

CHANGES IN INTERNATIONAL AIR CARGO: MONTREAL PROTOCOL NO. 4 ATTAINS FORCE OF LAW

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I. INTRODUCTION

On March 4, 1999¹, the handling of many international air cargo claims arising within the United States changed.² International air cargo claims are now governed by the provisions of Additional Protocol No. 4 to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed At Warsaw, signed at Montreal on September 25, 1975 [hereinafter Montreal Protocol No. 4]. Montreal Protocol No. 4 attained force of law on June 14, 1998 following

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1. Additional Protocol No. 4 to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed At Warsaw, signed at Montreal on September 25, 1975 [hereinafter Montreal Protocol No. 4]. The United States ratified Montreal Protocol No. 4 on Sept. 28, 1998, and the instrument of ratification was deposited at the Ministry for Foreign Affairs of the Polish People's Republic on Dec. 4, 1998. Art. XVIII, § 1 of Montreal Protocol No. 4 permits an instrument of ratification to come into force on the ninetieth day following deposit with the Government of the Polish People's Republic.

2. Providing the country of origin has ratified Montreal Protocol No. 4 and it has come into force.

ratification by thirty countries as required by the Treaty.³ Since then, eight additional countries besides the United States have ratified the Treaty.⁴ Notably absent, however, are twelve of the United States' twenty-five largest trading partners.⁵

The terms of Montreal Protocol No. 4 remove the requirement that documentation accompany cargo, alter defenses formerly available to an air carrier, and among countries subject to the Treaty, provide a uniform method of determining the limit of liability when cargo is lost, damaged or destroyed.

This article will examine the scope and distinguishing features of Montreal Protocol No. 4, discuss time limitations for notice of claim that are operative as a result of Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Hague on September 28, 1955 [hereinafter The Hague Protocol],⁶ and the surviving provisions of the original Warsaw Convention.

II. SCOPE OF MONTREAL PROTOCOL NO. 4

The Warsaw Convention, as amended by Montreal Protocol No. 4, continues to apply to all international carriage of persons, luggage or goods

3. Montreal Protocol No. 4, *supra* note 1, art. XVIII, § 1 (requires that at least thirty signatory States deposit their instruments of ratification with the Polish government before the Protocol comes into force). The first thirty countries to ratify in alphabetical order are: Argentina, Australia, Bosnia & Herzegovina, Brazil, Columbia, Croatia, Cyprus, Denmark, Egypt, Estonia, Ethiopia, Federal Republic of Yugoslavia, Finland, Ghana, Greece, Guatemala, Hungary, Ireland, Israel, Italy, Kuwait, Netherlands, Norway, Portugal, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Togo, and the United Kingdom, from the web site of the International Air Transportation Association, IATA "Delighted" at US Ratification of Montreal Protocol No. 4 (visited Feb. 12, 1999), <<http://www.iata.org/cargo/protocol4.htm>>.

4. Honduras, Mauritius, Nauru, Niger, Oman, Singapore, Turkey and Uzbekistan (Pakistan) all ratified on June 14, 1998 and the Protocol became effective Sept. 12. International Air Transportation Association, IATA "Delighted" at US Ratification of Montreal Protocol No. 4, (visited Feb. 12, 1999) <<http://www.iata.org/cargo/protocol4.htm>>.

5. The Federal Interagency Council on Statistical Policy maintains a web site located at <<http://www.fedstats.gov/>> to provide consumers with access to information produced by more than seventy agencies of the United States Federal Government. These statistics, located at <<http://webcentral.bts.gov/oai/international/table9.txt>>, reveal the top twenty-five countries ranked by total number of freight tons as of 1994 and an (N) after the name of the country signifies that it has not yet ratified Montreal Protocol No. 4: Japan (N), United Kingdom, Germany (N), South Korea (N), Columbia, France, Netherlands, Taiwan (N), Brazil, Hong Kong-UK (N), Canada, Italy, Mexico (N), Chile, Switzerland, Belgium, Dominican Republic (N), Costa Rica (N), Guatemala, Luxembourg (N), Ecuador (N), Singapore, Australia, Peru (N), and El Salvador (N).

6. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 28, 1955, 478 U.N.T.S. 371[hereinafter The Hague Protocol].

performed by aircraft gratuitously or for a fee.⁷ International carriage may take place between the territories of two countries or the place of departure and destination may be in the same country with an agreed stopping place in another country.⁸ For example, cargo loaded on board an aircraft in New York, which makes a stop in Montreal and is offloaded in Los Angeles is international cargo. Similarly, cargo moving from one international destination to another may be carried by several air carriers and one leg may be entirely within one country. The *domestic* leg does not destroy the international nature of the air carriage and the terms of the Convention still apply.⁹

Montreal Protocol No. 4 excludes postal items from its scope instructing that the contractual relationship between air carriers and the relevant postal administration controls.¹⁰ This prohibits an air carrier from asserting a limit of liability that is inconsistent with policy of the postal administration.

A ratifying country may opt out of Montreal Protocol No. 4, upon written notice to the Polish Government, when chartering an entire aircraft to carry military cargo, baggage, or personnel.¹¹ This provision becomes useful when large quantities of military equipment are quickly transported near an area of open hostility and the government calls upon commercial air carriers to assist.

Presently,¹² thirty-eight countries have deposited instruments of ratification with the Government of the Polish People's Republic signifying intent to abide by Montreal Protocol No. 4 and its force of law flows only between them.

III. DISTINGUISHING FEATURES OF MONTREAL PROTOCOL NO. 4

The provisions of Montreal Protocol No.4 significantly alter the terms of the original Warsaw Convention and The Hague Protocol. First, changes in the documentation accompanying cargo will reduce expenses for air carriers, freight forwarders, and consolidators. Second, the valuation of lost, damaged, or destroyed freight will be expressed in units of Special

7. Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.S. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 1502 (1988) [hereinafter Warsaw Convention], art. 1, § 1.

8. The Hague Protocol, *supra* note 6, art. I(a).

9. *Id.* art. I(b).

10. Montreal Protocol No. 4, *supra* note 1, art. II.

11. *Id.* art. XXI, § 1(a).

12. The effective date of this information is Dec. 31, 1998. The International Air Transport Association updated the list of ratifying countries on Sept. 29, 1998 and Dec. 31, 1998. The organization's web site has a search engine and the homepage is located at <<http://www.iata.org/>>.

Drawing Rights calculated regularly by the International Monetary Fund.¹³ Finally, defenses formerly available to air carriers have been restricted or eliminated.

A. *Changes in Documentation Accompanying Cargo*

In the spirit of advancing technology, the crafters of Montreal Protocol No. 4 renamed the section¹⁴ addressing air waybills from Air Consignment Note to Documentation relating to cargo, inferring that it was no longer imperative that consignment documents travel with the cargo.¹⁵ Consistent with this change, the air carrier is no longer required to sign the air waybill upon acceptance of the goods.¹⁶

This departure from tradition, as a cost saving measure,¹⁷ permits the air carrier to agree in advance with its customer that an electronic method which preserves a record of the cargo will suffice for purposes of shipment.¹⁸ Instead of the traditional air waybill, the customer may request, and be issued, a receipt from the carrier identifying the cargo, place of departure and destination, weight, and express permission to access the electronic air waybill.¹⁹ At the time of delivery, a similar receipt may be printed for the consignee to indicate acceptance. If cargo is traveling across country with a stop in a foreign country, the location of the stop must be indicated on the receipt if the cargo is to retain international character. Montreal Protocol No. 4, like The Hague Protocol, requires a lot less information on the air waybill than required under the original 1929

13. By linking valuation to Special Drawing Rights, the framers of the Treaty attempted to eliminate controversy that arose over the unit of account in which a limit of liability is expressed when the world shifted from the gold standard in 1978.

14. Warsaw Convention, *supra* note 7, ch. II, § III is entitled "Air Consignment Note" and Montreal Protocol No. 4, *supra* note 1, art. III, deletes that title and replaces it with "Documentation relating to cargo."

