883 (U.S. June 14, 1983) (No. 82-1186). The United States Constitution provides that treaties ratified by the Senate are the law of the land. U.S. CONST. art. VI, cl. 2. The Supreme Court consistently has held that courts must enforce treaty provisions since treaties are the equivalent of national legislation. *See* Doe v. Braden, 57 U.S. (16 How.) 654, 657 (1853) (court's duty is to interpret treaty and administer treaty according to treaty's terms); Foster v. Nelson, 27 U.S. (2 Pet.) 299, 314-15 (1829) (court must enforce treaty because treaty is equivalent of national legislation). Courts, therefore, must enforce the Warsaw Convention's provisions since the Convention, as a federal treaty, has the force of federal law. *See* Reed v. Wiser, 555 F.2d 1079, 1093 (2d Cir.) (Warsaw Convention is supreme law of land), *cert. denied*, 434 U.S. 922 (1977); Smith v. Canadian Pac. Airways, 452 F.2d 798, 801 (2d Cir. 1971) (Warsaw Convention is equal in stature and force to domestic laws of United States).

[10] *See In re* Air Crash Disaster at Warsaw, Poland on March 14, 1980, 535 F. Supp. 833, 842 (E.D.N.Y. 1982) (court used last official price of gold to calculate defendant's liability limitation), *aff'd on other grounds*, 705 F.2d 85 (2d Cir. 1983); *see also* Par Value Modification Act, Pub. L. No. 93-110, § 1, 87 Stat. 352, 352 (1973) (repealed 1976) (last official gold price was $42.22 per ounce); *supra* note 6 (history of official gold price).

[11] *See* Boehringer Mannheim Diagnostics, Inc. v. Pan Am. World Airways, 531 F. Supp. 344, 353 (S.D. Tex. 1981) (free market price of gold is proper unit for converting Article 22 judgments into United States dollars), *appeal docketed*, No. 81-2519 (5th Cir. Feb. 2, 1982); *see also Gold Tumbles $100 in a Week*, Wash. Post, March 1, 1983, at D7, col. 3 (free market gold price fluctuated from $850 an ounce in January, 1980 to $400.50 an ounce in March, 1983).

[12] *See* Kinney Shoe Corp. v. Alitalia Airlines, 15 Av. Cas. (CCH) 18,509, 18,513 n.9 (S.D.N.Y. 1980) (dicta) (court calculated defendant's liability with reference to value of current French franc); *see also* N.Y. Times, Oct. 2, 1980, at 43, col. 5 (1980 value of current French franc was approximately $.24).

[13] *See* Franklin Mint Corp. v. Trans World Airlines, 525 F. Supp. 1288, 1289 (S.D.N.Y. 1981) (SDR is logical replacement for gold as Convention's unit of conversion) (dicta), *aff'd*, 690 F.2d 303 (2d Cir. 1982), *cert. granted*, 51 U.S.L.W. 3883 (U.S. June 14, 1983) (No. 82-1186). The IMF created the SDR in 1969 to replace gold as the principal international reserve asset. *See* Articles of Agreement of the International Monetary Fund, *effective* Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 1501, 2 U.N.T.S. 39 (1947), *as amended* July 28, 1969, 20 U.S.T. 2775, T.I.A.S. No. 6748, 726 U.N.T.S. 266 (1976) *and* April 1, 1978, 29 U.S.T. 2203, T.I.A.S. No. 8937 (1978), arts 8, 9 (objective of IMF articles is to make SDR principal reserve asset in international monetary system) [hereinafter cited as Articles]. *See generally* Ward, *The SDR in Transport Liability Conventions: Some Clarification*, 13 J. MAR. L. & COM. 1, 1-30 (1981) (explanation of SDR). Central banks of countries that are members of the IMF exchange SDRs for convertible currencies. *Id.* at 2. Banks transfer SDRs by debiting the SDR account of the user and crediting the SDR account of the receiver, with the user country acquiring convertible currency from the receiving members. Meier, *The "Jamaica Agreement," International Reform and the Developing Countries*, 11 J. INT'L L. & COM. 67, 80 (1976). SDR balances, therefore, are actually lines of credit against which banks may borrow reserves. *See* Ward, *supra*, at 2. The five convertible currencies, which banks use to transfer SDRs, are the French franc, the Japanese yen, the pound sterling, the Deutsche mark, and the United States dollar. *Id.* at 3. The IMF officially replaced gold with the SDR as the international unit of conversion. *See* Jamaica Agreement of 1978, 29 U.S.T. 2203, T.I.A.S. No. 8937 [hereinafter cited as Jamaica Accords]; P. SAMUELSON, ECONOMICS 612 (1980) (SDRs are foundation of contemporary international system of finance). *See generally* Gold, *Development*

is the artificial monetary unit used by countries that are members of the International Monetary Fund (IMF) to convert foreign currencies into national currency equivalents.[14] Since the values of the conversion units range from the last official gold price, $42.22 an ounce, to a free market gold price that has exceeded $850 an ounce, a carrier's liability varies greatly depending on which unit a court selects to enforce Article 22.[15] Notwithstanding the disparate liability limits arising from the use of different units of conversion, American courts have selected inconsistent units to calculate carriers' liability under Article 22.[16] The judiciary's inability

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of the SDR as Reserve Asset, Unit of Account, and Denominator: A Survey, 16 GEO. WASH. J. INT'L LAW & ECON. 2 (1981) (history of SDR); Merren, *The SDR as a Unit of Account in Private Transactions*, 16 INTL LAWYER 503 (1982) (development of SDR as principle unit of account for international transactions).

[14] *See surpa* note 13 (SDR); *see also* Southard, *supra* note 6, at 426 (discussion of IMF). The IMF is an international institution possessing broad powers to guide the financial conduct of member countries and to give or withhold financial assistance. *Id.* The IMF's Articles of Agreement provide that the purpose of the institution is to monitor changes in international monetary arrangements and to provide financial resources to assist members with payment inbalances. *See* Articles, *supra* note 13, art. 1; *see also* Bretton Woods Agreement Act, Pub. L. No. 790-171, § 2, 59 Stat. 512, ____ (1945) (codified at 22 U.S.C. § 286 (1976) (United States joined IMF). *See generally* Articles, *supra* note 13, art. 15 (146 members of IMF include most western countries except Switzerland and Soviet Bloc countries).

[15] *See In re* Air Crash Disaster at Warsaw, Poland on March 14, 1980, 535 F.Supp. 833, 844 (E.D.N.Y. 1982), *aff'd on other grounds*, 705 F. 2d 85 (2d Cir. 1983); *supra* notes 6 & 7 (history of fluctuations in official and free market gold prices). In *Warsaw Crash*, the district court noted the variations arising from the use of the alternative conversion units proffered by the parties. *See Warsaw Crash*, 535 F. Supp. at 841 n.6. The court determined that had the Senate ratified the Guatemala City Protocol, a carrier's liability in a personal injury case would amount to $100,000 if the Court used the last official gold price as the unit of conversion. *See id.; supra* note 5 (Guatemala City Protocol). The court stated, however, that use of the free market gold price would raise the liability limit set forth in the Protocol to approximately $1,400,000. *See Warsaw Crash*, 535 F. Supp. at 841 n.6; *infra* notes 93-107 and accompanying text (discussion of *Warsaw Crash* case).

[16] *See* Maschinenfabrik Kern, A.G., v. Northwest Airlines, 562 F. Supp. 232, 239-40 (N.D. Ill. 1983) (court determined that last official gold price is Convention's unit of conversion); Deere v. Deutsche Lufthansa Aktiengesellschaft, No. 81 C 4726, slip op. at 3 (N.D. Ill. Dec. 30, 1982) (court used last official gold price to calculate liability limit); *In re* Air Crash Disaster at Warsaw, Poland on March 14, 1980, 535 F. Supp. 833, 844 (E.D.N.Y. 1982) (court used last official gold price), *aff'd on other grounds*, 705 F. 2d 85 (2d Cir. 1983); Boehringer Mannheim Diagnostics, Inc. v. Pan Am. World Airways, 531 F. Supp 344, 353 n.48 (S.D. Tex. 1981) (court used last official gold price of approximately $400 an ounce to calculate Article 22 liability limitation), *appeal docketed*, No. 81-2519 (5th Cir. Feb. 2, 1982); Franklin Mint Corp. v. Trans World Airlines (*Franklin Mint I*), 525 F. Supp. 1288, 1289 (S.D.N.Y. 1981) (court used last official gold price), *aff'd*, 690 F.2d 303 (2d Cir. 1982), *cert. granted*, 51 U.S.L.W. 3883 (U.S. June 14, 1983) (No. 82-1186); Kinney Shoe Corp. v. Alitalia Airlines, 15 Av. Cas. (CCH) 18, 509, 18,513 n.9 (S.D.N.Y. 1980) (dicta) (court used value of current French franc); Electronic Memories & Magnetics Corp. v. The Flying Tiger Line, Index No. 784512 (Cal. Super. Ct., San Francisco, Aug. 25, 1982) (court used last official gold price); *see also* Reed v. Wiser, 555 F.2d 1079, 1089 n.12 (2d Cir.) (dicta) (court suggested that proper unit of conversion is last official gold price), *cert. denied*, 434 U.S. 922 (1977). *But see* Franklin Mint Corp. v. Trans World Airlines *(Franklin Mint II)*, 690 F.2d 303, 311 (2d Cir. 1982)

to select a standard unit of conversion frustrates the purpose of the Warsaw Convention since the Convention's authors drafted Article 22 to insure uniform limitations of carriers' liability.[17]

Most courts that have considered the proper unit of conversion for Article 22 have attempted to adopt the unit that the courts believe is most consistent with the intent of the authors of the Warsaw Convention.[18]

(Article 22 is unenforceable in cases involving damage to or loss of cargo because alternative units of conversion are unacceptable), *cert. granted*, 51 U.S.L.W. 3883 (U.S. June 14, 1983) (No. 82-1186); *In re* Aircrash at Kimpo Int'l Airport, Korea on November 18, 1980, 558 F. Supp. 72, 74-75 (C.D. Cal. 1983) (court relied on *Franklin Mint II* decision and declared Article 22 unenforceable in cases involving death or injury to passengers). *See generally infra* notes 41-54 and accompanying text (discussion of *Franklin Mint I); infra* notes 55-68 and accompanying text (discussion of *Franklin Mint II); infra* notes 77-87 and accompanying text (discussion of *Boehringer); infra* note 88 (discussion of *Kern*); *infra* notes 88-97 and accompanying text (discussion of *Deere); infra* notes 98-111 and accompanying text (discussion of *Warsaw Crash); infra* notes 137-43 and accompanying text (discussion of *Kimpo).*

[17] *See supra* notes 3-4 and accompanying text (purposes of Warsaw Convention); *infra* notes 19-23 and accompanying text (Convention's authors intended to establish fixed liability limitations).

[18] *See* Franklin Mint Corp. v. Trans World Airlines, 690 F.2d 303, 309-10 (2d Cir. 1982) (court rejected use of French franc as unit of conversion because framers of Warsaw Convention explicitly rejected use of single national currency as unit of conversion), *cert. granted*, 51 U.S.L.W. 3883 (U.S. June 14, 1983) (No. 82-1186); *In re* Air Crash Disaster at Warsaw, Poland on March 14, 1980, 535 F. Supp. 833, 842 (S.D.N.Y. 1982) (framers of Warsaw Convention deliberately sought to avoid using one country's currency as unit of conversion), *aff'd. on other grounds*, 705 F.2d 85 (2d Cir. 1983); Boehringer Mannheim Diagnostics, Inc. v. Pan Am. World Airways, 531 F. Supp. 344, 350 (S.D. Tex. 1981) (drafters of Warsaw Convention picked gold as unit of conversion because of gold's stability and tendency to reflect real values better than currency), *appeal docketed*, No. 81-2519 (5th Cir. Feb. 2, 1982). The majority of courts that apply the provisions of the Warsaw Convention use the Convention's legislative history to insure uniform application of the Convention's provisions. *See* Reed v. Wiser, 555 F.2d 1079, 1088-91 (2d Cir.) (Convention's legislative history indicates that authors intended Article 22 to limit liability of carrier's employees), *cert. denied*, 434 U.S. 922 (1977); Block v. Compagnie Nationale Air France, 386 F.2d 323, 336-51 (5th Cir. 1967) (court examined Convention's legislative history to determine meaning of "carrier"), *cert. denied*, 392 U.S. 905 (1968); *cf.* Eck v. United Arab Airlines, 360 F.2d 804, 812-15 (2d Cir. 1966) (Convention's legislative history indicates that Article 28(1) makes venue proper in country where passenger purchases ticket if carrier has place of business in same country).

In *Choctaw Nation of Indians v. United States*, the Supreme Court sanctioned the use of a treaty's legislative history as an aid in interpreting the treaty. *See* 318 U.S. 423, 431-32 (1943) (courts must look at legislative history of treaty to determine intentions and understanding of parties to treaty); *see also* Maugnie v. Compagnie Nationale Air France, 549 F.2d 1256, 1258 (9th Cir. 1977) (treaty interpretation involves consideration of legislative history and intent of contracting parties); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 147 (Tent. Draft No. 1, 1980) (courts should look to circumstances attending negotiation of international agreement to ascertain parties' intent) [hereinafter cited as RESTATEMENT]. In subsequent decisions, the Supreme Court offered other guidelines for interpreting treaties. *See* Maximov v. United States, 373 U.S. 49, 54 (1963) (courts interpreting treaties should look to intent and purposes of parties); Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 158-63 (1934) (conduct of parties subsequent to ratification of treaty is relevant when interpreting treaty's provisions); Factor v. Laubenheimer, 290 U.S. 276, 293-94 (1933) (courts should afford opinions of Executive

The Convention's legislative history indicates that the authors believed that Article 22 was the most important provision in the Convention.[19] The authors purposefully enacted a low liability limitation to allow airlines to attract investors that otherwise might be unwilling to risk capital that could be lost in one catastrophic accident.[20] The authors attempted to offset the low liability limitation, however, by requiring courts to shift to the airlines the burden of showing that the airlines could not have taken any actions to avoid the damages or injuries.[21] Although subsequent conferences have raised the ceiling on the Convention's liability limitations,[22] the parties to the Convention never have abandoned the basic principle that carriers' liability should not exceed a fixed and definite sum.[23]

To insure stable liability limits, the Convention's authors chose gold as the Convention's unit of conversion, reasoning that the use of a fixed gold price would provide more predictable liability limitations than would the use of national currencies subject to unilateral devaluation.[24] Since

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Branch much weight when interpreting treaties); Sullivan v. Kidd, 254 U.S. 433, 439 (1921) (courts should construe a treaty like any other contract). *See generally* RESTATEMENT, *supra*, § 147 (criteria for interpreting treaties).

[19] *See* MINUTES, *supra* note 3, at 20 (statement of Convention's reporter) (carrier's liability is fundamental matter of Convention); *id.* at 36-37 (statement of Russian delegate) (Article 22 is most important provision of Convention); *id.* at 205 (statement of Italian delegate) (provisions concerning carrier's liability limitations are most important articles of Convention); *see also* H. DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW 1 (1954) (limiting carriers' liability was principal goal of Warsaw Convention's provisions); A. LOWENFELD, AVIATION LAW § 2.1 (1981) (Convention's authors' most important goal was to limit potential liability of carriers in case of accidents).

[20] *See* L. KREINDLER, 1 AVIATION ACCIDENT LAW § 11.01 [2] (1982) (Warsaw Convention's liability limitation provision enacted to mitigate airlines' principal problem, accumulating capital in face of enormous risks); Lowenfeld & Mendelsohn, *supra* note 2, at 499 (Warsaw authors hoped liability limit would attract capital that otherwise might be scared away by risk of large aviation accidents); *see also* Hull Letter, *supra* note 2, at 4 (Secretary of State Hull claimed that low liability limit would lead to reduction of operating expenses for carriers).

[21] *See* Warsaw Convention, *supra* note 1, art. 20 (burden of proof on carrier to show that carrier took necessary measures to avoid damage caused); *see also* Lowenfeld & Mendelsohn, *supra* note 2, at 500 (transmittal from United States delegation indicated Convention framers balanced low liability provision by shifting burden of proof to carrier to show lack of negligence). *But see* Montreal Agreement, *supra* note 5, at 1 (Montreal Agreement created system of absolute liability on all flights entering or leaving United States by eliminating Article 20).

