

The Liability Regime of the Air Carrier under the National Legislation of Korea by Adopting the Montreal Convention*

몬트리올 협약을 수용한 한국의 국내 입법상 항공운송인의 책임제도

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Contents

- I. Introduction
- II. General Principles of Liability of the Air Carrier
- III. Liability of the Air Carrier for Damage Caused to Passenger
- IV. Liability of the Air Carrier for Damage Caused to Baggage
- V. Liability of the Air Carrier for Damage caused to Cargo
- VI. Conclusion

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I . Introduction

Air transport has become the principal means of transporting passengers over long distances. At the same time, the aircraft carries a considerable amount of cargo.

The Warsaw Convention for the Unification of Certain Rules Relating to International Carriage was adopted in 1929, and the Convention established the principle of the air carrier's liability for damage caused to passenger, baggage and cargo, and for damage caused by delay.

The Warsaw Convention had to be amended or added in order to be kept up date. The amendments and additions are the Hague Protocol of 1955, the Guadalajara Convention of 1961, the Montreal Agreement of 1966, Guatemala Protocol of 1971, the Montreal Additional Protocols No.1, No.2, No.3, and Montreal Protocol No.4 of 1975, and the Montreal Convention of 1999.

In 1999, the ICAO adopted the Montreal Convention for the Unification of Certain Rules for International Carriage by Air vastly modernizing the unification of private air law. The Montreal Convention will replace the instruments of the Warsaw system, and came into force on 4 November 2003.¹⁾

As of December 2011, the Montreal Convention is in force for one hundred and two(102) states, Korea has ratified the Montreal Convention, and brought it into force on December 19, 2007.

The Montreal Convention is not only an international convention. It has also exercised a considerable influence on national legislation. A number of states have adopted into their legislation the entire text of the Convention, or certain of its principles, with the object of regulating their national air transport.

Korea has made the national legislation of the Part VI the Carriage by Air of Commercial Act on April 29, 2011, and it has brought into force on November 24, 2011. The national legislation of the Part VI the Carriage by Air of Commercial

1) Paul Stephen Dempsey and Michael Milde, *International Air Carrier Liability: the Montreal Convention of 1999*, McGill University Institute of Air & Space Law, 2005, p.viii.

Act of Korea has the provisions on the liability for damage caused to passenger, baggage, and cargo.

The Part VI the Carriage by Air of Commercial Act of Korea has adopted certain principles of the liability of the air carrier under the Montreal Convention of 1999.

This paper reviews the text of national legislation relating to the liability regime of the air carrier in respect of the carriage of passenger, baggage and cargo under the Part VI the Carriage by Air of Commercial Act of Korea, and compare the differences between the liability regime of the air carrier under the Montreal Convention and the Part VI the Carriage by Air of Commercial Act of Korea.

II . General Principles of Liability of the Air Carrier

1. Exoneration of Liability of the Carrier

If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he derives his rights, the carrier shall be wholly or partly exonerated from its liability to the extent that such negligence or wrongful act or omission caused or contributed to the damage.²⁾

This provision has adopted Article 20 of Montreal Convention.

In *Chisholm v. TWA*, the injury of a passenger walking around the plane in turbulence when the “fasten seat belt” sign was on, was recognized as the contributory negligence of the passenger.³⁾

2) Article 898 of Commercial Act of Korea.

3) *Chisholm v. TWA* 1963[1] LILR 626, 4 Avi 17,247.

2. Application to Claims in Non-contract and so on

Provisions in relation to the liability of the carrier under this Chapter apply to the liability for compensation for damages caused by tort of the carrier.⁴⁾

This provision has adopted Article 29 of Montreal Convention. However, Article 899 paragraph 1 of Commercial Act of Korea has not accepted the terms “In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable” set out in Article 29 of Montreal Convention.