15. Warsaw Convention, *supra* note 7, art. 6, para. 1, required that the air consignment note be handed over with the goods.

16. The Hague Protocol, *supra* note 6, art. V, shifted the signature requirement for the air carrier from the time the cargo was accepted, *Id.* § III, art. 6, para. 3, to anytime before the cargo was loaded on board the aircraft. Montreal Protocol No. 4, *supra* note 1, removes the air carrier signature requirement completely.

17. *Testimony of Assistant Secretary of State for Economic and Business Alan P. Larson on the Issue of Affairs Pending Treaties and Protocols before the Senate Committee on Foreign Affairs Wednesday, May 13, 1998*, at 2, para. 5 (visited Nov. 24, 1998), <<http://www.senate.gov/~foreign/larson.htm>>.

18. Montreal Protocol No. 4, *supra* note 1, art. 5, para 2.

19. *Id.* art. 8, which requires that the air waybill and receipt for cargo contain the point of departure and destination and the weight of the shipment. *Id.* art. 5, para. 2, permits a receipt providing identification of the cargo and access to the electronic record.

Warsaw Convention.²⁰ Practitioners will observe that ratification of Montreal Protocol No. 4 results in the removal of Article 9 of the Warsaw Convention.²¹ This is expected to eliminate litigation over incomplete air waybills. Also notable among the changes is the lack of a statement that the air carriage is subject to the rules relating to liability established by the Warsaw Convention.²² Customer refusal to abide by this cost saving measure does not permit the carrier to refuse the shipment.²³

B. *Limitation of Liability Expressed in Special Drawing Rights*

In the event of loss or damage, carrier liability is limited to seventeen Special Drawing Rights, as defined by the International Monetary Fund, per kilogram.²⁴ The valuation date for any conversion from Special Drawing Rights to the local currency is the date of judgment by any competent court.²⁵ This limitation applies unless the customer has declared a specific interest in delivery at destination and paid additional freight, if required. The consignor may also have the option to insure the goods under a policy of insurance²⁶ issued to the carrier by requesting the coverage and paying the carrier the required charges. If cargo is damaged but not destroyed, the carriers' liability is the smaller value comparing the cost to repair against the limitation expressed in Montreal Protocol No. 4. This amount is determined by multiplying the weight of the damaged cargo in kilograms times seventeen Special Drawing Rights.²⁷ The Special Drawing Rights are then converted into local currency.²⁸ A sample

20. Warsaw Convention, *supra* note 7, art. 8 contained seventeen items to be included on the Air Consignment Note. This quantity of information was reduced to only four by Art. VI of The Hague Protocol, *supra* note 6. However, The Hague Protocol to the Warsaw Convention 1955 was not adopted by the United States until it ratified Montreal Protocol No. 4.

21. Warsaw Convention, *supra* note 7, art. 9 prohibited a carrier from asserting limitations of liability or exclusions afforded it by the Treaty if it accepted cargo without a complete air waybill.

22. Warsaw Convention, *supra* note 7, art. 8(q) has been deleted by The Hague Protocol. However, the United States failed to ratify this Treaty and chose instead to continue to observe the terms of the original Warsaw Convention.

23. Montreal Protocol No. 4, *supra* note 1, art. 5, para. 3.

24. *Id.* art. VII (b, d).

25. *Id.* art. VII (d).

26. *Id.* art. VII (b).

27. The Hague Protocol, *supra* note 6, art. XI, rewrites the Warsaw Convention, *supra* note 7, art. 22, para. 2(b).

28. International Monetary Fund Treasurer Department (visited Jan. 4, 1999)

<<http://www.imf.org/external/np/tre/sdr/drates/0701.htm>> ; this website is where currency values are expressed in terms of Special Drawing Rights each day.

calculation is presented in the footnotes below.²⁹ Presently one hundred eighty two countries³⁰ are members of the International Monetary Fund including thirty-six of thirty-eight countries that have ratified Montreal Protocol No. 4.³¹ Cargo claims arising in countries that have ratified the treaty but are not members of the International Monetary Fund are resolved in a judicial proceeding prescribed by the Treaty.³² The court converts the carrier's liability per kilogram into local currency equivalent to 250 Poincaré gold francs per kilogram, a fictitious unit of account defined as the value of sixty-five and a half milligrams of gold of nine hundred millesimal fineness.