[22] *See supra* note 5 (history of Article 22).

[23] *See* Reed v. Wiser, 555 F.2d 1079, 1089 (2d Cir.) (parties to Convention continue to believe that Convention's fundamental purpose is to fix carriers' liability), *cert. denied*, 434 U.S. 922 (1977).

[24] *See* DRION, *supra* note 19, at 183 (Warsaw authors selected gold as Convention's unit of conversion to avoid effects of devaluations that would result from using national currencies to calculate liability limits); Heller, *The Warsaw Convention and the "Two-Tier" Gold Market*, 7 J. WORLD TRADE L., 126, 129 (1973) (Warsaw authors chose gold as unit of conversion because of gold's stability and tendency to reflect real values); *see also* MINUTES, *supra* note 3, at 89-93. The minutes of the Warsaw Convention indicate that a French represen-

the official gold price and the free market gold price were virtually the same in 1929, the authors did not contemplate any problems arising from the use of gold as the Convention's unit of conversion.[25] The IMF subsequently instituted a system of international currency exchange whereby the IMF assigned each member nation a par value for the nation's currency based upon the dollar value of gold at an official price maintained by the United States.[26] In the late 1960's and early 1970's, however, an international gold crisis led to a wide divergence in the rates of the official gold price and the free market gold price.[27] In order to ensure flexibility in exchange rates and to insulate monetary transactions from the unstable free market gold prices, the IMF replaced gold with the SDR as the international unit of account in 1978.[28] On the same date that the IMF's adoption of the SDR became effective, the United States abolished the official price of gold, primarily because of the wide disparity between the official gold price and the free market gold price.[29]

Prior to Congress' repeal of the official gold price, American courts consistently used the official gold price to calculate carriers' liability under Article 22.[30] Nevertheless, the existence of a higher free market price

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tative originally proposed the French franc as the Convention's unit of conversion. *See id* at 89-90. A Swiss representative, however, argued against the adoption of a national currency like the French franc because a country could modify a national currency without the approval of the Convention's parties. *Id.* The Swiss representative instead proposed the Poincaré gold franc as the Convention's unit of conversion because the Poincaré franc corresponded to a set weight of gold. *See id.* at 90-91. The representatives at the Convention overwhelmingly accepted the Swiss proposal and expressed the Convention's liability limit in terms of the gold franc. *See id.*; *supra* notes 5 & 6 and accompanying text (Article 22 refers to gold as Convention's conversion unit); *see also* Serbian Loans Case (Fr. v. Serb.), 1929 P.C.I.J., Ser. A, Nos. 20/21, at ____ (Judgment of July 12) (court determined that parties to international agreements selected Poincaré gold franc as agreements' unit of conversion because gold franc maintained standard of value), *reported in* 2 WORLD COURT REPORTS 394-401 (M. Hudson, ed. 1935). *See generally* Asser, *supra* note 4, at 645-46 & 646 n.2 (Poincaré gold franc selected as conversion unit for majority of multilateral transportation conventions promulgated after 1924).

[25] *See* Heller, *supra* note 6, at 81 (1974) (prior to 1960's free market gold price stabilized at same value as official gold price).

[26] *See* Heller, *supra* note 24, at 78-80 (discussion of par value system); *supra* note 6 (history of gold).

[27] See *supra* note 6 (history of gold).

[28] *See* Second Amendment of Articles of Agreement of the International Monetary Fund, Apr. 1, 1976, 29 U.S.T. 2203, T.I.A.S. No. 8937 (Jamaica Accords abolished official price of gold and replaced gold with SDR as international unit of account); *supra* note 6 (history of gold); *supra* note 13 (SDR).

[29] *See* U.S.C. 286a (Supp. V 1981)(United States rescinded official gold price of effective date of Jamaica Accords); *supra* note 6 (history of gold).

[30] *See* Berguido v. Eastern Air Lines, 369 F.2d 874, 879-80 (3d Cir. 1966) (court utilized official gold price to limit defendant's liability to $8,300 when actual damages equalled $375,000); Danzinger v. Compagnie Nationale Air France, 16 Av. Cas. (CCH) 17,261, 17,264 (S.D.N.Y. 1979) (court used official gold price to calculate defendant's liability for undelivered baggage in case arising before repeal of official gold price); Sadie Olshin v. EL AL Israel Airlines, 15 Av. Cas. (CCH) 17,463, 17,463 (S.D.N.Y. 1979) (court utilized official gold price to limit defendant's liability to $700 when actual damages equalled $1,100,000).

raised the possibility that courts might use the free market price as the Convention's unit of conversion to avoid the Convention's low liability limitations.[31] Concerned that the existence of a free market gold price might lead to inconsistent application of Article 22, the Warsaw parties convened in Montreal in 1975 to consider replacing gold as the Convention's unit of conversion.[32] The representatives at the Montreal Conference determined that use of SDRs to calculate carriers' liability limitations would provide the uniform limits that had attracted the Convention's authors to choose gold as the Convention's unit of conversion.[33] Accordingly, the representatives drafted the Montreal Protocols to substitute SDRs for gold as the Convention's conversion unit.[34]

Although United States leadership was instrumental in the drafting of the Montreal Protocols,[35] the United States Senate refused to ratify

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[31] *See* Note, *Legal Problems in Compensation Under the Gold Clauses of Private International Law Agreements*, 63 GEO. L.J. 817, 829-30 (1975) (existence of two-tier gold system allowed courts to use either official gold price or free market gold price to enforce liability limitation clauses that used Poincaré gold franc as unit of conversion). *Compare* Hornlinie v. Societe Nationale des Petroles Aquitaine, Judgment of April 14, 1972, Supreme Court, Neth. 1972 Nederlandse Jurisprudentie [N.J.] ____ (Dutch High Council converted judgment under analagous limitation provision of shipowners' liability convention with reference to official gold price) *with* Sago v. Sagoland, Judgment of Oct. 2, 1973, Lower Court, Goteburg, Sweden 1973 ____ ____ (Swedish court calculated defendant's liability with reference to free market price of gold) *and* Zakoapolos v. Olympic Airways Corp., Judgment of February 15, 1974, Ct. of App. 3d Dep't, Athens, 1974 ____ ____ (court calculated carriers' liability under Warsaw Convention with reference to free market gold price).

[32] *See* MONTREAL REPORT, *supra* note 5, at 3-4 (Warsaw parties convened at Montreal Conference because parties recognized that demise of gold standard required new method for currency conversion); *Revised Warsaw Convention*, *supra* note 2, at 790 & n.154 (strong possibility that courts would use free market gold price to calculate Convention judgments encouraged Warsaw Parties to reconsider viability of gold as conversion unit at Montreal Conference); *see also* Tobolewski, *supra* note 5, at 173 (almost all representatives at Montreal Conference agreed that gold was unacceptable unit of conversion).

[33] *See* 29 CONG. REC. S2239 (daily ed. March 7, 1983) (statement of Sen. Percy) (Warsaw parties substituted SDR as Convention's unit of conversion because SDR is far more stable unit of conversion than gold or any other currency); *see also* Detailed Report of the United States Delegation International Conference of Air Law held under the auspices of the International Civil Aviation Organization, Montreal 17 (1975) (United States promotion of SDR led to overwhelming support for adoption of SDR as Convention's unit of conversion); Gaynes, Memorandum, Bureau of Int'l Aviation, Civil Aeronautics Board (April 18, 1980) (parties at Montreal Conference rejected free market gold price in favor of SDR) [hereinafter cited as Gaynes Memo]; *supra* note 5 (Montreal Conference).

[34] *See* Montreal Protocols 3 and 4, *supra* note 5, art. 22 (Protocols amended Convention to substitute SDR as Convention's unit of conversion). *See generally* Fitzgerald, *The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing International Carriage By Air*, 42 J. AIR L. & COM. 273, 273-91 (1976) (discussion of Montreal Protocols).

[35] *See* President's Message to the Congress Transmitting Protocols to the Convention on International Carriage by Air, III PUB. PAPERS—GERALD FORD 2933-34 (January 14, 1977) (United States was leader in efforts that resulted in adoption of Montreal Protocols 3 and 4) [hereinafter cited as Ford Message]; *see also* MONTREAL REPORT, *supra* note 5, at 4 (United States initiated movement to substitute SDRs for gold as Convention's unit of conversion). The Montreal Protocols were the results of over two decades of efforts by the United States to change the Warsaw Convention to provide greater protection to shippers and passengers.

the Protocols on March 10, 1983.[36] The primary reason for rejection of the Protocols was opposition to an absolute ceiling that the Protocols placed on the amount of damages recoverable by plantiffs.[37] The legislative history of the Senate's action, however, indicates that even though the Senate rejected the Montreal Protocols, the political branches of the government approve of the concept of limited carrier liability in international aviation.[38]

Id. at 5. The Protocols created a system of no-fault liability that increased the amount plaintiffs could recover under Article 22 to approximately $120,000 in personal injury cases and $21 per kilogram in cases involving damage to cargo. *Id.* at 4-5; *see* Montreal Protocol No. 3, *supra* note 5, art. II (carrier's liability cannot exceed 100,000 SDRs in cases involving death or injury to passengers); Montreal Protocol No. 4, *supra* note 5, art. VII (carrier's liability cannot exceed 17 SDRs in case of damage to or loss of cargo); *supra* note 5 (one SDR equaled approximately $1.20 in 1975). *But see* 29 CONG. REC. S2248 (daily ed. March 7, 1983) (statement of Sen. Hollings) (liability limitation established in Montreal Protocols equalled approximately $109,000 in 1983 because value of SDR had dropped to $1.09). In addition, the Protocols included a Supplemental Compensation Plan that provided an additional $200,000 of recovery for loss of life. *See* Montreal Protocol No. 3, *supra* note 5, art. 38; MONTREAL REPORT, *supra* note 5, at 5 (Supplemental Compensation Plan). The Protocols also included a settlement inducement clause designed to force airlines to settle claims within 6 months by subjecting the airlines to added costs if in a subsequent trial a court awards more than the airline's offer. *See* Montreal Protocol No. 3, *supra* note 5, art. II. Because of the changes incorporated into the Protocols, the Protocols received the strong support of the Ford, Carter, and Reagan administrations. *See "International No-Fault" Would Fix Liability in Airline Crashes*, Wash. Post, March 2, 1983, at A22, col. 1; *see also* Ford Message, *supra*, at 2294 (recommended that Senate approve Montreal Protocols modernizing Warsaw Convention); Letter from George P. Schultz, Secretary of State, to Howard Baker (June 22, 1982) (Reagan administration supports Protocols), *reprinted* in 29 CONG. REC. S2238 (daily ed. March 7, 1983). The Senate Foreign Relations Committee also strongly approved the Protocols. *See* MONTREAL REPORT, *supra* note 5, at 5 (Senate Foreign Relations Committee voted 16-1 in favor of Protocols).

[36] *See* 29 CONG. REC. S2279 (daily ed. March 8, 1983) (50 to 42 vote in favor of Montreal Protocols was 12 votes short of two-thirds majority required for ratification).

[37] *See Air Liability Treaty Rejected by Senate*, N.Y. Times, March 9, 1983, at D6, col. 5 (rejection of Protocols result of opposition to absolute ceiling on plaintiffs' recovery); *see also* 29 CONG. REC. S2278 (daily ed. March 8, 1983) (statement of Sen. Biden) (recommended rejection of Protocols because Protocols established system of absolute liability); *id.* at S2245 (daily ed. March 7, 1983) (statement of Sen. Hollings) (advocated rejection of Protocols for failure to provide adequate compensation for personal injury claims). The Montreal Protocols altered the Warsaw Convention by eliminating a clause in the Convention that allowed plaintiffs to avoid the convention's liability limitations by proving that a carrier's willful misconduct caused the injuries. *See* MONTREAL REPORT, *supra* note 5, at 5; *supra* note 4 (willful misconduct clause). The opponents of the Protocols claimed that the elimination of the willful misconduct clause unfairly disadvantaged plaintiffs by precluding recoverable damages in excess of $320,000. *See* 29 CONG. REC. S2245 (daily ed. March 7, 1983) (statement of Sen. Hollings). To support the position that the Protocols were unfair to passengers, the opponents demonstrated that plaintiffs had recovered as much as $1 million from negligent airlines in cases involving carriers' willful misconduct. *Id. But cf. id.* at S2237 (daily ed. March 7, 1983) (statement of Sen. Byrd) (85% of personal injury recoveries would fall below $320,000 level authorized by Protocols).

[38] *See* 29 CONG. REC. S2279 (daily ed. March 8, 1983) (majority of Senators voted in favor of Montreal Protocols); *supra* note 35 (Senate Foreign Relations Committee almost unanimously agreed with Ford, Carter and Reagan administrations' support of United States

The effect of the rejection is that the Convention's gold clause remains in force.[39] The lack of uniformity characterizing Article 22 liability limitations undoubtedly will continue because each court will select the conversion unit that the court considers best as a matter of judicial policy.[40] Since the rejection of the Protocols offers little guidance about the proper unit of conversion, the starting point for determining the proper conversion unit is to examine the decisions of the courts that have considered alternative units of conversion for enforcing Article 22.

The District Court for the Southern District of New York was the first American court to address the proper unit of conversion after gold lost its official value.[41] In *Franklin Mint Corp. v. Trans World Airlines,*

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ratification of Montreal Protocols); *see also* MONTREAL REPORT, *supra* note 5, at 5 (limitations of airline liability are fact of life in international aviation law); *cf. In re* Aircrash in Bali, Indonesia, on April 22, 1974, 684 F.2d 1301, 1308 (9th Cir. 1982) (Congress has had ample time to reconsider Warsaw Convention but has effected no changes). The Senate debates over the Montreal Protocols indicate that the majority of Senators favored the United States adherence to the Warsaw Convention since the Convention provides a uniform system of liability for international air travel. *See* 29 CONG. REC. S2271 (daily ed. March 8, 1983) (statement of Sen. Danforth) (United States participation in Warsaw Convention inures to benefit of American citizens because Convention guarantees protection to Americans should aviation accident occur in foreign country); *id.* at S2238 (daily ed. March 7, 1983) (statement of Sen. Percy) (Convention provides system of uniform, predictable, and worldwide liability coverage); *id.* at S2260 (daily ed. March 7, 1983) (statement of Sen. Kassenbaum) (Convention resolves potential conflict of law issues of enormous proportions). The Senators generally recognized that the liability limitation established in Article 22 was fundamental to the Convention. *See id.* at S2271 (daily ed. March 8, 1983) (statement of Sen. Danforth) (almost all foreign countries that are parties to the Convention oppose unlimited carrier liability); *id.* at 2238 (daily ed. March 7, 1983) (statement of Sen. Kassenbaum) (principle of limited liability is tradeoff for uniform and predictable coverage provided by Convention). Consequently, the majority of Senators approved of the concept of a liability limitation in international air travel. *See id.* at S2279 (daily ed. March 8, 1983) (majority of Senators favored Montreal Protocols). Even the proponents of the Warsaw Convention, however, acknowledged that the Convention's current liability limits are unreasonably low and thus advocated an increase in the amount plaintiffs could recover under Article 22. *See, e.g., id.* at S2277 (daily ed. March 8, 1983) (statement of Sen. Thurmond); *id.* at S2271 (statement of Sen. Danforth) *id.* at S2270 (statement of Sen. Kassenbaum).

[39] *See supra* note 5 (Article 22 uses Poincaré gold franc as Convention's unit of conversion).

[40] *See supra* note 16 and accompanying text (American courts have enforced Article 22 inconsistently).