In *El Al Israel Airlines v. Tseng*, the case involved an intrusive security search of Tsui Yuan Tseng at New York’s John F. Kennedy International Airport during the process of embarking an El Al flight to Tel Aviv. Pursuant to Al El’s preboarding security procedures, a security guard questioned Ms. Tseng about her destination and travel plans, conclude her responses were illogical, and ranked her as a high risk passenger. She then were subjected to a 15-minute search of her baggage and person, during which she was required to remove her shoes, jacket and sweater, and to lower her blue jeans to midhip. A female security guard then examined her clothes by hand and by an electronic security wand. Ms. Tseng testified that she was “really sick and very upset...emotionally traumatized and disturbed” by the incident, causing her to undergo medical and psychiatric treatment upon her return from Israel. Ms. Tseng filed an action in state court, asserting the torts of assault and false imprisonment. El Al had the case removed to U.S. District Court, which held that the claim was governed by the Warsaw Convention; but the court concluded that the claim was not cognizable under Article 17 because Ms. Tseng suffered no bodily injury, and her injury was not the result of an “accident”. On appeal, the Second circuit agreed, but held that plaintiff’s claims for assault and false imprisonment did not fall under the Warsaw Convention, and could be pursued under state tort law. The U.S. Supreme concluded that the Warsaw Convention precludes a passenger from maintaining an action for personal injury damages under local law when her claim

4) Article 899 paragraph 1 of Commercial Act of Korea.

does not satisfy the conditions for liability under the Convention. In other words, recovery for an injury caused by an accident occurring on an international itinerary, on board the aircraft or in the course of embarking or disembarking, if not allowed under the Warsaw Convention, is not available at all.⁵⁾

If the claims for damages to passenger, baggage or cargo is brought against a servant or agent of the carrier, if the damage is caused in respect of the performance of duties of the servant or agent, the servant or agent shall be entitled to avail themselves of the pleas and limits of liability which the carrier is entitled to invoke. Nevertheless, this provision shall not apply if the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that the death, injury or delay of passenger and the loss, damage or delay of baggage would probably result.⁶⁾

This provision has adopted Article 30 paragraphs 1 and 3 of Montreal Convention. However, Article 899 paragraph 3 of Commercial Act of Korea has not accepted the terms “Save in respect of the carriage of cargo” set out in Article 30 paragraph 3 of Montreal Convention.⁷⁾ Accordingly, Article 899 paragraph 3 of Commercial Act of Korea shall apply in respect of claims for passenger and baggage..

The aggregate of the amounts of limits of liability of the carrier, its servants and agents for passenger, baggage and cargo shall not exceed the limits prescribed in Articles 905, 907, 910 and 915.⁸⁾

This provision has adopted Article 30 paragraph 2 of Montreal Convention.

The Warsaw Convention limitation have been extended to include not only air carriers, but their employees and agents. Injured passengers, however, may not by litigating directly against airline employees, recover additional sums beyond those prescribed by the Warsaw Convention.⁹⁾

5) *EI AI Israel Airlines v. Tseng*, 525 U.S. 155(1999); Paul Stephen Dempsey and Michael Milde, *op. cit.*, pp.210-211.

6) Article 899 paragraphs 2 and 3 of Commercial Act of Korea.

7) Article 30 paragraph 3 of Montreal Convention provides that “Save in respect of the carriage of cargo, the provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act of omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.”

8) Article 899 paragraph 4 of Commercial Act of Korea.

3. Claims against the Actual Carrier

Provisions in relation to the liability of the carrier under this Chapter apply to the carriage performed by the actual carrier in the case of claim for damages against the actual carrier performed the whole or part of the carriage by virtue of authority from the contracting carrier, but is not with respect to the successive carrier under Article 901.¹⁰⁾

This provision has adopted Article 39 of Montreal Convention.

Article 39 of Montreal Convention has its origin in the Guadalajara Convention of 1961.

The aggregate of the amounts of limits of liability of the contracting carrier, actual carrier and its servants and agents for passenger, baggage and cargo shall not exceed the limits prescribed in Articles 905, 907, 910 and 915.¹¹⁾

This provision has adopted Article 44 of Montreal Convention.

Article 44 of Montreal Convention originated in Article 6 of the Guadalajara Convention. It prohibits multiple recovery by the claimant of damage awards from the actual carrier, the contracting carrier, and their servants and agents. Thus the claimant may receive compensatory damages to enable it to achieve restitution, but no more.¹²⁾

4. Successive Carrier

In the case of carriage to be performed by various successive carriers, each carrier is deemed to be one of the parties to the contract of carriage in relation to that part of the carriage performed by each carrier.¹³⁾

9) Reed v. Wiser, 555 F.2d 1079 at 1093(2d Cir. 1977), cert. denied, 434 U.S. 922(1977); Paul Stephen Dempsey and Michael Milde, *op. cit.*, p.213.