C. *Changes in Defenses Available to the Air Carrier*

Changes in documentation relating to cargo have led to the first defense surrendered by the air carrier. Historically, the consignor was responsible for the preparation of the air waybill as well as any irregularity, incorrectness, or lack of required information.³³ The carrier lost the ability to raise the limitations contained in the Treaty if it accepted an incomplete air waybill.³⁴ With preparation of the cargo receipt shifting to the air carrier, any irregularity resulting in loss or damage becomes its responsibility and it must indemnify the consignor reversing the historical trend.³⁵

Before Montreal Protocol No. 4 attained force of law, many international air carriers excluded liability arising from four sources over which they had no control. In order to accomplish this, they published the exclusions on their air waybill and in their tariff which was filed with

29. For example, ten pallets of computer components are shipped from Argentina (has also ratified Montreal Protocol No.4) to the United States. Each pallet weighs four hundred kilograms and one pallet is destroyed during the loading of the aircraft. The carrier's liability on Dec. 31, 1998 would be the lesser of the cost to replace the destroyed merchandise or \$9,574.60. The calculation for this value is 400 (kilograms) x 17 (Special Drawing Rights per kilogram) x 1.408030 (Currency units per Special Drawing Right on the date specified) = \$9,574.60. If the consignee (recipient of the cargo) can replace the freight contained on the pallet for \$7,500, the carrier owes the lesser amount.

30. Member countries of the International Monetary Fund may be located at <<http://www.imf.org.external/np/sec/memdir/members.htm>> and the home site is located at <<http://www.imf.org/>>.

31. A comparison of countries that are members of The International Monetary Fund to countries that have ratified Montreal Protocol No. 4 reveals that only Nauru and Zaire are not members of the International Monetary Fund.

32. Montreal Protocol No. 4, *supra* note 1, art. VII(d).

33. Warsaw Convention, *supra* note 7, art. 10, para. 1.

34. *Id.* art. 9.

35. Montreal Protocol No. 4, *supra* note 1, art. 10, para. 3.

government authorities. The four categories were: inherent defect of the cargo, improper packing, an act of war or armed conflict, or an act of a public authority. All are now included as defenses in Montreal Protocol No. 4 and the Treaty places the burden of proof on the carrier.³⁶

Under Article 20 of the Warsaw Convention, liability may be avoided if the carrier can prove that it and its agents took all necessary measures to avoid damage or demonstrate that it was impossible for such measures to be taken.³⁷ Under Montreal Protocol No. 4, this defense is now limited to instances where delay results in loss or damage to the cargo.³⁸ The Warsaw Convention imposed liability on the carrier for damage occasioned by delay in the carriage of goods.³⁹

D. *Time Limitations for Notice of Claim*

When the United States ratified Montreal Protocol No. 4, a provision of the treaty⁴⁰ gave force to all the surviving provisions of The Hague Protocol. One significant cargo provision of this treaty amendment has survived and will affect the handling of international air cargo claims now that Montreal Protocol No. 4 has taken effect.

Under the Warsaw Convention, damage complaints had to be made in writing within seven days of receipt of the cargo if it was damaged and within fourteen days of notice that the cargo was available for pickup if the air carriage was delayed.⁴¹ Failure to notify the carrier of intent to make a claim in a timely manner resulted in a time bar and claim prohibition.⁴² The provisions of The Hague Protocol expand these time limits. A written complaint must now be made within fourteen days of cargo receipt in the case of damage and within twenty-one days of notice that the cargo is available for pickup in the case of delay.⁴³ Article 35 of the Warsaw Convention defines *days* as current days and not working days. This provision remains effective.