[41] *See* Franklin Mint Corp. v. Trans World Airlines, 525 F. Supp. 1288, 1289 (S.D.N.Y. 1981) (court utilized last official gold price to calculate defendant's liability), *aff'd* 690 F.2d 303 (2d Cir. 1982) *cert. granted,* 51 U.S.L.W. 3883 (U.S. June 14, 1983) (No. 82-1186); *see also* McGilchrist, *The Gold Franc in the United States After* Franklin Mint, 1982 LLOYD'S MAR. & COM. L.Q. 281, 281 (*Franklin Mint I* was first American decision to address proper unit of conversion for Article 22). Prior to the *Franklin Mint I* decision, two courts had assumed alternate units of conversion for purposes of Article 22. *Compare* Reed v. Wiser, 555 F.2d 1079, 1089 n.12 (2d Cir.), *cert. denied,* 434 U.S. 922 (1977) *with* Kinney Shoe Corp. v. Alitalia Airlines, 15 Av. Cas. (CCH) 18,509, 18,513 n.9 (S.D.N.Y. 1980).

The issue in *Reed* was whether an airline employee sued by the survivors of American passengers killed in the crash of a Trans World Airlines (TWA) jet in the Aegean Sea could

Inc. (*Franklin Mint I*),[42] the plaintiff contracted with Trans World Airlines (TWA) for the carriage of 714 pounds of numismatic materials from the United States to England.[43] During the course of delivery, the materials were either lost or stolen.[44] Franklin Mint sued TWA for $250,000, the alleged value of the materials, and TWA sought to limit its liability by invoking Article 22.[45]

The parties in *Franklin Mint I* recognized the need to adopt a unit for converting Article 22 judgments into United States dollars and offered four alternative units of conversion.[46] Franklin Mint argued that the court should use the free market price of gold to calculate TWA's liability because the free market price is the only gold price currently in existence.[47] TWA, on the other hand, proposed the SDR, the last official price of gold, and the current value of the French franc as alternative units of conversion.[48] After considering the alternatives, the district court accepted TWA's position that the SDR was a logical unit of conversion since the SDR has replaced gold as the international unit of account.[49] The *Franklin*

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invoke Article 22 to limit the employee's liability. *See Reed*, 555 F.2d at 1081. The Second Circuit determined that Article 22 protected an airline's employees and held that a plaintiff may not recover greater damages from an employee than the plaintiff could recover from the airline. *Id.* at 1093. In a footnote to the opinion, the *Reed* court limited the defendant's liability as if the Guatemala City Protocol had been in effect. *See id.* at 1089 n.12; *supra* note 5 (United States never ratified Guatemala City Protocol). The *Reed* court assumed that the free market price of gold was the proper unit of conversion because the Protocol provided that courts should calculate the liability limitations with reference to gold value at the date of judgment. *Id.*; *see* Boehringer Mannheim Diagnostics v. Pan Am. World Airways, 531 F. Supp. 344, 352 (S.D. Tex. 1981) (court determined that *Reed* language was dicta and therefore not authoritative), *appeal docketed*, No. 81-2519 (5th Cir. Feb. 2, 1981); *see also* Franklin Mint Corp. v. Trans World Airlines, 690 F.2d 303, 310 (2d Cir. 1982) (court rejected dicta in *Reed*), *cert. granted*, 51 U.S.L.W. 3887 (U.S. June 14, 1983) (No. 82-1186).

In *Kinney*, the district court calculated defendant's liability with reference to the value of the current French franc. *See Kinney*, 15 Av. Cas. (CCH) at 18,513 n.9 (dicta) (court utilized value of French franc to limit defendant's liability to $60 per kilogram of goods). The *Kinney* court's calculation was also dicta since the damages sought by the plaintiff amounted to less than the defendant's liability limitation calculated with reference to any of the alternative units of conversion. *Id.* Moreover, the *Kinney* court did not explain why it choose the French franc as the unit of conversion. *See id.*

[42] 525 F. Supp. 1288 (S.D.N.Y. 1981), *aff'd.* 690 F.2d 303 (2d Cir. 1982), *cert granted*, 51 U.S.L.W. 3883 (U.S. June 14, 1983) (No. 82-1186).

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *See id.* at 1289.

[47] *Id.*; *see* Brief for Appellant at 8-15, Franklin Mint Corp. v. Trans World Airlines, 690 F.2d 303 (2d Cir. 1982) (free market gold price is Warsaw Convention's unit of conversion because free market price is only gold price still in existence).

[48] *See Franklin Mint I*, 525 F. Supp. at 1289; McGilchrist, *What is the Poincaré gold franc worth?*, 1982 Lloyd's Mar. & Com. L. Q. 164, 171 (TWA's counsel advocated use of SDR); *see also* Brief for Defendant at 4-6, Franklin Mint Corp. v. Trans World Airlines, 525 F. Supp. 1288 (S.D.N.Y. 1981) (TWA claimed that SDR was proper unit of conversion because SDR has replaced gold as international unit of account).

[49] *See Franklin Mint I*, 525 F. Supp. at 1289.

Mint I court ultimately held, however, that the last official price of gold was the proper unit for calculating Convention judgments.[50] The *Franklin Mint I* court based its decision on a 1974 order by the Civil Aeronautics Board (CAB), the federal regulatory agency for the airlines industry, that directed airlines to file tariffs with the CAB using the last official gold price to calculate the airlines' liability limits.[51] The *Franklin Mint I* court reasoned that absent a presidential or congressional declaration on a replacement for gold as the proper unit of conversion under Article 22, the CAB's utilization of the last official price of gold was the closest approximation of a governmental interpretation of Article 22.[52] The court

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[50] *See id.* In holding that the last official gold price was the proper unit of conversion, the *Franklin Mint I* court declined to set forth its reasoning in detail. *Id.* Instead, the court stated that it adopted TWA's arguments supporting use of the last official gold price. *Id.*; *see supra* text accompanying note 48 (TWA argued that last official gold price was one alternative unit of conversion). TWA had argued that the last official gold price was a viable unit of conversion because use of the last official gold price effectuated the Warsaw Convention's authors intentions to provide stable and uniform liability limits. *See* Petition for Writ of Certiorari at 15, Franklin Mint Corp. v. Trans World Airlines, 690 F.2d 303 (2d Cir. 1982), *cert. granted*, 51 U.S.L.W. 3883 (U.S. June 14, 1983) (No. 82-1186) [hereinafter cited as Petition for Certiorari]. TWA also argued that use of the last official gold price to calculate TWA's liability was proper since the Civil Aeronautics Board (CAB) permits carriers to calculate liability limitations with reference to the last official gold price. *Id.*; *see infra* note 51 (CAB). In addition, TWA contended that the court should use the last official gold price because shippers and carriers adopt the last official gold price as the Convention's unit of conversion in contracts of carriage. *See* Petition for Certiorari, *supra*, at 15.

[51] 525 F. Supp. at 1289; *see* Civil Aeronautics Board Order 74-1-16, 39 Fed. Reg. 1526 (1974) (CAB directed airlines to calculate liability limitations with reference to official price of gold as established in 1973); *supra* note 6 (Congress raised official price of gold to $42.22 an ounce in 1973); *see also* 14 C.F.R. § 221.38(j) (1982) (carriers must publish liability limitations in tariffs). *See generally* Federal Aviation Act of 1958, 49 U.S.C. §§ 1382, 1386 (Supp. V 1981) (CAB authorized to coordinate and review international airline matters and agreements). Prior to Congress' repeal of the official gold price in 1978, the CAB required airlines to calculate liability limitations with reference to the official price of gold. *See* 37 Fed. Reg. 11,385 (1972) (carrier's liability for damaged goods was $7.52 per pound); CAB Order 74-1-16, 39 Fed. Reg. 1526 (1974) (CAB required carriers to file tariffs using official gold price of $42.22 an ounce). When Congress abolished the official gold price in 1978 the CAB did not revise its 1974 order. *See* Boehringer Mannheim Diagnostics, Inc. v. Pan Am. World Airways, 531 F. Supp. 344, 352 (S.D. Tex. 1981), *appeal docketed*, No. 81-2519 (5th Cir. Feb 2, 1982). A 1981 internal memorandum, however, stated that the CAB should continue to require carriers to use the last official price of gold to calculate liability limitations to fulfill the United States' obligation to enforce the Warsaw Convention. *See* Bureau of Compliance and Consumer Protection, Civil Aeronautics Board, Memorandum on Warsaw Convention Liability Limits at 5 (May 20, 1981) [hereinafter cited as 1981 CAB memo]. The CAB has not reversed its 1973 revised order and has continued to require carriers to use the last official gold price to calculate liability limits. *See In re* Air Crash Disaster At Warsaw, Poland on March 14, 1980, 535 F. Supp. 833, 843 n.8 (E.D.N.Y. 1982), *aff'd on other grounds* 705 F.2d 85 (2d Cir. 1983). *But cf.* Civil Aeronautics Board Order 81-3-143, Docket 39243 (March 29, 1981) (CAB allowed British Caledonian Airways Limited to increase its liability limit for personal injury to 100,000 SDRs).

[52] *See* 525 F. Supp. at 1289 (CAB is government agency most intimately concerned with limiting carriers' liability under Warsaw Convention), *aff'd*, 690 F.2d 303 (2d Cir. 1982), *cert. granted*, 51 U.S.L.W. 3883 (U.S. June 14, 1983) (No. 82-1186).

also reasoned that the parties had intended to adopt the last official price of gold as the basis for converting the Article 22 limitation into dollars since TWA had filed tariffs with the CAB that complied with the 1974 directive.[53] Under the *Franklin Mint I* decision, TWA's liability limit was approximately 6,500 dollars.[54]

The Second Circuit affirmed the district court's holding in *Franklin Mint Corp. v. Trans World Airlines, Inc.* (*Franklin Mint II*).[55] In the most significant portion of the Second Circuit's decision, the *Franklin Mint II* court declared the Warsaw Convention's liability limitations prospectively unenforceable in the United States.[56] The Second Circuit reasoned that the very convening of the 1975 conference that promulgated the Montreal Protocols indicated that the parties to the Warsaw Convention recognized that the change in gold's status had eliminated the Convention's unit of conversion.[57] Although the Second Circuit recognized that the lack of an internationally agreed upon unit of conversion did not necessarily preclude enforcement of Article 22, the court stated that a unit of conversion is enforceable in United States courts only if the Senate

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[53] *Id.*; *see supra* note 51 (CAB rulings).

[54] *See* 525 F. Supp. at 1289.

[55] 690 F.2d 303 (2d Cir. 1982), *cert. granted*, 51 U.S.L.W. 3883 (U.S. June 14, 1983) (No. 82-1186).

[56] *See id.* at 311 (Warsaw Convention's limits on liability for loss of cargo unenforceable in United States). In determining that Article 22 is unenforceable in cases involving loss of or damage to cargo, the *Franklin Mint II* court limited its holding to liability arising from events occurring at least 60 days after issuance of the opinion. *Id.* at 311-12. The *Franklin Mint II* court stated that because other courts had adopted alternative units of conversion, litigants in cases involving the Convention could not have expected the *Franklin Mint II* court's holding. *Id.* at 312; *see* Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971) (nonretroactive application of holding compelled in case of first impression if parties could not have foreseen holding). The *Franklin Mint II* court reasoned that prospective application of the court's holding was necessary to give the parties covered by the Convention time to adjust to the holding. 690 F.2d at 312. The *Franklin Mint II* court determined that courts should use the last official price of gold as the unit of conversion for purposes of Article 22 until the court's holding took effect. *See id.* (last official gold price was appropriate unit of conversion because carriers had relied on CAB ruling to calculate liability limitations with reference to last official gold price); *see also supra* note 51 (CAB rulings).

[57] *See* 690 F.2d at 309; *supra* notes 29-38 & accompanying text (Montreal Protocols). In *Franklin Mint II*, the Second Circuit stated that the Jamaica Accords destroyed the international arrangements that led the Warsaw Convention's authors to select gold as the Convention's unit of conversion. *See* 690 F.2d at 309; *supra* note 13 and accompanying text (Jamaica Accords substituted SDR for gold as IMF's unit of account); *see also supra* note 24 and accompanying text (Convention's authors chose gold as Convention's unit of conversion because gold was internationally approved conversion unit). To support the court's position that no internationally approved unit of conversion exists, the court noted that the parties to the Convention use a variety of units of conversion. *See* 690 F.2d at 308-09. In addition, the *Franklin Mint II* court stated that although TWA's liability limit ranged from $6,500 to $400,000 depending on the conversion unit used, courts have used each alternative unit proffered by the parties to calculate carriers' liability under Article 22. *See id.* at 309; *infra* notes 169-76 and accompanying text (foreign courts use inconsistent units of conversion).

has ratified a treaty that approves the unit of conversion or if both Houses of Congress have passed legislation approving the unit of conversion.[58] The *Franklin Mint II* court determined that the legislative repeal of the official price of gold in 1978 indicated that Congress had abandoned the Warsaw Convention's unit of conversion.[59] Since the judiciary lacked the authority to adopt a new unit of conversion, the *Franklin Mint II* court held that the Convention's liability limitation was unenforceable.[60]

Although the *Franklin Mint II* court declared Article 22 unenforceable in United States courts, the Second Circuit discussed the viability of the alternative conversion units proffered by the parties.[61] First, the Second Circuit declared that Congress' repeal of the official price of gold reflected a legislative reluctance to base liability limitations on a commodity lacking a specific value.[62] The court, therefore, rejected use of the last official price of gold as the unit of conversion on the grounds that use of the last official price of gold would contravene the intention of the Convention's authors to use a unit of conversion that maintains the level of liability limitation at a specific value.[63] Second, the *Franklin Mint II* court rejected the free market price as a unit of conversion because the free market price fluctuated daily.[64] The court stated that a decision to base the liability limitation on the free market price would contravene the intention of the Convention's authors to adopt a stable unit of conversion.[65] The Second Circuit also rejected use of the current French franc as the unit of conversion since the authors of the Convention wanted to avoid reliance on a single national currency, which could be subject to unilateral action.[66]

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[58] 690 F.2d at 311.

[59] *See id.* (Congress' repeal of Par Value Modification Act was explicit abandonment of previously established unit of conversion); *supra* note 6 (repeal of official gold price).

[60] *See* 690 F.2d at 312 (substitution of new unit of conversion is political question unfit for judicial resolution).

[61] *See id.* at 309-11 (*Franklin Mint II* court rejected alternatives proffered by parties).

[62] *Id.*

[63] *See id.* (Convention's authors selected gold as unit of conversion to establish liability limit at specific value). In *Franklin Mint II*, the Second Circuit disapproved of the CAB's position that the last official price of gold was the proper monetary unit for converting Convention judgments because Congress had repealed the official gold price. *See id* at 309-10 (Second Circuit declared that law of inertia was sole criterion supporting CAB's use of last official gold price).

[64] *Id.* at 310.

[65] *See id.* In *Franklin Mint II*, the plaintiff claimed that the Second Circuit's dicta in *Reed* supported application of the free market gold price to calculate TWA's liability limit. *See id.* at 310 n.22; *supra* note 37 (*Reed* court calculated defendant's liability with reference to free market gold price). The *Franklin Mint II* court stated that the *Reed* decision implied a free market standard under the Guatemala City Protocol. 690 F.2d at 310 n.22; *see supra* note 5 (Guatemala City Protocol). Since the United States never ratified the Guatemala City Protocol, the *Franklin Mint II* court rejected the plaintiff's claim that *Reed* had determined that the free market gold price was the Warsaw Convention's unit of conversion. *See* 690 F.2d at 310 n.22 (court rejected Franklin Mint's reliance on *Reed* dicta).

[66] 690 F.2d at 310; *see supra* note 24 (Warsaw Convention's authors rejected use of French franc as Convention's conversion unit).

Finally, the *Franklin Mint II* court disapproved of the SDR because the SDR constitutes a unit of conversion also subject to unilateral action by an international body distinct from the parties to the Convention and because the parties to the Convention never authorized use of the SDR.[67] Since each proffered alternative was inappropriate, the *Franklin Mint II* court declined to select a unit of conversion and instead suggested that the political branches of the government enact legislation to provide a unit of conversion.[68]

Although the *Franklin Mint II* court declared Article 22 unenforceable in cases involving loss of or damage to cargo, the Second Circuit did not state what rules of liability would apply after the court's decision.[69] Most courts have held that the Warsaw Convention preempts state law rules of liability to the extent that state law prevents application of the Convention's liability limitations.[70] Most courts have held, however, that if the Convention's liability limitations do not apply, then the common law rules of liability should again determine the proper damage award.[71] At common law, a carrier is liable for all damages to goods caused by the carrier's negligence unless a statute or a contract limiting the liability

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[67] *See* 690 F.2d at 310-11. The *Franklin Mint II* court offered three justifications for not using the SDR to calculate TWA's liability. *See id.* First, the court stated that use of the SDR would be inappropriate since the United States never has ratified the Montreal Protocols. *Id.* Second, the court stated that use of the SDR would present practical problems since the court would have to set the liability limit by defining the limit in terms of a particular number of SDRs per kilogram of cargo. *See id.* Finally, the court stated that the SDR is the conversion unit of the IMF and, therefore, is subject to the IMF's unilateral modification or elimination. *Id.* The court declared that it lacked authority to adopt a unit of conversion subject to change by an international body distinct from the Warsaw parties. *See id.* at 311.