10) Article 900 paragraph 1 of Commercial Act of Korea.

11) Article 900 paragraph 3 of Commercial Act of Korea.

12) Paul Stephen Dempsey and Michael Milde, *op. cit.*, p.237.

13) Article 901 paragraph 1 of Commercial Act of Korea.

This provision has adopted Article 36 paragraph 1 of Montreal Convention.

In the case of successive carriage, the compensation for damage sustained by death, injury or delay of passenger can be requested only against the carrier which performed the carriage during which the fact occurred. Nevertheless, in case where, by express agreement, the first carrier has assumed liability for the whole journey, the first carrier and the carrier which performed the carriage during which the fact occurred will be jointly and severally liable to compensate for damage.¹⁴⁾

This provision has adopted Article 36 paragraph 2 of Montreal Convention.

In the case of successive carriage, the compensation for damage sustained by loss, damage or delay of baggage can be requested against the first carrier, the last carrier, and the carrier which performed the carriage during which the fact occurred.¹⁵⁾

This provision has adopted Article 36 paragraph 3 of Montreal Convention.

In the case of successive carriage, the consignor can request the compensation for damage sustained by loss, damage or delay of cargo against the first carrier and the carrier which performed the carriage during which the fact occurred. Nevertheless, the consignee who is entitled to delivery can request the compensation for damage against the last carrier and the carrier which performed the carriage during which the fact occurred.¹⁶⁾

This provision has adopted Article 36 paragraph 3 of Montreal Convention.

If the first carrier or the last carrier compensates for damage, such carrier has a right of recourse against the carrier which performed the carriage during which the death, injury or delay of passenger, and the loss, damage or delay of baggage or cargo took place.¹⁷⁾

This provision has adopted Article 37 of Montreal Convention.

In *Commercial Union Insurance Co. v. Alitalia*, a shipper of a pasta packing machine gave over the goods to an Italian freight forwarder that listed itself on the air waybill

14) Article 901 paragraph 2 of Commercial Act of Korea.

15) Article 901 paragraph 3 of Commercial Act of Korea.

16) Article 901 paragraph 4 of Commercial Act of Korea.

17) Article 901 paragraph 6 of Commercial Act of Korea.

as consignor and consignee. Alitalia argued that only the freight forwarder had standing to bring suit, and not the subrogee insurance company of the manufacturer of the damaged goods. In response, the court held that Article 30(3) of the Warsaw Convention was limited only to instances where carriage was provided by successive carriers, which was not the case here. Said the court, outside the context of successive carriage, the Convention does not discuss which parties have standing for cases of damage to cargo. The Court held that the manufacturer(or its subrogee) could sue the airline if it could prove it had a legal relationship with the freight forwarder making it(the manufacturer) the true party in interest.¹⁸⁾

5. Extinguishment of Liability of the Carrier

The liability of the carrier for passenger, consignor or consignee shall be extinguished, however founded, if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.¹⁹⁾

This provision has adopted Article 35 paragraph 1 of Montreal Convention.

6. Invalidity of Contractual Provisions

Any contractual provisions tending to relieve the carrier or to fix a lower limit than that which is applicable according to this Chapter shall be null.²⁰⁾

This provision has adopted Article 47 of Montreal Convention. Article 47 of Montreal Convention originated in article 9 of Guadalajara Convention.

18) Commercial Union Insurance Co. v. Alitalia Airlines, 347 F. 3rd 448(2nd Cir. 2003).

19) Article 902 of Commercial Act of Korea.

20) Article 903 of Commercial Act of Korea.

III. Liability of the Air Carrier for Damage Caused to Passenger

1. Liability of the Carrier

The carrier is liable for damage sustained in the case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.²¹⁾

This provision has adopted Article 17 paragraph 1 of Montreal Convention.