IV. SURVIVING PROVISIONS OF THE 1929 WARSAW CONVENTION

Many provisions of the 1929 Warsaw Convention have survived the amendments of The Hague Protocol 1955 and Montreal Protocol No. 4 in

36. *Id.* art. IV, which rewrites Warsaw Convention, art. 18 by adding these defenses in para. 3 (a - d).

37. Warsaw Convention, *supra* note 7, art. 20, para. 1.

38. Montreal Protocol No. 4, *supra* note 1, art. V, which rewrites Warsaw Convention, *supra* note 7, art. 20.

39. Warsaw Convention, *supra* note 7, art. 19.

40. Montreal Protocol No. 4, *supra* note 1, art. XV.

41. Warsaw Convention, *supra* note 7, art. 26, § 2.

42. *Id.* art. 26, paras. 2, 4.

43. The Hague Protocol, *supra* note 6, art. XV.

1975. These provisions fall generally into two categories: application of the treaty and liability of the air carrier.

A. *Application of the Treaty*

The supremacy clause of the 1929 Warsaw Convention remains in force.⁴⁴ It holds that with one exception, any contractual provision between an air carrier and other parties, which attempts to relieve the carrier of liability otherwise imposed by the Treaty, or fix a lower monetary limitation per unit of freight is null and void.⁴⁵ The exception applies to an arbitration clause for cargo claims which is permitted as long as the arbitration takes place within the territory of a ratifying state and in which a court may obtain jurisdiction over the air carrier.⁴⁶ When a provision of a contract between the air carrier and another party is declared void, the contract becomes divisible and surviving provisions remain enforceable.⁴⁷

A potential conflict exists when a cargo claim arises in a country that has not yet ratified Montreal Protocol No. 4 but has ratified the original Warsaw Convention or any of its amendments. These include The Hague Protocol, Additional Protocol No. 1 signed at Warsaw to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed on September 25, 1975 [hereinafter Montreal Protocol No. 1], and Additional Protocol No. 2 to Amend Convention for the Unification of Certain Rules Relating to International Carriage By Air Signed At Warsaw Signed on September 25, 1975 [hereinafter Montreal Protocol No. 2]. Both Montreal Protocols No. 1 and No. 2 limit the liability of the air carrier to 17 Special Drawing Rights per kilogram of cargo.⁴⁸ The Hague Protocol to the Warsaw Convention 1955 limits carrier liability to two hundred fifty francs per kilogram and converting currencies has been the subject of much controversy.⁴⁹

44. Warsaw Convention, *supra* note 7, art. 32.

45. *Id.*

46. *Id.* arts. 32, 28.

47. *Id.* art. 23.

48. Additional Protocol No. 1 To Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw, on Oct. 12, 1929, Signed at Montreal Sept. 25, 1975 [hereinafter Montreal Protocol No. 1], art. II rewrites Warsaw Convention, *supra* note 7, art. 22 introducing Special Drawing Rights. Additional Protocol No. 2 To Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw, Oct. 29, 1929, as Amended by the Protocol done at The Hague on Sept. 28, 1955, Signed at Montreal, Sept. 25, 1975 [hereinafter Montreal Protocol No. 2], art. II also rewrites Warsaw Convention, *supra* note 7, art. 22, and includes an additional provision in para. 2(b) specifying that only the weight of the damaged package is used in calculating the liability of the carrier.

49. In *SS Pharmaceuticals Co. Ltd. v. Qantas Airways Ltd.*, 22 NSWLR 734 (1988), an Australian court determined that carrier liability was based upon the market value of gold.