[68] *See id.* (*Franklin Mint II* court stated that Article 22 is unenforceable until political branch of government replaces gold with another unit of conversion).

[69] *See id.* at 311 n.27 (Second Circuit limited holding solely to unenforceability of Convention's liability limitations).

[70] *See In Re* Aircrash in Bali, Indonesia on April 22, 1974, 684 F.2d 1301, 1307 (9th Cir. 1982) (court held that Convention's liability limitation provisions preempt conflicting California wrongful death statute); Reed v. Wiser, 555 F.2d 1079, 1093 (2d Cir.) (Convention's liability limitation provisions govern all claims arising out of personal injury cases involving passengers on international flights), *cert. denied*, 434 U.S. 922 (1977); *In re* Air Crash Disaster at Warsaw, Poland on March 14, 1980, 535 F. Supp. 833, 845 (E.D.N.Y. 1982) (plaintiffs cannot maintain separate wrongful death action under state law because Convention's liability limitations preempt conflicting state law), *aff'd on other grounds*, 705 F.2d 85 (2d Cir. 1983).

[71] *See* Maghsoudi v. Pan Am. World Airways, 470 F. Supp. 1275, 1280 (D. Hawaii 1979) (defendant who cannot take advantage of Article 22 may rely on common-law damage rule to circumscribe defendant's liability); Husserl v. Swiss Air Transp. Co., 351 F. Supp. 702, 706 (S.D.N.Y. 1972) (court must use common-law rules of liability to determine defendant's liability if Warsaw Convention does not apply to case); *see also* Zamora, *Carrier Liability For Damage or Loss to Cargo in Int'l Transport*, 23 AM. J. COMP. L. 391, 397 (1975) (common law provided that carrier was liable for all loss of or injury to goods that carrier contracted to carry while goods were in course of transit).

exonerates the carrier.[72] If the *Franklin Mint II* court's decision to declare the Convention's liability limitations unenforceable is correct, then the Warsaw Convention provides for unlimited carrier liability.[73] Arguably the only way a carrier can avoid full liability for cargo is to contract with the owner of the cargo for a fixed level of liability. Article 23 of the Convention (Article 23), however, prohibits a carrier from contracting for a lower level of liability than the amount for which the Convention provides.[74] The effect of the Second Circuit's determination that Article 22 is unenforceable, therefore, is to subject carriers to full liability in all cases involving damage to or loss of goods.[75]

Although the *Franklin Mint II* court determined that the Convention's limits on liability for loss of cargo are unenforceable in the United States, three federal district courts have adopted units of conversion and have limited a carrier's liability in cargo cases without declaring Article 22 unenforceable.[76] Eighteen days after the district court decided *Franklin Mint I*, the District Court for the Southern District of Texas considered the proper unit of conversion for Article 22 judgments in *Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*[77] In *Boehringer*, Pan American Airways (Pan Am) contracted to transport Boehringer's 1860-pound automatic blood analyzer, which was damaged during the course of delivery from Brazil to Texas.[78] Boehringer sued Pan Am

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[72] *See* Herd & Co. v. Krawell Mach. Co., 359 U.S. 297, 303 (1959) (discussion of liability limitation provisions).

[73] *See* Maschinenfabrik Kern, A.G. v. Northwest Airlines, 562 F. Supp. 232, 239 (N.D. Ill. 1983) (effect of *Franklin Mint II* decision is that liability for damage to goods by air carriers on international flights will be unlimited); Kreindler, *The Future of the Warsaw Convention*, N.Y.L.J., Jan. 3, 1983, at 1, col. 1 (*Franklin Mint II* eliminated any effective limitations on carriers' liability under Warsaw Convention); Moller, *The Warsaw Convention: Can It Survive?, reprinted in* 29 CONG. REC. S2276 (daily ed. March 8, 1983) (damage limitations in international air travel no longer exist after *Franklin Mint II*).

[74] *See* Warsaw Convention, *supra* note 1, art. 23; *supra* note 4 (Article 23).

[75] *See supra* note 73 (carrier subject to unlimited liability in cargo cases after *Franklin Mint II*).

[76] *See* Maschinenfabrik Kern, A.G. v. Northwest Airlines, 562 F. Supp. 232, 239-40 (N.D. Ill. 1983) (court determined that last official gold price was Convention's conversion unit); Deere v. Deutsche Lufthansa Aktiengesellschaft, No. 81 C 4726, slip op. at 3 (N.D. Ill. Dec. 30, 1982) (court used last official price of gold to calculate carrier's liability under Article 22); Boehringer Mannheim Diagnostics, Inc. v. Pan Am. World Airways, 531 F. Supp. 344, 353 (S.D. Tex. 1981) (court used free market gold price to calculate carrier's liability under Article 22), *appeal docketed*, No. 81-2519 (5th Cir. Feb. 2, 1982); *see also* Electronic Memories & Magnetics Corp. v. The Flying Tiger Line, Inc., Index No. 784512 (Cal. Super. Ct., San Francisco, Aug. 25, 1982) (court calculated carrier's liability limit with reference to last official gold price); *cf. In re* Air Crash Disaster at Warsaw, Poland on March 14, 1980, 535 F. Supp. 833, 840 (E.D.N.Y. 1982) (court used last official gold price to calculate carrier's liability in personal injury case), *aff'd on other grounds*, 705 F.2d 85 (2d Cir. 1983). *See generally supra* note 41 (dicta on Convention's unit of conversion).

[77] 531 F. Supp. 344 (S.D. Tex. 1981); *appeal docketed*, No. 81-2519 (5th Cir. Feb. 2, 1982).

[78] *Id.* at 346-47.

for $75,000 and Pan Am relied on Article 22 to limit its liability.[79] Pan Am claimed that the last official price of gold was the proper unit of conversion, since the CAB has permitted airlines to calculate liability limitations according to the last official gold price.[80] Boehringer argued, however, that the free market gold price was the proper unit of conversion since Congress had abolished the official gold price.[81]

The *Boehringer* court noted the lack of judicial precedent regarding the proper unit of conversion and looked to the history of the Warsaw Convention to determine the appropriate unit.[82] The court considered two CAB memoranda that discussed the effect of Congress' repeal of the official gold price on the Convention's liability limitation.[83] A 1980 memorandum suggested that abolition of the official gold price removed the legal basis for using the official gold price to convert Convention judgments into United States dollars.[84] A 1981 memorandum, however, stated that the CAB should continue to engage in the legal fiction that an official gold price exists to fulfill the United States' obligation to observe the requirements of the Warsaw Convention.[85] The *Boehringer* court dismissed the memoranda as inconsistent with the history of the Convention, reasoning that the Convention's authors would not approve of the use of a fictitious gold price to convert Article 22 judgments into national currencies.[86] Since the official gold price no longer existed, the *Boehringer* court declared the free market price of gold the only proper basis for calculating Pan Am's liability limitation.[87]

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[79] *Id.* at 348-49.

[80] *See id.* at 352-53; *supra* note 51 (CAB rulings).

[81] *See* 531 F. Supp. at 352-53.

[82] *See id.* at 349-53 (court looked to Convention's history to determine proper unit of conversion since no American court had previously considered issue); McGilchrist, *supra* note 41, at 282 (*Boehringer* was case of first impression).

[83] *See* 531 F. Supp. at 351-52 (*Boehringer* court compared 1980 and 1981 CAB internal memoranda).

[84] *See* Bureau of Consumer Protection, Civil Aeronautics Board, Memorandum on Warwaw Convention Liability Limits 4-5 (March 18, 1980) (memorandum recommended that CAB use free market gold price as Convention's unit of conversion since official gold price did not exist) [hereinafter cited as 1980 CAB memo].

[85] *See* 1981 CAB memo, *supra* note 51, at 5-6 (memorandum recommended that CAB continue using last official gold price as Convention's unit of conversion because last official gold price effectuates Convention's purpose to provide stable liability limitations).

[86] *See* 531 F. Supp. at 352 (*Boehringer* court determined that nothing in Warsaw Convention's history supports position that courts should use last official gold price to calculate carrier's liability limits).

[87] *Id.* at 353 & n.48 (Pan American was liable for $160,000). In *Boehringer*, Pan American's (Pan Am) contract with Boehringer included a provision limiting Pan Am's liability to $9.07 per pound of goods. *See id.* at 353 ($9.07 per pound is last official gold price converted into United States dollars). The *Boehringer* court determined that Pan Am's liability limit under Article 22 converted with reference to the free market price of gold at $400 an ounce was approximately $1,160,000. *See id.* at 353 n.48 (Pan Am's liability limit was approximately $86.00 per pound). The *Boehringer* court, therefore, rejected the contractual provision limiting Pan Am's liability as a provision fixing a lower limit than the limit established in the Con-

Although the *Boehringer* court claimed its holding effectuated the intentions of the Convention's authors, the District Court for the Northern District of Illinois rejected the *Boehringer* holding as inconsistent with the Convention's history.[88] In *Deere v. Deutsche Lufthansa Aktiengecellschaft*,[89] the plaintiff sought recovery from Deutsche Lufthansa Ak-

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vention. *Id.* at 353; *see supra* text accompanying note 74 (Article 23 prohibits liability limits below Article 22 ceiling).

[88] *See* Deere v. Deutcshe Lufthansa Aktiengecellschaft, No. 81 C 4726, slip op. at 4 (N.D. Ill. Dec. 30, 1982) (court determined that last official gold price was only conversion unit that effectuated purpose of Warsaw Convention to limit carrier's liability at fixed and definite sum); *see also* Maschinenfabrik Kern, A.G., v. Northwest Airlines (Kern), 562 F. Supp. 232, 233 (N.D. Ill. 1983). In *Kern*, the plaintiff Maschinenfabrik Kern, A.G. (Kern) sought damages from Northwest Airlines (Northwest) in the amount of $74,171 for injury to Kern's duplicating machines during air shipment from the United States to Switzerland. *Id.* The major issue in *Kern* was which conversion unit the court should use to calculate Northwest's liability under Article 22. *See id.* (Northwest did not dispute nature and extent of damage to Kern's machines). Northwest argued that the last official gold price was the Convention's proper unit of conversion. *See id.* at 237. Northwest, thus, maintained that its liability could not exceed $45,850, the level of damages that would result should the court calculate Northwest's liability with reference to the last official price of gold. *Id.* Kern, however, claimed that the court should use the free market price of gold to calculate Northwest's liability because an official gold price no longer existed. *Id.* Kern, therefore, asserted that it could recover the full value of the machines since Northwest's liability limit calculated with reference to the free market gold price exceeded Kern's damage claim of $74,171. *Id.*

After considering the conversion units proffered by the parties, the *Kern* court held that the last official gold price was the proper conversion unit for limiting a carrier's liability under Article 22. *Id.* at 239. The court stated that the CAB had approved of the use of the last official price of gold to convert Convention judgments by allowing carriers to continue to calculate liability limits with reference to the last official gold price. *Id.*; *see supra* note 51 (CAB rulings). The *Kern* court reasoned that since the CAB was the governmental agency most intimately concerned with limiting carriers' liability under the Warsaw Convention, the court should enforce the CAB's position in favor of the last official gold price. *See Kern*, 562 F. Supp. at 239. After acknowledging that both the *Warsaw Crash* and *Franklin Mint I* courts had used the last official gold price to convert Convention judgments, the *Kern* court maintained that the executive and the legislature should authorize application of any conversion unit other than the last official gold price. *Id.* Moreover, the court asserted that since the CAB had allowed carriers' to calculate liability limits with reference to the last official gold price, the public had notice that the courts might use the last official price of gold to convert Convention judgments. *Id.* at 239-40. The court, thus, stated that maintanance of the CAB rule was not unjust because commercial entities like Kern could protect themselves from low liability limits by purchasing additional insurance. *Id.* at 240.

In determining that the last official price of gold was the Warsaw Convention's unit of conversion, the *Kern* court explicitly rejected the *Franklin Mint II* court's holding that Aritcle 22 is unenforceable. *Id.* at 239; *see supra* notes 55-68 and accompanying text (*Franklin Mint II*). The *Kern* court reasoned that it could not allow Kern to recover Kern's entire damage claim since the clear intention of the Convention in Article 22 was to limit the liability of air carriers on international runs. *Kern*, 562 F. Supp. at 239. Moreover, the *Kern* court found that the *Franklin Mint II* court incorrectly determined that Congress' action in repealing the official gold price operated to eliminate all limitations of liability in the Convention. *Id.* Rather, the court stated that Congress did not intend to declare Article 22 unenforceable since the act authorizing the repeal of the official gold price primarily dealt with various monetary matters and only incidently affected the provisions of the War-

tiengecellschaft (Lufthansa) for damages to Deere's IBM computer that occurred during Lufthansa's transport of the computer from Chicago to Frankfurt, Germany.[90] The only issue in *Deere* was what unit of conversion the court should use to limit Lufthansa's liability under Article 22.[91] The parties in *Deere* offered the exchange value of the current French franc, the last official price of gold, the free market price of gold, and the SDR as alternate units of conversion.[92] Although the *Deere* court stated that problems existed with the use of each alternative unit,[93] the court declared that it had to select one of the alternatives in order to enforce Article 22.[94] After noting that both the *Boehringer* and *Franklin Mint II* courts disapproved of use of the last official gold price, the *Deere* court determined that the last official gold price most nearly effectuated the Convention's purpose to provide fixed and definite liability limitations.[95] The *Deere* court held, therefore, that the last official gold price was the Convention's unit of conversion.[96]

In rejecting the holdings in *Boehringer* and *Franklin Mint II*, the *Deere* court relied on the decision of the District Court for the Eastern District of New York in *In re Air Crash Disaster at Warsaw, Poland* (*Warsaw Crash*).[97] *Warsaw Crash* arose out of a fatal accident involving a jet owned and operated by Polskie Linie Lotniczee (LOT) in which all the members of an American boxing team died.[98] One of the major issues in *Warsaw Crash* was which unit of conversion the court should use to calculate LOT's liability.[99] Although *Warsaw Crash* was a personal injury case, the district

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saw convention. *Id.*; *see* 22 U.S.C 286a note (Supp. II 1978) (Congress rescinded official gold price); *infra* notes 158-67 (*Franklin Mint II* court lacked authority to declare Article 22 unenforceable).

[89] *Deere*, No. 81 C 4726 slip op. at ____.

[90] *See id.*, slip op. at 1.

[91] *See id.*, slip op. at 1-2.

[92] *See id.*, slip op. at 2.

[93] *See id.*, slip op. at 3 & 4 n.2 (*Deere* court agreed with *Franklin Mint II* court that strong arguments against each alternative conversion unit existed).

[94] *Id.*, slip op. at 3.

[95] *Id.*

[96] *See id.*, slip op. at 3-4 (*Deere* court granted Lufthansa's motion for summary judgment as to use of last official gold price for calculating Lufthansa's liability limit).

[97] 535 F. Supp. 833 (E.D.N.Y. 1982), *appeal denied on issue of appropriate unit of conversion*, No. 82-8018 (2d Cir., Aug. 19, 1982), *aff'd on other grounds*, 705 F.2d 85 (2d Cir. 1983); *see Deere* No. 81 C 4726, slip op. at 3 (*Deere* court adopted *Warsaw Crash* court's determination that last official gold price was Convention's unit of conversion).

[98] *See* 535 F. Supp. at 834.

[99] *See id.* at 839-44 (plaintiffs claimed that Article 23 nullified Montreal Agreement because defendant's liability calculated with reference to free market gold price exceeded $75,000); *supra* note 5 (Montreal Agreement); *supra* text accompanying note 74 (Article 23). *But see* 535 F. Supp. at 843-44 (*Warsaw Crash* court determined that last official gold price was proper unit of conversion and held that Montreal Agreement limited defendant's liability). *See generally In re* Air Crash Disaster at Warsaw, Poland, on March 14, 1980, 705 F.2d 85 (2d Cir. 1983).

court did not distinguish personal injury cases from cargo cases when considering the Convention's unit of conversion.[100]

The plaintiffs in *Warsaw Crash*, survivors of the American boxers, claimed that the free market gold price is the proper unit of conversion for limiting a carrier's liability under Article 22.[101] LOT, however, contended that the court should use either the French franc or the SDR to calculate LOT's liability.[102] After reviewing the arguments favoring the alternative units proffered by the parties, the *Warsaw Crash* court rejected application of each conversion unit.[103] The court determined that use of the free market value of gold as the Convention's unit of conversion would contravene the Convention's purpose of providing consistent liability limitations.[104] The court disapproved of the SDR and the French franc as units of conversion because Article 22 still established liability limitations with reference to gold.[105] The *Warsaw Crash* court reasoned that the court lacked authority to calculate Convention judgments with reference to monetary units other than gold until the parties to the Convention ratified an amendment eliminating gold as the Convention's unit of conversion.[106]

Although neither party suggested use of the last official gold price, the *Warsaw Crash* court limited LOT's liability with reference to the last official gold price.[107] The court stated that the Convention's authors intended courts to limit Convention judgments with reference to a constant

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[100] *See* 535 F. Supp. at 839 (*Warsaw Crash* court adopted *Franklin Mint I* court's holding that last official gold price is Convention's unit of conversion).

[101] *See* 535 F. Supp. at 839. The *Warsaw Crash* plaintiffs maintained that public policy considerations mandated use of the free market gold price as the Convention's unit of conversion. *Id.* First, the plaintiffs claimed that American attempts to raise the ceiling on the Article 22 liability limitations indicated that the United States sought liability limits that responded to inflation. *Id.*; *see supra* note 5 (American attempts to raise Article 22 liability limits). The plaintiffs contended that use of the fluctuating free market gold price would insure that the Article 22 liability limitations respond to inflation. 535 F. Supp. at 839. Second, the plaintiffs claimed that the use of the free market price would effectuate the United States' interest in establishing a liability limitation that provided maximum recovery to plaintiffs. *Id.* Finally, the plaintiffs claimed that use of the free market price was proper because the United States' deregulation of the airlines industry evidenced support for the operation of free market forces in the industry. *Id.*

[102] *See* 535 F. Supp. at 840-42 (LOT's arguments).

[103] *See id.* at 841-43.

[104] *See id.* at 842-43.

[105] *Id.* at 843.

[106] *See id.* In *Warsaw Crash*, the court acknowledged that the drafting of treaties is the sole province of the government's political branches. *Id.* The *Warsaw Crash* court declared that until the parties to the Convention redrafted Article 22 to replace gold as the Convention's unit of conversion, the judiciary lacked authority to substitute an alternative method of calculating a carrier's liability. *Id.* The court also declared that until the Warsaw parties altered Article 22 to change the gold clause, the judiciary had to select a unit of conversion that would enforce Article 22 without undermining the gold clause. *See id.*

[107] *Id.*

gold price maintained by the parties to the Convention.[108] Use of the last official gold price, therefore, was proper because the United States had established the official gold price to determine the relationship of United States' dollars and currencies of all other nations using a similar standard of conversion.[109] Moreover, the *Warsaw Crash* court determined that application of the last official price to limit LOT's liability effectuated the author's intentions to provide uniform liability limitations.[110] The *Warsaw Crash* court, therefore, rejected the *Boehringer* holding and instead held that the last official gold price remained the Warsaw Convention's unit of conversion.[111]

In approving the *Warsaw Crash* court's use of the last official gold price, the *Deere* court correctly determined that application of the last official gold price as the Convention's unit of conversion produces results more consistent with the Convention's purpose than does use of the free market price.[112] First, use of the last official price of gold as the Convention's unit of conversion effectuates the intentions of the Convention's authors to provide uniform limitations of liability since the last official gold price never changes.[113] Use of the free market price to convert Con-

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[108] *Id.*

[109] *Id.*

[110] *See id.* (*Warsaw Crash* court determined that use of last official gold price as conversion unit provided more stable liability limitations than alternative conversion units).

[111] *See id.* at 843 & n.8 (*Warsaw Crash* court rejected *Boehringer* holding as inconsistent with Convention's purpose to provide stable liability limitations and with CAB's approval of last official gold price); *supra* text accompanying note 87 (*Boehringer* holding). In approving the *Franklin Mint I* court's holding that the last official gold price is the Convention's unit of conversion, the *Warsaw Crash* court recognized that its holding might undermine the intentions of the Convention's authors since an official gold price no longer existed. *See* 535 F. Supp. at 844. The court, however, justified the holding on two grounds. *Id.* First, the court stated that the international monetary system had not changed so much since the abolition of the official gold price that use of the last official gold price to convert Convention judgments would undermine the intentions of the Convention's authors. *Id.* Second, the court stated that the parties to the Convention had indicated that the original Convention's liability limitations were not immutable by amending the Convention to raise the liability limitations established by Article 22. *Id.*; *see supra* note 5 (amendments to Article 22). The *Warsaw Crash* court declared that the change in the gold standard probably demanded another amendment by the parties. 535 F. Supp. at 844. Until the parties amended Article 22, however, the court stated that the judiciary had to enforce Article 22 by utilizing the last official price of gold to limit carriers' liability. *Id.*

[112] *See Deere*, No. 81 C 4726, slip op. at 3 (*Deere* court agreed with *Warsaw Crash* court's determination that last official gold price is conversion unit that effectuates Convention's purpose of limiting carrier's liability); *see also* Maschinenfabrik Kern, A.G. v. Northwest Airlines, 562 F. Supp. 232, 239 (N.D. Ill. 1983) (court applied last official gold price to calculate defendant's liability because clear intention of Warsaw Convention in Article 22 was to limit liability of air carriers on international runs); *supra* notes 18-23 and accompanying text (legislative history of Warsaw Convention indicates that purpose of Article 22 is to establish carriers' liability at fixed and definite sum); *supra* notes 32-34 and accompanying text (Warsaw parties rejected use of free market price as Convention's unit of conversion at Montreal Conference).

[113] *See supra* note 6 (last official gold price set at $42.22 an ounce).

vention judgments does not provide uniform liability limits since the free market price fluctuates daily.[114] Second, application of the free market price defeats the purpose of Article 22 because carriers' liability limitations calculated with reference to the free market price usually are so high that the liability limitations are ineffective.[115] For example, in *Boehringer*, the court calculated Pan Am's liability limit with reference to the free market price of $400 an ounce.[116] Pan Am's liability limit thus approximated $160,000, entitling Boehringer to recover its entire claim of $75,000.[117] If the court had utilized the last official price of $42.22 an ounce, however, Pan Am's liability would have amounted to $14,512.[118] The *Boehringer* court's use of the free market price thus contravened the intentions of the Warsaw authors to limit the carrier's liability at a fixed and definite level.[119]

Proponents of the free market gold price argue, however, that use of the last official gold price leads to unreasonably low liability limitations that usually prevent plaintiffs from recovering a reasonable amount of damages from carriers.[120] Since the free market price is the real value

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[114] *See Gold Tumbles $100 in a Week*, Wash. Post, March 1, 1983, at D7, col. 3 (free market gold price fluctuated from $850 an ounce in 1980 to $400 an ounce in 1982); *U.S. Pushes Gold Sales*, Wash. Post, April 13, 1983, at F1, col. 6 (price of gold was $431 an ounce on April 12, 1983); *see also* G. MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT 179 (1977) (wide and uncontrolled variations in liability limitations resulting from use of free market gold price frustrate Warsaw Convention's purpose); Asser, *supra* note 4, at 669 (use of free market price to calculate defendant's liability inconsistent with intentions of authors of Convention to establish uniform liability limits); Martin, *supra* note 8, at 75 (unstable free market gold price inappropriate unit of conversion because it provides inconsistent liability limitations).

[115] *See* McHenry, *Aviation Law Report*, 14 LAW AM. 13, 16 (1982) (application of free market gold price to calculate defendant's liability would remove Warsaw Convention's liability limitations in majority of cases); *see also* Maschinenfabrik Kern, A.G. v. Northwest Airlines, 562 F. Supp. 232, 239 (N.D. Ill. 1983) (court recognized that application of free market gold price to convert Convention judgments would defeat Convention's purpose in Article 22 of limiting carrier's liability); 535 F. Supp. at 841 n.6 (*Warsaw Crash* court determined that use of free market gold price to calculate carriers' liability would destroy liability limitations in cases involving injury to passengers); 531 F. Supp. at 353 n.97 (*Boehringer* court recognized that use of free market gold price to calculate carriers' liability could lead to unrealisticially high liability limitations).

[116] *See* 531 F. Supp. at 353 n.48 (defendant's liability limitation equaled approximately $86.00 per pound if calculated with reference to free market gold price).

[117] *Id.*

[118] *See id.* at 353 (defendant's liability limitation equaled $9.07 per pound if calculated with reference to official gold price).

[119] *See supra* notes 5 & 18-23 and accompanying text (Convention's authors purposefully provided for low liability limitation).

[120] *See* Heller, *Converting the Gold Franc—a reply from the unconverted*, 5 AIR L. 33, 33 (1980) (use of last official gold price to convert Convention judgments fails to provide adequate compensation); Moller, *Gold Up—Warsaw Damage Limitations Down*, N.Y.L.J., Oct. 17, 1980, at 2, col. 1-3 (application of last official gold price to calculate carriers' liability limits under Warsaw Convention does not afford plaintiffs fair compensation because last official gold price does not reflect currency changes).

of gold, the proponents claim that use of the free market price adequately compensates plaintiffs by providing recoverable damages that reflect changes in inflation.[121] Use of the free market price to calculate a carrier's liability may effectuate the public policy of maximizing the recovery of aggrieved plaintiffs.[122] Arguably, the ambiguous wording of Article 22 allows courts to utilize the free market gold price as the Convention's unit of conversion on the basis of policy considerations alone.[123] The Warsaw parties, however, explicitly rejected the free market price of gold as the Convention's unit of conversion at the Montreal Conference because the free market price would provide excessively high liability limits.[124] Generally, courts hold that the actions of the parties to a treaty subsequent to the ratification of the treaty have some probative value in ascertaining the treaty's provisions.[125] Since application of the free market price would produce results inconsistent with the intent of the Warsaw parties to maintain carriers' liability limitations at a fixed and definite level, courts should not use the free market price to avoid the Convention's low liability limitations.

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[121] *See* R. MANKIEWICZ, THE LIABILITY REGIME OF THE INTERNATIONAL AIR CARRIER 155 (1981) (courts should use free market gold price to convert Convention judgments because free market price insures realistic liability limitations); Heller, *supra* note 6, at 95 (proper unit of conversion for purposes of Article 22 is free market gold price since use of free market price insures plaintiffs maximum recovery); Mendelsohn, *The Value of the Poincaré Gold Franc in Limitation of Liability Conventions*, 5 J. MAR. L. & COM. 125, 127 (1973) (free market price superior to official gold price as conversion unit because free market price insures higher liability limitations); Moller, *supra* note 120, at 2, col. 2 (courts should apply free market gold price to calculate Article 22 liability limitations); Tobolewski, *supra* note 5, at 179 (free market gold price proper unit for converting Convention judgments because free market price reflects world inflation and commodity price increases); *see also* McGilchrist, *supra* note 41, at 284 (*Boehringer* court influenced by near unanimity of commentators favoring application of free market gold price to convert Convention judgments). *But see* J. GOLD, SDRs, CURRENCIES AND GOLD 101 n.28 (IMF Pamphlet Series No. 33, 1980) (use of free market gold price as conversion unit indefensible because gold no longer serves as common denominator for expressing value of currencies); *supra* note 114 (commentators who reject use of free market gold price to convert Convention judgments); *see also supra* note 24 and accompanying text (purpose of Convention's gold clause).

[122] *See* PROSSER, HANDBOOK ON THE LAW OF TORTS § 5, at 22-23 (1971) (basic premise of American tort law is that injured parties should receive full compensation for injuries).

[123] *See* GOLD, THE FUND AGREEMENT IN THE COURTS 441 (1982) (some commentators favor free market price as Convention's conversion unit simply because free market price compensates for inadequate liability limitations); *Gold Clauses*, *supra* note 28, at 819 (courts can use free market gold price as conversion unit to provide plaintiffs maximum recovery as long as Article 22 refers to Poincaré gold franc).

[124] *See Revised Warsaw Convention*, *supra* note 2, at 790-91; *supra* notes 32-34 and accompanying text (Warsaw parties rejected free market price in favor of SDR as Convention's conversion unit).

[125] *See* Block v. Compagnie Nationale Air France, 386 F.2d 323, 337 (5th Cir. 1967) (courts may examine subsequent practices of parties as aid in treaty interpretation process), *cert. denied*, 392 U.S. 905 (1968); Note, *Maximizing Passenger Recovery Under the Warsaw Convention: Articles 17 and 22*, 34 WASH. & LEE L. REV. 141, 144 n.17 (1977) (subsequent practice of individual parties is probative in treaty construction).

Although the last official gold price is more representative of the Warsaw parties' intent than is the free market price of gold, the last official gold price is not a perfect conversion unit because the last official price lacks any relationship to contemporary currency values.[126] Application of a fictitious gold price threatens to contravene the Warsaw authors' intent to calculate Convention judgments with reference to a standard of value that serves as an internationally approved conversion unit.[127] Most courts recognize, however, that each alternative conversion unit has drawbacks.[128] Courts that enforce Article 22, therefore, must select the conversion unit that most nearly effectuates the intentions of the Warsaw parties.[129] Since the last official gold price produces results consistent with the Convention's purpose of limiting carrier's liability, use of the last official gold price to convert Convention judgments is preferable to use of the free market price of gold.[130]

The *Franklin Mint II* court, nevertheless, rejected use of the last official gold price as the Convention's unit of conversion, holding that Congress' decision to repeal the official price of gold and subsequent failure to replace gold with an alternative unit of conversion was an explicit rejection by Congress of the last official gold price as the Convention's unit of conversion.[131] The *Franklin Mint II* court recognized, however, that Congress may not have focused on the Warsaw Convention when repealing the official gold price.[132] The legislative history of Congress' repeal

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[126] *See supra* note 6 (Senate repealed official gold price because official price no longer reflected true value of gold).

[127] *See* Deere v. Deutsche Lufthansa Aktiengecellschaft, No. 81 C 4726, slip op. at 3 & n.2 (N.D. Ill. Dec. 30, 1982) (use of last official gold price to calculate carriers' liability is easy to criticize because official gold price no longer exists); *In re* Air Crash Disaster at Warsaw, Poland in March 14, 1980, 535 F. Supp. 833, 844 (E.D.N.Y. 1982) (use of last official gold price may contravene intent of Convention's authors to adopt conversion unit that reflects changes in global economy), *aff'd on other grounds*, 705 F.2d 85 (2d Cir. 1983); *see also* Franklin Mint Corp. v. Trans World Airlines, 690 F.2d 303, 309-10 (2d Cir. 1982) (problems with last official gold price as Convention's unit of conversion), *cert. granted*, 51 U.S.L.W. 3883 (U.S. June 14, 1983) (No. 82-1186). *But see supra* note 111 (*Warsaw Crash* court's justifications for adopting last official gold price).

[128] *See Deere*, No. 81 C 4726, slip op. at 3 & n.2 (conversion units proffered by parties are easy to criticize); *Warsaw Crash*, 535 F. Supp. at 842-44 (court discussed arguments against each alternative conversion unit); *supra* notes 61-68 and accompanying text (*Franklin Mint II* court's reasoning for rejecting alternative conversion units).

[129] *Deere*, No. 81 C 4726, slip op. at 3.

[130] *See supra* notes 112-19 and accompanying text (application of last official gold price as Convention's unit of conversion effectuates Convention's purpose of limiting carrier's liability); *supra* text accompanying note 124 (Warsaw parties rejected use of free market gold price).