Presently, 113 countries have ratified the Warsaw Convention and 103 countries have ratified The Hague Protocol.⁵⁰ Forty-one countries⁵¹ have ratified Montreal Protocol No. 1 and forty-three⁵² countries have ratified Montreal Protocol No. 2, both of which came into force in 1997.⁵³ When cargo claims arise and the countries of origin and destination have ratified different Amendments to the Treaty, the version (be it original Warsaw Convention, The Hague Protocol, or any of the Montreal Protocols) that both countries have ratified will be the law that is applied.⁵⁴

B. *Liability of the Air Carrier*

Traditionally, receipt of the cargo without complaint, by the party entitled to delivery has exonerated the carrier from any liability.⁵⁵ Prior to ratification of Montreal Protocol No. 4, a clean air waybill signed by the consignee without comment created the presumption of a successful air carriage and delivery.⁵⁶ Now, a clean cargo receipt or lack of notice of claim will serve to establish that the cargo was delivered in satisfactory condition.⁵⁷

There continues to be a requirement of written notice of intent to file a claim and it may be noted on the air waybill or cargo receipt, or if the cargo transaction was paperless, on a separate writing.⁵⁸

50. International Air Transp. Ass'n, Principal Instruments of the Warsaw System, (1991).

51. The International Civil Aviation Organization, [hereinafter ICAO] monitors signatories to Montreal Protocol No.1 and Montreal Protocol No. 2. As of Dec. 31, 1998, the Depository for the Government of the Republic of Poland advised ICAO that Montreal Protocol No. 1 had attained force of law between forty-one signatory countries. A comparison of those countries that have ratified Montreal Protocol No. 1 and those that have ratified Montreal Protocol No. 4 reveals only nine that have not ratified Montreal Protocol No. 4. The nine countries are Bahrain, Canada, Chile, Cuba, France, Mexico, Peru, Tunisia, and Venezuela.

52. As of Dec. 31, 1998, the Depository for the Government of the Republic of Poland advised ICAO that Montreal Protocol No. 2 had attained force of law between forty-three ratifying countries. A comparison of those countries that have ratified Montreal Protocol No. 2 and those that have ratified Montreal Protocol No. 4 reveals that only nine countries have not ratified Montreal Protocol No. 4. The nine countries are Bahrain, Canada, Chile, Cuba, France, Mexico, Peru, Tunisia, and Venezuela.

53. Montreal Protocol No.1, *supra* note 48; Montreal Protocol No.2, *supra* note 48, *Status as of Dec. 31, 1998*, Depository, the Government of the Republic of Poland, *reprinted by* ICAO.

54. If, for example, cargo travels from the United States to Germany, where The Hague Protocol has been ratified but not Montreal Protocol No. 4, the carrier limitation of two hundred fifty francs per kilogram will be applied instead of seventeen Special Drawing Rights.

55. Warsaw Convention, *supra* note 7, art. 26, para. 1.

56. *Id.* art. 26, para. 1.

57. Montreal Protocol No. 4, *supra* note 1, art. 11, para. 1.

58. Warsaw Convention, *supra* note 7, art. 26, para. 3.

Legal action to resolve cargo claims within the Treaty are subject to a two year Statute of Limitations⁵⁹ and must be brought within the boundaries of a country that has ratified the Treaty and in a court that can obtain jurisdiction over the air carrier.⁶⁰

For purposes of making a claim when the cargo was handled by several air carriers, the consignor retains the right to claim against the first air carrier, the consignee retains the right to proceed against the last air carrier and either party may proceed against the air carrier in whose possession the damage or loss took place.⁶¹

V. CONCLUSION

At the time of this writing, Montreal Protocol No. 4 has been in force in the United States for less than one month and no litigation has arisen to begin judicial interpretation of the new Treaty. The economic benefits and competitive advantage anticipated by United States air cargo carriers will not be quantified for some time. However, the potential savings and change in business practices associated with the Treaty will serve to urge air carriers of major trading partners of the United States such as Japan, Germany, and Korea⁶² to lobby their governments for similar ratification.

59. *Id.* art. 29, para. 1.

60. *Id.* art. 28, para. 1.

61. *Id.* art. 30, para. 3.

62. Japan is the number one country with which the United States exchanges air freight according to 1994 U.S. Government statistics. Germany is number three and Korea is number four. The website was visited on Jan. 5, 1999 and is verifiable at <<http://webcentral.bts.gov/oai/international/table9.txt>> .