[131] *See* 690 F.2d at 311 (Congress abandoned unit of conversion specified by Warsaw Convention); *supra* notes 56-60 and accompanying text (*Franklin Mint II* court's reasoning).

[132] *See* 690 F.2d at 311 (*Franklin Mint II* court recognized that Congress did not focus explicitly on Warsaw Convention when Congress repealed Par Value Modification Act); *see also* 72 U.S.C. § 286(a) (Supp. V 1981) (repealing Par Value Modification Act, Pub. L. No. 93-110, § 1, 87 Stat. 352, 352 (1973); *supra* note 6 (discussion of Par Value Modification Act).

of the official gold price actually indicates that Congress did not consider the Convention when it abolished the official price of gold.[133] Courts uniformly hold that a statute enacted subsequent to ratification of a treaty does not repeal the treaty unless Congress explicitly intended to repeal the treaty.[134] Since Congress did not explicitly focus on the Warsaw Convention when repealing the official gold price, no basis exists for the Second Circuit's holding that the repeal of the official gold price precludes application of the last official price of gold as the Convention's conversion unit.[135] The *Franklin Mint II* court, therefore, should have refrained from declaring Article 22 unenforceable and instead should have held that the last official gold price remains the Convention's proper unit of conversion.

In declaring Article 22 unenforceable, the *Franklin Mint II* court limited the court's holding to cases involving loss of or damage to goods.[136] The District Court for the Central District of California, however, extended the Second Circuit's holding to a case involving death and injuries to passengers.[137] The litigation in *In re Aircrash at Kimpo International Airport, Korea (Kimpo)*[138] arose from the crash of a Korean Air Lines (Korean) jet near Seoul, Korea, killing several American passengers and injuring others.[139] The plaintiffs in *Kimpo* argued that the court should calculate

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[133] *See supra* notes 6 & 29 and accompanying text (Congress repealed official gold price because of great disparity between official price of gold and free market price of gold); *see also* Maschinenfabrik Kern, A.G. v. Northwest Airlines, 562 F. Supp. 232, 239 (N.D. Ill. 1983) (court determined that Congress did not intend to declare Article 22 obsolete by eliminating official price of gold). *See generally* FOREIGN RELATIONS COMM., BRETTON WOODS AGREEMENT ACT, S. REP. NO. 1148, 94th Cong., 2d Sess. (1976) (no reference to Warsaw Convention included in Senate report accompanying abolition of official gold price), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS, 5935, 5935-67.

[134] *See e.g.*, Moser v. United States, 341 U.S. 41, 45-46 (1951) (subsequent and not inconsistent statute did not modify treaty); Cook v. United States, 288 U.S. 102, 120 (1932) (statute does not modify treaty unless Congress expressly intended statute to modify treaty); United States v. Domestic Fuel Corp., 71 F.2d 424, 429 (3d Cir. 1934) (later statute does not repeal treaty unless Congress evidenced clear intent to repeal treaty).

[135] *See supra* notes 131-34 and accompanying text. In rejecting application of the last official gold price as the Convention's conversion unit, the *Franklin Mint II* court stated that the repeal of the Par Value Modification Act was a legislative declaration that Congress no longer recognized the last official price of gold. *Franklin Mint II*, 690 F.2d at 309. The legislative history of Congress' abolition of the official gold price, however, indicates that Congress contemplated that gold would continue to play some economic role in the international monetary system. *See Bretton Woods Report, supra* note 133, at 5947 (Senate recognized that vast numbers of legal mechanisms in international monetary system still perpetutated some role for gold even though IMF intended to replace gold with SDR as international unit of account); *see also* 31 U.S.C.A. 5117 (b) (West Supp. 1982) (United States Treasury currently uses last official gold price to govern issuance of gold certificates).

[136] *See* 690 F.2d at 311; McGilchrist, *Can the U.S. courts denounce the Warsaw Convention?*, 1983 LLOYD'S MAR. & COM. L.Q. 111, 118 (*Franklin Mint II* holding applies only to cargo claims although court's reasoning is equally applicable to bodily injury cases).

[137] *See In Re* Aircrash at Kimpo Int'l Airport, Korea on November 18, 1980, 558 F. Supp. 72, 74-75 (C.D. Cal. 1983) (Article 22 unenforceable in personal injury case).

[138] *Id.*

[139] *Id.* at 72.

Korean's liability limitation with reference to the free market price of gold.[140] Korean, on the other hand, offered the last official price of gold, the SDR, and the current French franc as alternative units of conversion.[141] The *Kimpo* court relied on the *Franklin Mint II* court's reasoning and rejected application of the four alternative conversion units.[142] Since use of each conversion unit was unacceptable, the *Kimpo* court held that Article 22 is unenforceable in cases involving death or injuries to passengers.[143]

In declaring Article 22 unenforceable, the *Kimpo* court recognized that the holding subjected carriers to unlimited liability in personal injury cases in American courts.[144] A special arrangement entitled the Montreal Agreement presently governs the liability limitations in cases involving injuries to passengers on international flights that enter or leave the United States.[145] The Montreal Agreement provides for absolute carrier liability up to $75,000 for injuries to passengers on all international flights that include the United States as a point of arrival, departure, or stopover.[146] The Montreal Agreement operates under a provision in Article 22 that allows a passenger to contract with a carrier for a liability limitation that exceeds the Article 22 limitation.[147] If Article 22 is unenforceable, however, Article 23 nullifies the Montreal Agreement because the Agreement would reduce the liability of a carrier below the amount that a plaintiff could recover under the Convention.[148] After *Kimpo*, therefore, plaintiffs may

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[140] *Id.*

[141] *Id.* at 74.

[142] *See id.* at 74-75 (*Kimpo* court agreed with *Franklin Mint II* court's determination that alternate units of conversion proffered by parties are unacceptable).

[143] *See id.* In extending the *Franklin Mint II* holding to a case involving personal injury, the *Kimpo* court recognized that the *Franklin Mint II* holding was prospective. *Id.*; *see supra* note 56 (prospective application). The *Kimpo* court, however, applied the *Franklin Mint II* decision retroactively and declared Article 22 unenforceable in an action that arose prior to *Franklin Mint II*. *See* 558 F. Supp. at 75. The *Kimpo* court reasoned that the airlines knew a rational limit on liability could not exist without an internationally agreed upon unit of conversion. *Id.* Since the Montreal Conference in 1975 amounted to a recognition by the Warsaw parties that the Convention's unit of conversion no longer existed, the court stated that airlines could see as early as 1975 that courts might refuse to enforce Article 22. *See id.*; *supra* notes 32-34 and accompanying text (Montreal Conference). *But see supra* note 56 (*Franklin Mint II* court applied holding prospectively because Warsaw parties could not have foreseen court's refusal to enforce Article 22).

[144] *See Kimpo*, 558 F. Supp. at 75. (court determined Article 22 was unenforceable and granted plaintiffs' motion to strike defense of Warsaw Convention).

[145] *See supra* note 5 (Montreal Agreement provides that airlines accept absolute liability for injury to passengers up to $75,000 per passenger).

[146] *Id.*

[147] *See* Warsaw Convention, *supra* note 1, art. 22 (1) (Article 22 allows carriers to contract for higher liability limit).

[148] *See id.* art. 23 (Article 23 prohibits carrier from fixing liability limitation below level that Warsaw Convention establishes); *see also In re* Air Crash Disaster at Warsaw, Poland on March 14, 1980, 535 F. Supp. 833, 839 n.5 (E.D.N.Y. 1982) (use of free market gold price to calculate carriers' liability negates application of Montreal Agreement since application would constitute violation of Article 23), *aff'd on other grounds*, 705 F.2d 85 (2d Cir. 1983);

rely on state law to recover damages from airlines.[149] In certain states, provisions in wrongful death statutes may limit a carrier's liability.[150] State conflict of law rules also may place plaintiffs in a jurisdiciton which limits liability on wrongful death.[151] Since most states, however, have no limitations on liability for wrongful death,[152] carriers may be potentially liable for the full extent of damages suffered in personal injury cases.[153] The impact of the *Kimpo* and *Franklin Mint II* decisions is to subject carriers to varying liability limits, including full liability, in cases involving both damages to goods and to persons.[154]

Regardless of the legal basis of the *Kimpo* decision, the court's holding

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McGilchrist, *supra* note 136 at 118 (conclusion that Montreal Agreement would become a nullity if *Franklin Mint II* applied to personal injury cases).

[149] *See* Husserl v. Swiss Air Transp. Co., 351 F. Supp. 702, 706 (S.D.N.Y. 1972) (state law determines defendant's liability if Article 22 does not apply).

[150] *See* SPEISER, RECOVERY FOR WRONGFUL DEATH 2D 7.1, 7.2 (1975 & Supp. 1982) (wrongful death statutes in Maine and West Virginia impose liability limitations); *see also* Note, *A Proposed Revision of the Warsaw Convention*, 57 IND. L.J. 297, 306 n.62 (1982) (list of twenty-six states that create original cause of action in wrongful death statutes) [hereinafter cited as *Warsaw Revision*].

[151] *See* SPEISER, *supra* note 150, at 13.2 (conflict of law rules in certain jurisdictions would require courts to apply excessively low liability limitations of such countries as Brazil and Mexico if damage claims arose out of accidents in those countries); *see also* Tramotana v. S.A. Empresa de Viacao Aerea Rio Grandese, 350 F.2d 468, 470-77 (D.C. Cir. 1965) (court applied Brazilian law and limited plaintiff's recovery to $170 for death of American in plane crash in Brazil); Prott v. Royder, 517 S.W.2d 922, 923-24 (Tex. Civ. App. 1974) (court applied Mexican law to measure damages in claims arising out of plane crash in Mexico because Texas courts apply law of place of accident). *But see In Re* Paris Air Crash, 399 F. Supp. 732, 739-47 (C.D. Cal. 1975) (court refused to apply foreign standards and instead applied California law to measure claimant's recovery since California's interests in resolving suit were significantly greater than interests of countries of states of which decedents or claimants were citizens); Kreindler, *Pan Am Crash Spotlights Airline Putsch on Montreal*, N.Y.L.J., July 18, 1982, at 4, col. 5 (New York, California, Florida, and Illinois have replaced traditional conflicts rule under which courts rigidly apply law of place of accident with flexible method whereby courts consider question of which law has most significant relationship with particular transaction). *See generally* MONTREAL REPORT, *supra* note 5, at 6 (rules of jurisdiction and standards of liability are completely unpredictable if Convention's liability limitations do not apply).

[152] *See* SPEISER, supra note 150, at 7.2.

[153] *See* Maghsoudi v. Pan Am. World Airways, 470 F. Supp. 1275, 1280 (D. Hawaii 1979) (common-law damage rules determine defendant's liability if Article 22 does not apply); *see also In re* Aircrash in Bali, Indonesia On April 22, 1974, 684 F.2d 1301, 1307 (9th Cir. 1982) (court held that California's wrongful death law would determine defendant's liability if Article 22 did not apply).

[154] *See supra* notes 144-53 and accompanying text (*Kimpo* holding may subject air carriers to full liability in personal injury cases); *supra* notes 69-75 and accompanying text (*Franklin Mint II* holding subjects carriers to unlimited liability in property damage cases); *see also* 29 CONG. REC. S2250 (daily ed. March 7, 1983) (statement of Sen. Hollings) (*Kimpo* and *Franklin Mint II* effectively eliminate Warsaw Convention by subjecting carriers to unlimited liability); Kreindler, *Montreal Protocols Ready For Vote*, N.Y.L.J., March 7, 1983 at 2, col. 1 (*Kimpo* decision eliminates Warsaw Convention as enforceable limit on airlines' liability).

that Article 22 is unenforceable in personal injury cases could elicit strong negative responses from the other Warsaw parties.[155] Since the majority of foreign airlines are state-owned, most Warsaw parties are strongly opposed to the idea of unlimited carrier liability.[156] Consequently, several foreign governments have informed the State Department that the *Franklin Mint II* decision will seriously affect the United States relations in international aviation.[157] The *Kimpo* and *Franklin Mint II* holdings, therefore, create the possibility that other parties to the Convention may eliminate Warsaw coverage for American carriers.

The *Kimpo* decision will be void, however, if the Supreme Court determines that the *Franklin Mint II* court lacked authority to declare Article 22 unenforceable.[158] The Supreme Court consistently has held that courts may annul or disregard provisions of a treaty that the Senate has ratified only if the provisions are unconstitutional.[159] In declining to enforce Article 22, the *Franklin Mint II* court did not question the constitutionality of the Warsaw Convention.[160] The *Franklin Mint II* court instead

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[155] *Cf.* Asser, *supra* note 4, at 645 (most foreign countries will accuse United States of violating Warsaw Convention if American courts calculate carriers' liability limits with reference to free market gold price); Gaynes Memo, *supra* notes 33, at 4 (United States adoption of free market gold price as Convention's unit of conversion might lead to wholesale denunciation of Convention).

[156] *See* 29 CONG. REC. S2271 (daily ed. March 8, 1983) (statement of Sen. Danforth) (foreign countries strongly oppose high liability standards advocated by United States and reject concept of unlimited carrier liability); *see also Warsaw Revision, supra* note 150, at 312 n.100 (most foreign carriers engaged in international transport are owned by foreign governments).

[157] Brief for the United States as Amicus Curie at 2-3, 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. January 15, 1983) (No. 82-1186) [hereinafter cited as Amicus Curie Brief].

[158] *See* 51 U.S.L.W. 3883 (U.S. June 14, 1983) (Supreme Court granted TWA's and Franklin Mint's writs of certiorari).

[159] *See* Doe v. Braden, 57 U.S. (16 How.) 635, 657 (1854) (courts must enforce provisions of treaties unless provisions are unconstitutional); *see also* Terlinder v. Ames, 184 U.S. 270, 288 (1902) (courts ought to enforce treaties); Whitney v. Robertson, 124 U.S. 190, 194-95 (1888) (courts have duty to enforce treaties and should not abrogate provisions of treaty unless provisions are unconstitutional).

[160] *See* 690 F.2d at 311 n.27 (*Franklin Mint II* holding limited solely to prospective unenforceability of Article 22 in cargo cases). The majority of courts considering the constitutionality of the Warsaw Convention have held that the Convention's liability limitation clause is constitutional. *See* Pierre v. Eastern Airlines, 152 F. Supp. 486, 487 (D.N.J. 1957) (court rejected plaintiff's attack on constitutionality of Convention); Indemnity Ins. Co. of North Am. v. Pan Am. Airways, 58 F. Supp. 338, 343 (S.D.N.Y. 1944) (Warsaw Convention is constitutional). *But cf. In re* Aircrash in Bali, Indonesia On April 22, 1974, 684 F.2d 1301, 1308-13 (9th Cir. 1982). In *Bali*, the plaintiffs attacked the constitutionality of Article 22, arguing that the liability limitation burdened the plaintiffs' right to travel. *Id.* at 1309; *see* Zemel v. Rusk, 381 U.S. 1, 13-14 (1965) (international travel is fundamental constitutional right). The *Bali* court held that the plaintiffs had a right to compensation from the United States government if the $75,000 liability limitation established by the Montreal Agreement unreasonably impaired the plaintiffs' claims for damages. *See Bali*, 684 F.2d at 1311-12 (plaintiff can recover damages from United States government if liability limitation constitutes tak-

distinguished unenforceability from termination, noting that courts cannot end treaty obligations by judicial decree.[161] The *Franklin Mint II* holding, however, substantially alters carriers' obligations under the Warsaw Convention by subjecting carriers to full liability in cases involving both goods and persons.[162] Generally, courts hold that any change in an essential provision of a treaty constitutes a modification of the treaty.[163] Most courts addressing the question have held that a court does not have the authority to modify an essential provision of a treaty absent a clear declaration by either the President or Congress authorizing the modification.[164] In *Franklin Mint II*, the court did not have such a declaration since neither the President nor Congress has endorsed abolition of the Warsaw Convention's liability limitation.[165] The Second Circuit,

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ing of property without compensation). The *Bali* court, however, declined to determine whether the Warsaw Convention was unconstitutional and instead stated that whether Article 22 amounted to an unreasonable taking of plaintiff's property was a question for the Court of Claims. *See id.* at 1311-12; *see also* Moller, *supra* note 73, at S2276 (*Bali* and *Franklin Mint II* decisions portend overdue demise of Warsaw Convention). *See generally* Haskill, *The Warsaw System and the U.S. Constitution Revisited*, 39 J. AIR L. & COM. 483 (1973) (discussion of constitutionality of Warsaw Convention).

[161] *See* 690 F.2d at 311 & n.26 (*Franklin Mint II* court stated that courts cannot terminate treaties that Senate has ratified).

[162] *See supra* notes 69-75 and accompanying text (owner of damaged or lost goods can recover full value of goods after *Franklin Mint II*); McGilchrist, *supra* note 136, at 116 (*Franklin Mint II* court's holding of Article 22 unenforceable effectively abrogated Warsaw Convention).

[163] *See In re* Air Crash Disaster in Warsaw, Poland on March 14, 1980, 535 F. Supp. 833, 843 (S.D.N.Y. 1982) (annulment or disregard of essential provision of treaty constitutes modification of treaty that only Senate can make), *aff'd on other grounds*, 705 F.2d 85 (2d Cir. 1983).

[164] *See* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658, 690 (1979) (Court reluctant to find congressional abrogation of treaty rights absent explicit statutory language); Menominee Tribe of Indians v. United States, 391 U.S. 404, 412-13 (1968) (Congress must express clear intent to abrogate treaty before Court will hold that Congress abrogated treaty); Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 160 (1934) (courts should not impute to Congress intention to abrogate or modify treaty).

[165] *See supra* note 35 and accompanying text (political branches of government favor maintaining Warsaw Convention's liability limitation regime); *see also* Amicus Curie Brief, *supra* note 157, at 9-16 (Justice Department's brief on behalf of TWA states that *Franklin Mint II* court did not have requisite Congressional authorization to declare Article 22 unenforceable); *cf. supra* note 51 and accompanying text (CAB continues to allow carriers to calculate liability limitations with reference to last official gold price). The CAB's approval of carriers' tariffs calculated with reference to the last official gold price supports the viability of the last official gold price as a conversion unit. *See* Maschinenfabrick Kern, A.G. v. Northwest Airlines, Inc., 562 F. Supp. 232, 237 (N.D. Ill. 1983) (court enforced CAB's position favoring last official gold price because CAB is governmental agency most intimately concerned with air carriers' liability limits); Deere v. Deutsche Lufthansa Aktiengellschaft, No. 81 C 4726, slip op. at 2-3 (N.D. Ill. Dec. 30, 1982) (court relied on CAB approval of last official gold price as support for court's holding). Generally, courts follow the interpretation of treaty provisions by the government agencies charged with enforcing the treaties. *See* Sumitomo Shoji Am. Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982) (agency's interpreta-

therefore, effectively rewrote Article 22 by subjecting carriers to unlimited liability without clear authorization from the political branches of government.[166] Since treaty drafting is the exclusive province of the political branches, the *Franklin Mint II* court lacked authority for its holding.[167]

In declaring Article 22 unenforceable, the *Franklin Mint II* court recognized that most foreign courts have enforced Article 22.[168] The foreign courts, however, like American courts have adopted inconsistent units of conversion.[169] The civil court of Rome, for example, has determined that the SDR is the proper standard for converting Article 22 judgments into the Italian lire.[170] Another Italian court used the free market gold price to calculate a carrier's liability.[171] Courts in

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tion of treaty provision entitled to great weight); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) (courts should grant agency's interpretation of treaty provision probative value when interpreting treaty); *cf.* FCC v. WNCN Listeners Guild, 450 U.S. 582, 594 n.30 (1981) (reviewing court not empowered to substitute its judgment for that of agency).

[166] *See* MONTREAL REPORT, *supra* note 5, at 5 (limitations on airline liability are fact of life in international aviation law); *supra* note 38 and accompanying text (United States does not plan to abrogate Convention); *supra* text accompanying note 75 (*Franklin Mint II* court eliminated liability limitations provided by Warsaw Convention); *see also supra* note 19 and accompanying text (Article 22 most important Convention provision).

[167] *See supra* notes 155 & 160 (judiciary's role in conduct of foreign affairs limited to enforcement of treaties); *see also* Coleman v. Miller, 307 U.S. 433, 454-55 (1939) (most issues in United States foreign relations are beyond competence of judiciary to examine). The Supreme Court has held that courts cannot terminate treaties because treaties are international obligations entered into by the political branches of the government. *Id.*; *see* Whitney v. Robertson, 124 U.S. 190, 194 (1888) (treaty termination is responsibility of political branches of government). Courts, therefore, generally refuse to inquire into the validity of treaties. *See generally* Nelson, *The Termination of Treaties and Executive Agreements By The United States: Theory and Practice*, 42 MINN. L. REV. 879 (1958).

[168] *See Franklin Mint II*, 390 F.2d at 608-09.

[169] *See id. See generally* GOLD, *supra* note 123, at 439-57 (discussion of judicial application of gold units of account in international treaties that contain liability limitation provisions); McGilchrist, *supra* note 48, at 166-69 (discussion of foreign courts that have adopted alternate units of conversion for limiting carriers' liability).

[170] *See* Linee Aerea Italiene v. Riccioli, Judgment of Nov. 14, 1978, Corte cass. Italy, 1978 Foro It. I ____, *reprinted in* Franklin Mint Corp. v. Trans World Airlines, Inc., 690 F.2d 303 (2d Cir. 1982), app. 95-108 (hereinafter cited as Appendix). The sole issue in *Riccioli* was the defendant's liability limitation under Article 22. *Id.* at 101. After noting that alternative units of conversion exist for converting Convention judgments into Italian lira, the *Riccioli* court stated that the Warsaw authors' adoption of a gold franc as the Convention's conversion unit indicated that the authors intended to calculate damages through the exchange systems. *Id.* at 105. The court then determined that the SDR was closer to the value of the Poincaré franc and the official exchange rate of the Italian lire than any other alternative conversion unit. *Id.* at 106. The *Riccioli* court, therefore, held that the SDR was the conversion unit most consistent with the intentions of the Warsaw authors and used the SDR to calculate the liability of the defendant airlines. *Id.*

[171] Cosida S.p.A. v. British Airways European Division, Judgment of June 9, 1981, Corte app., Italy, 1981 For. It. I ____, *reprinted in* Appendix, *supra* note 170, at 31-41. In *Cosida*, the plaintiff sought recovery from British Airways European Division (B.E.A.) for the full value of a parcel containing gold objects which B.E.A. allegedly lost during the course of

both India[172] and Greece[173] also held that the free market gold price is the proper unit of conversion for determining liability limitations under Article 22.[174] In France, however, two courts have adopted the modern French franc as the Convention's conversion unit.[175] A lack of uniformity in Convention judgments, therefore, exists in foreign courts as well as in American courts.[176] The inability of courts to adopt a standard unit

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transport. *Id.* at 33. After determining that Article 22 limited B.E.A.'s liability, the *Cosida* court looked to the language of the Convention to determine the proper conversion unit. *See id.* at 40. The court stated that Article 22 required calculation of a carrier's liability according to the value by which francs are substituted on the date of decision. *Id.* Since a gold free market existed in Italy on the date of the decision, the court refered to the average quotation of the two principal European markets at London and Zurich to determine a free market gold price for calculating B.E.A.'s liability. *See id.* (court calculated B.E.A.'s liability with reference to conversion unit amounting to approximately $500 per troy ounce).

[172] *See* Kuwait Airways Corp. v. Sanghi, Judgment of August 11, 1978, ____, Civil Station Bangalore, India, 1978 ____, ____, *reprinted in* Appendix, *supra* note 170, at 265-71. In *Kuwait*, the defendant airlines lost plaintiff's luggage on a flight from India to London. *Id.* at 267. At trial, the defendant invoked Article 22 and claimed that the proper unit for calculating the defendant's liability limit was the official price of gold. *Id.* at 267-68. The court rejected the defendant's claim and held the free market gold price was the proper unit of conversion since the Indian Carriage by Air Act of 1972 provided that Article 22 calculations should be converted into rupees at the prevailing rate of exchange. *Id.* at 269.

[173] *See* Zakoapolos v. Olympic Airways Corp., Judgment of February 15, 1974, Ct. of App. 3d Dep't, Athens, 1974 ____ ____ (free market gold price is proper unit of conversion for purposes of Article 22), *reprinted in* Appendix, *supra* note 170, at 251-55. In *Zakoapolos*, the Athens Court of Appeals relied on the language of the Hague Protocol to determine that the free market gold price should be the Convention's unit of conversion. *Id.* at 252-53; *see supra* note 5 (Hague Protocol). Article 22 of the Hague Protocol provides that a court should convert damages into national currencies according to the currencies' gold values at the date of judgment. *See* Hague Protocol, *supra* note 5, art. 22. The *Zakoapolos* court reasoned that the Protocol's authors intended courts to use the free market price of gold since the official price of gold would not differ from one date to another. *See* Appendix, *supra* note 170, at 252-53.

[174] *See* GOLD, *supra* note 123, at 440-41 & nn.5-9 (foreign courts occasionally used market price of gold to convert Convention judgments prior to effective date of Jamaica Accords); *see also* Bulkan Bulgarian Airlines v. Tammaro, Judgment of Oct. 25, 1976, Corte app. Italy, 1976 Foro It. I ____ (court calculated defendant's liability limitation with reference to quotation of gold on principal European markets at London and Zurich), *reprinted in* Appendix, *supra* note 170, at 263, 263-64; Forencia C.I.A. Argentina De Seguros S.A. v. Varig S.A., Judgment of August 27, 1976, National Court of Appeals, Buenos Aires, 1976 Jurisprudencia Argentina [J.A.] ____ (court used free market gold price to convert Convention judgment), *reprinted in* Appendix, *supra* note 170, at 256, 257-60.

[175] *See* Pakistan Int'l Airlines v. Compagnie Air Inter S.A., Judgment of October 31, 1981, Cours d'appel, Aix-en-Provence, 1981 Dalloz-Sirey *Jurisprudence* [D.S. Jur.] ____ (court calculated carrier's liability with reference to value of current French franc because Jamaica Accords prohibit IMF members from maintaining external value of currency in terms of gold), *reprinted in* Appendix, *supra* note 170, at 156-70; Chamie v. Egyptair, Judgment of Jan. 31, 1980, Cours d'appel, Paris, 1980 D.S. Jur ____ (court rejected application of both last official gold price and free market gold price and used current French franc as conversion unit because French franc has gold weight identical to Poincaré franc), *reprinted in* Appendix, *supra* note 170, at 171-92.

[176] *Compare supra* note 16 and accompanying text (American courts have selected inconsistent units to convert Convention judgments) *with supra* notes 170-75 (foreign courts

of conversion undermines the intentions of the authors of the Warsaw Convention to provide uniform liability limitations.[177]

Since foreign and United States courts have failed to adopt a standard unit of conversion, a carrier's liability under Article 22 varies depending on where a plaintiff brings an action against the carrier.[178] Article 28 of the Convention provides that a plaintiff has the option of bringing suit in the court of the domicile of the carrier, or in the carrier's principal place of business, or in the country where the plaintiff contracted for carriage or at the place of destination.[179] A plaintiff alleging damages under the Warsaw Convention presumably will bring suit against a carrier in the court that uses the unit of conversion providing the highest liability limitation.[180] In the majority of cases, therefore, plaintiffs will bring suit in courts that use the free market price of gold as the unit of conversion since the value of the free market price is so much higher than the value of other units of conversion.[181] Alternatively, plaintiffs will bring suit in American courts that follow the *Franklin Mint II* and *Kimpo* decisions since plaintiffs usually will recover damages that exceed the Article 22 liability limitation.[182] The inability of the courts to adopt a standard unit

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have selected inconsistent units to convert Convention judgments).

[177] *See supra* notes 3 & 18-23 and accompanying text (Warsaw authors intended to create uniform levels of carriers' liability).

[178] *See supra* notes 165-70 and accompanying text (foreign courts adopt inconsistent units of conversion); *see also* Warsaw Convention, *supra* note 1, art. 28 (forum provision); Since courts adopt inconsistent units of conversion, plaintiffs in actions arising under the convention may be able to use Article 28(1) to secure high damage awards. For example, suppose a carrier operated by Air France departs from Paris to Montreal. En route to Montreal, the carrier stops in London and picks up passengers. After leaving London, the plane crashes outside of Montreal and all the passengers die. The majority of the passengers' relatives, therefore, probably would bring suit in Montreal, the place of destination, because Canadian courts utilize the free market price of gold to convert Convention judgments. *See In re* Air Crash Disaster at Warsaw Poland, on March 14, 1980, 535 F. Supp. 833, 839 (E.D.N.Y. 1982), *aff'd on other grounds*, 705 F.2d 85 (2d Cir. 1983). Passengers that bought tickets in London could bring suit in English courts where the unit of conversion is the SDR. *See* Franklin Mint Corp. v. Trans World Airlines, 690 F.2d 303, 308 n.14 (2d Cir. 1982) (British Carriage by Air order requires courts to use SDR to convert Convention judgments), *cert. granted*, 51 U.S.L.W. 3883 (U.S. June 14, 1983) (No. 82-1186). Presumably, very few passengers would bring suit in France because the French courts utilize the current French franc as the unit of conversion and the value of the French franc is far less than the value of the free market price of gold or the SDR. *See supra* note 175 and accompanying text (French courts convert Convention judgments with reference to current French franc).

[179] *See* Warsaw Convention, *supra* note 1, art. 28.

[180] *Id.*; *see supra* notes 169-76 and accompanying text (foreign courts have adopted inconsistent units of conversion).

[181] *See supra* note 11 and accompanying text (free market gold price has exceeded $850 an ounce).

[182] Interview with Sir Joseph Gold, Senior Consultant of the Legal Department of the International Monetary Fund, in Lexington, Virginia (April 8, 1983) (*Franklin Mint II* decision will lead to overcrowding in American courts as foreign plaintiffs will try to take advantage of unlimited liability) [hereinafter cited as Gold interview]; *supra* text accompanying note 154 (*Kimpo* and *Franklin Mint II* decisions subject carriers to unlimited liability in cargo and passenger cases).

of conversion, therefore, increases the possibility of widespread forum shopping.[183]

Although the Warsaw Convention continues to provide a degree of uniformity to international air travel,[184] the parties to the Convention must adopt a standard unit for converting Convention judgments to eliminate forum shopping and provide uniform liability limitatons.[185] The demise of the gold standard as an internationally approved unit of conversion has undermined the efforts of the Convention's authors to establish a uniform system of liability.[186] The parties to the Warsaw Convention, therefore, must amend Article 22 and replace gold with another unit of conversion that is more responsive to the current international order.[187] Arguably, the Montreal Protocols are an appropriate amendment because the Protocols substitute the SDR for gold as the Convention's unit of conversion.[188] Without the approval of the United States, however, there is little chance that the Warsaw parties will ratify the Protocols.[189] The lack of uniformity that currently characterizes Convention judgments will continue unless

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[183] *See Warsaw Revision*, *supra* note 150, at 307 (forum shopping contravenes Convention's purpose of uniformity).

[184] *See* MONTREAL REPORT, *supra* note 5, at 5 (Warsaw Convention provides uniform system of rules and procedures for protection of travellers and shippers); *see also In re* Paris Air Crash of March 3, 1974, 399 F. Supp. 732, 741-42 (C.D. Cal. 1975). The *Paris Crash* case demonstrates the problems that will arise if courts hold Article 22 unenforceable and rely on state law rules to determine damage awards. *See id.*; *see also supra* notes 71-73 and accompanying text (common-law rules of liability apply in cargo cases after *Franklin Mint II*); *supra* notes 149-53 and accompanying text (state wrongful death statues determine damage awards in cases involving death after *Kimpo*). *Paris Crash* arose out of a fatal accident involving an American-built plane owned by Turkish Air Lines shortly after takeoff in France. *See Paris Crash*, 399 F. Supp. at 735. The 337 decedents in *Paris Crash* were from 24 countries. *Id.* at 741-42. The claimants were from 12 states. *Id.* After *Kimpo* and *Franklin Mint II*, a court would have to determine choice of law questions and recoverable damages under each set of state law. Applying the various state rules could thus lead to virtually endless litigation in personal injury cases arising under the Convention. Enforcement of Article 22, however, would prevent the lengthy litigation that is inevitable if courts must determine each case on the basis of state law liability rules. *See* MONTREAL REPORT, *supra* note 5, at 6 (Warsaw Convention insures reliable recovery to plaintiffs with less litigation and related expenses than if Convention did not exist).

[185] *See supra* notes 178-83 and accompanying text (inconsistent liability limits lead to forum shopping); *supra* notes 169-76 and accompanying text (foreign courts have adopted inconsistent units of conversion); *supra* note 16 and accompanying text (American courts have adopted inconsistent units to convert Convention judgments).

[186] *See supra* note 6 and accompanying text (demise of gold standard); *supra* notes 2-3 and accomanying text (purpose of Convention).

[187] *See supra* notes 32-34 and accompanying text (Warsaw parties determined gold was inappropriate unit of conversion).

[188] *See* MONTREAL REPORT, *supra* note 5, at 5 (Senate Foreign Relations Committee strongly supported Montreal Protocols); *supra* notes 32-38 and accompanying text (Montreal Protocols).

[189] Gold interview, *supra* note 182; *see* MONTREAL REPORT, *supra* note 5, at 5 (Warsaw parties probably will not ratify Protocols if Senate rejects Protocols); *supra* note 35 (United States played important role in drafting of Montreal Protocols).

the Warsaw parties take action to insure uniform application of the Convention's liability limitations.[190]

Absent international action, Congress may take steps to insure uniform application of Article 22 in American courts by selecting an appropriate unit of conversion.[191] Some countries have precluded national courts from selecting inconsistent units of conversion to enforce Article 22 by enacting official regulations specifying the montary units that courts should use to convert Convention judgments.[192] For example, English courts achieved consistent application of Article 22 after the government promulgated the Carriage by Air Order of 1980 and allowed courts to utilize SDRs for purposes of the Warsaw Convention.[193] By enacting legislation that provides a substitute for gold as the Convention's unit of conversion, Congress would eliminate the inconsistent judgments that currently arise under Article 22 and forestall widespread denunciation of the Convention by countries whose airlines are subject to unlimited liability in American courts.[194]

In selecting a conversion unit for American courts, Congress should attempt to promote international uniformity by adopting an internationally recognized unit of conversion.[195] Since most countries no longer approve of gold as a conversion unit,[196] the SDR is the most logical unit for conver-

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[190] *See supra* notes 169-76 and accompanying text (foreign courts have adopted inconsistent units of conversion); *supra* note 16 and accompanying text (American courts have adopted inconsistent units to convert Convention judgments).

[191] *See In re* Air Crash Disaster at Warsaw, Poland on March 15, 1980, 535 F. Supp. 833, 844 (E.D.N.Y. 1982) (Congress must enact legislation to resolve uncertainty in American courts concerning Convention's unit of conversion), *aff'd on other grounds*, 705 F.2d 85 (2d Cir. 1983).

[192] *See* S. Silard, *A Comment on* Franklin Mint v. TWA (Dec. 7, 1982) (unpublished manuscript) (West Germany, Norway, Sweden, Ireland, and Great Britain have adopted SDRs as basis for converting Convention judgments into national currencies); Gold interview, *supra* note 182 (Netherlands recently adopted SDR as basis for calculating carrier's liability limitations).

[193] *See* British Carriage By Air (sterling equivalents) Order of 1980, Statutory Instrument 1980 No. 281 (Parliament adopted SDR for purposed of Article 22). The Carriage By Air Order allows the British government to fix the sterling equivalent to the Warsaw Convention's unit of conversion. *Id.*; *see* McGilchrist, *supra* note 48, at 164 (Carriage By Air Order insures that Convention's liability limitations are uniform). In 1978, the British government amended the Carriage By Air order to effect conversions on the basis of the current market value in sterling of the SDR. *Id.* British courts, therefore, have experienced no difficulty converting the Convention's liability limitations into pounds. *Id.*

[194] *See* J. GOLD, *supra* note 121, at 92 (enactment of official regulations translating Poincaré gold francs into SDR eliminates problem of inconsistent application of gold clauses); *supra* note 16 (American courts have adopted inconsistent units of conversion).

[195] *See supra* notes 184-90 and accompanying text (Warsaw parties must adopt standard unit of conversion since uniformity in international aviation law is purpose of Convention); *supra* note 24 and accompanying text (Warsaw authors selected gold as Convention's conversion unit because gold was internationally approved conversion unit that provided consistent liability limitations).

[196] *See* GOLD, *supra* note 123, at 455-46 (most countries do not recognize gold as acceptable unit of conversion).

ting Convention judgments.[197] First, the SDR currently serves the same monetary function that gold served when gold had an official price.[198] Consequently, parties to at least thirty other international transportation conventions have replaced gold with the SDR as the conventions' unit of conversion.[199] Second, the Warsaw parties determined that the SDR is the logical replacement for gold at the conference that promulgated the Montreal Protocols.[200] Although the Senate rejected ratification of the Protocols, the legislative history of the rejection indicates approval of the use of the SDR as a conversion unit.[201] Third, the SDR is not subject to unilateral devaluation like a national currency because the IMF's Articles of Agreement require 85 percent of the organizaton's 146 members to approve a major change in the SDR's valuation.[202] Finally, the SDR is a relatively stable unit because the SDR does not have a commodity price.[203] Use of the SDR as the Convention's conversion unit, therefore, provides the stable liability limitations sought by the Warsaw parties.[204] Since the SDR is the logical substitute for gold as the Convention's unit of conversion, Congress should follow England's lead and enact legislation requiring courts to convert Convention judgments with reference to the SDR.[205]

Until Congress determines the proper unit of conversion, however, the American courts must enforce Article 22 by selecting one of the alternative units.[206] Although no court has used the SDR to calculate a car-

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[197] *See* Franklin Mint Corp. v. Trans World Airlines, 525 F. Supp. 1288, 1289 (S.D.N.Y. 1981) (court determined that SDR is logical unit of conversion because SDR has replaced gold as international unit of conversion), *aff'd*, 690 F.2d 303 (2d Cir. 1982), *cert. granted*, 51 U.S.L.W. 3883 (U.S. June 14, 1983) (82-1186).

[198] *See supra* note 13 (IMF replaced gold with SDR as international unit of conversion in Jamaica Accords).

[199] Gold interview, *supra* note 182; *see* GOLD, FLOATING CURRENCIES SDRS, AND GOLD 37-38 (IMF Pamphlett series No. 22, 1978) (international organizations and conventions that have replaced gold with SDR as unit of conversion).

[200] *See supra* notes 32-34 (Montreal Conference).

[201] *See* 29 CONG. REC. S2239 (daily ed. March 7, 1983) (statement of Sen. Percy) (SDR is stable unit of conversion that provides more consistent measurements than gold or any particular currency); *see also* Letter from Elizabeth H. Dole, Secretary of Transportation, to Howard Baker (March 7, 1983) (Reagan Administration approves of use of SDR as conversion unit for limiting liability under Warsaw Convention), *reprinted in* 29 CONG. REC. S2278 (daily ed. March 8, 1983).

[202] *See* Articles, *supra* note 13, art. 15, § 2.

[203] *See* Franklin Mint Corp. v. Trans World Airlines, 690 F.2d 303, 310 (2d Cir. 1982) (SDR is relatively stable since SDR fluctuations are generally less extreme than fluctuations in free market gold price), *cert. granted*, 51 U.S.L.W. 3883 (U.S. June 14, 1983) (No. 82-1186).

[204] *See supra* text accompanying note 17 (Convention's authors drafted Article 22 to insure uniform limitations of carriers' liability).

[205] *See supra* note 193 and accompanying text (British Carriage by Air Act); *supra* note 192 (foreign countries that have adopted SDRs for purpose of converting Convention judgments); *see also* J. GOLD, THE FUND AGREEMENT IN THE COURTS XVIII 648 (1982) (IMF countries currently are substituting SDRs for gold as conversion units for international conventions which formerly used Poincaré franc to convert convention judgments).

[206] *See* Deere v. Deutsche Lufthansa Aktiengesellschaft, No. 81 C 4726, slip op. at 3

rier's liability, a strong argument exists that American courts may use SDRs to convert Convention judgments.[207] Generally, courts try to interpret the Warsaw Convention in view of its modern purposes, rather than acceding to the goals of the era when the Convention was promulgated.[208] Since the SDR currently serves the same function as an international unit of conversion that gold served in 1929, use of the SDR as the Conven-

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(N.D. Ill. Dec. 30, 1982) (American courts must enforce Article 22 since United States remains party to Warsaw Convention); *supra* note 9 (role of judiciary in foreign affairs is to enforce treaties).

[207] *See* GOLD, *supra* note 121, at 91 (rational choice for courts applying Warsaw Convention's gold clause is to use SDR to convert Convention judgments). Several foreign courts have used the SDR to calculate carriers' liability in cases arising under international transport conventions that use Poincaré gold francs as the conventions' unit of conversion. *See, e.g.*, Matter of the Khendrick Kuivas, Judgment of Dec. 29, 1976, Hamburg District Court, Federal Republic of Germany, 1976 ___ 6; Linee Aerea Italiene v. Riccioli, Judgment of Nov. 14, 1978, Corte Cass., Italy Foro It. I ___, *reprinted in* Appendix, *supra* note 170, at 95-108; State of the Netherlands v. Giant Shipping Corp., Judgment of May 1, 1981, Supreme Court Neth., 1981, N.J. ___, *reprinted in* Appendix, *supra* note 170, at 64-95. In the *Khendrik Kuivas* case, for example, the Hamburg District Court adoptd the SDR for calculating the liability of a Soviet vessel in a case arising under the International Convention Relating to the Limitation of the Liability of Ounces of Seagoing Ships (Ship Convention). *Id.* The liability limitation clause in the Ship Convention, like Article 22 of the Warsaw Convention, refers to the Poincaré gold franc as the Ship Convention's unit of conversion. *Id.* at 4. The *Khendrick Kuivas* court reasoned that the application of the SDR was the most practical procedure for achieving uniformity in international limits of liability because the IMF was in the process of substituting SDRs for gold as the international unit of account. *Id.* at 6.

More recently, in the *Giant Shipping* case, the Supreme Court of the Netherlands adopted the SDR as the unit of conversion for an analogous liability limitation provision under the International Convention on Carriage of Goods by Sea. *See* Appendix, *supra* note 170, at 87 (court rejected applicaton of free market price to calculate carrier's liability under convention that referred to Poincaré gold franc as unit of conversion). The *Giant Shipping* court offered two justifications for its holding that the SDR was the proper unit of conversion for Convention judgments. *Id.* First, the IMF had adopted the SDR as the successor to gold as the internationally approved unit of conversion. *Id.* Second, legislatures in many countries were preparing amendments to international transportation conventions that would replace gold with the SDR as the conventions' unit of conversion. *Id.* The Netherlands legislature subsequently approved the *Giant Shipping* decision by adopting SDRs as the basis for converting Convention judgments into guilders. Gold interview, *supra* note 153. Since *Giant Shipping* is the only decision concerning conversion units rendered by the highest court of a Warsaw Convention party, American courts should afford the *Giant Shipping* holding some probative value when enforcing Article 22. *See* Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 158-63 (1934) (Supreme Court relied on interpretation of multilateral treaty by Canadian Supreme Court); *supra* notes 17 & 185-90 and accompanying text (one major goal of Warsaw Convention is uniform application of Article 22).

[208] *See* Day v. Trans World Airlines, 528 F.2d 31, 35 (2d Cir. 1975) (judiciary may construe Convention's provisions liberally to insure that change in circumstance from date of treaty's drafting does not destroy purpose of treaty), *cert. denied*, 429 U.S. 890 (1976); *see also* Maugnie v. Compagnie Nationale Air France, 549 F.2d 1256, 1261 n.10 (9th Cir. 1977) (court may consider change in circumstances since 1929 treaty enactment when construing provisions of Warsaw Convention); *cf.* Nielsen v. Johnson, 279 U.S. 47, 51-52 (1929) (courts should construe treaties liberally to effectuate intentions of treaties' parties).

tion's conversion unit would provide a contemporary interpretation of Article 22.[209] Moreover, since application of SDRs as the Convention's unit of conversion would produce stable limitations of liability, use of the SDR to convert Convention judgments is more consistent with the Convention's purpose of limiting carriers' liability than is holding the Convention's liability limitations unenforceable.[210] In addition, use of the SDR to convert Convention judgments is consistent with a recent trend among the Warsaw parties to adopt SDRs for converting Convention judgments in the parties' national courts.[211] Since uniformity is one of the principal goals of the Convention, American courts often have considered the practices of other signatories when applying provisions of the Warsaw Convention.[212] Although use of the SDR to convert Convention judgments may depart from the Convention's language, courts may use the SDR since application of the SDR effectuates the modern purposes of the Convention.[213]

Since the Senate has not terminated the United States' adherence to the Warsaw Convention, courts in the United States must still enforce the Convention's liability limitation provisions.[214] Until the parties to the Convention adopt a uniform standard or until Congress acts affirmatively, American courts must attempt to adopt consistent units of conversion.[215] Although the courts may have difficulty adopting a standard unit of conversion, the courts should not follow the *Franklin Mint II* and *Kimpo* courts' decisions that Article 22 is unenforceable because courts do not have the authority under the Constitution to affect changes in the essential provisions of treaties.[216] Instead, courts should use the SDR to calculate

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[209] *See* Articles, *supra* note 13, art. 15 (IMF's Articles provide for replacement of gold with SDR as international unit of conversion); Gold interview, *supra* note 182 (SDR logical conversion unit for purposes of Article 22 because SDR will replace gold as internationally approved conversion unit).

[210] *See supra* note 33 and accompanying text (Montreal Conference determined that SDR was logical unit of conversion for Article 22 because application of SDR produced stable liability limitations).

[211] *See supra* notes 192-93 and accompanying text (countries that have adopted SDRs as basis for converting Convention judgments into national currencies).

[212] *See* Benjamins v. British European Airways, 572 F.2d 913, 919 (2d Cir. 1978) (court looked to opinions of other Warsaw signatories to insure uniform application of Convention), *cert. denied,* 439 U.S. 1114 (1979); Block v. Compagnie Nationale Air France, 386 F.2d 323, 337-38 (5th Cir. 1967) (courts obliged to keep interpretation of Warsaw Convention as uniform as possible with interpretations of other signatories), *cert. denied,* 392 U.S. 405 (1968)

[213] *See supra* note 207 (list of foreign courts that have determined application of SDR best effectuates Convention's purpose of providing stable and uniform liability limitations).

[214] *See supra* note 9 & 158-67 and accompanying text (courts have constitutional responsibility to enforce treaties that Senate has ratified).

[215] *See supra* notes 9 & 36 and accompanying text (courts must select proper unit of conversion because Warsaw parties have not amended Article 22 to take account of change in gold's status)

[216] *See supra* notes 158-67 and accompanying text (*Franklin Mint II* court lacked authority for holding Article 22 unenforceable); *see also supra* notes 55-68 and accompanying text (*Franklin Mint II*); *supra* notes 137-43 and accompanying text (*Kimpo*).

carriers' liability since use of the SDR provides a modern day interpretation of the Convention.[217] A less desirable but also legitimate conversion factor is the last official price of gold.[218] American courts that are hesitant to use the SDR because use of the SDR departs from the Convention's language can follow the *Warsaw Crash* and *Deere* holdings and utilize the last official gold price to limit carriers' liability.[219] Consistent application of either the last official gold price or the SDR fulfills the United States' obligation to observe requirements of the Convention and thus insures that both passengers and carriers receive the benefits of the uniform system of liability provided by the Warsaw Convention.

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[217] *See supra* notes 206-13 and accompanying text (American courts can use SDR to convert Convention judgments).

[218] *See supra* notes 112-30 and accompanying text (use of last official gold price effectuates purpose of Convention better than does use of free market gold price).

[219] *See supra* notes 89-97 and accompanying text (*Deere*); *supra* notes 98-111 and accompanying text (*Warsaw Crash*); *see also supra* notes 112-30 (last official gold price preferable conversion unit than free market gold price).