In *Eastern Airlines v. Floyd*, the case involved an action brought against Eastern Airlines for alleged international infliction of emotional harm. Several passengers claimed to have suffered mental distress when their aircraft, bound for the Bahamas, lost power in all three engines and began a sharp and terrifying descent. The flight crew informed the passengers that it would be necessary to ditch the plane in the ocean. Almost miraculously, the pilots managed to restart the engines and land the jet safely back at Miami International Airport. The passengers, while initially praising the crew as their “saviors”, later claimed to have suffered severe emotional (but not physical) injury nonetheless. The U.S. Supreme Court held that Article 17 of the Montreal Convention does not allow recovery for purely mental injuries.²²⁾

2. Limit of Liability of the Carrier

For damages arising under Article 17 not exceeding 100,000 units of account,²³⁾

21) Article 904 of Commercial Act of Korea.

22) *Eastern Airline v. Floyd*, 499 U.S. 530 111 S.Ct. 1489(1991); Paul Stephen Dempsey and Michael Milde. *op. cit.*, p.128.

23) The sums mentioned in terms of units of account shall be deemed to refer to Special Drawing Rights as defined by the International Monetary Fund.

The 100,000 SDR for each passenger limitation on damages provided under Article 17 paragraph 1 of Montreal Convention was increased at the end of calendar 2009 to 113,110 SDR for each

the carrier shall not be able to exclude or limit its liability. The carrier shall not be liable for damages arising under Article 904 to the extent that they exceed for each passenger 100,000 units of account if the carrier proves that (i) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or (ii) such damage was solely due to the negligence or other wrongful act or omission of a third party.²⁴⁾

This provision has adopted Article 21 of Montreal Convention.

The Montreal Convention is the two-tier liability system for death or wounding of the passenger with strict liability up to 100,000 SDR and presumptive liability with a reversed burden of proof without any limit above that threshold although restricted to compensatory damages for bodily injury resulting from an accident, to the explicit exclusion of punitive, exemplary or any other non-compensatory damage.²⁵⁾

As the carrier is aware of this limit in advance, he will be able to arrange for sufficient insurance cover. It is to be noted, however, that the possibility for the carrier to exonerate himself for damage over 100,000 SDR is often merely theoretical. Cases may occur where the exact cause of an accident may never become known. In such situations the carrier will not be able to supply the necessary proof and hence will be able without any limit.²⁶⁾

3. Advance Payment

In the case of aircraft accidents resulting in death or injury of passengers, the carrier shall make advance payments without delay to natural persons who are entitled to claim compensation. Such advance payments shall not constitute a recognition of

passenger. The Montreal Convention contained Article 24 paragraph 1 known as an 'escalator clause', permitting the ICAO to review the limits at five year intervals and make suitable change. The ICAO based the increase on data suggesting a 13.1% increase in inflation during the period.

24) Article 905 of Commercial Act of Korea.

25) Paul Stephen Dempsey and Michael Milde, *op. cit.*, p.41.

26) I.H.Ph. Diederiks-Verschoor, *An Introduction to Air Law*, Eighth revised edition, Kluwer Law International, 2006, pp.175-176.

liability. Advance payments may be offset against any amounts paid as damages by the carrier.²⁷⁾

The Enforcement Decree of Commercial Act of Korea which became effective on November 24, 2011, provides that pursuant to Article 906 paragraph of Commercial Act, the carrier shall pay the amount of advance payment resulting from the accident of aircraft as follows: (1) 16,000 units of account per person in the case of death of the passenger, (2) within the limits of 8,000 units of account per person in the case of bodily injury of the passenger, as the expense for medical treatment of bodily injury, the amount which was borne actually by the person who is entitled to claim compensation pursuant to Article 906 paragraph 1 of Commercial Act, and the person who has the obligation to support pursuant to Civil Act.²⁸⁾

This provision has adopted Article 28 of Montreal Convention. The root of Article 28 of Montreal Convention is in EC Regulation 2027/97, that imposed the duty on all community carriers to make such advance payments within specified time limit.²⁹⁾

Even today quite a number of carriers voluntarily make advance payment. However, passengers are sometime reluctant to accept these as they fear to forfeit their rights to a complete compensation by accepting these advance payments.³⁰⁾

4. Liability for Delay in the Carriage of Passenger

The carrier is liable for damage occasioned by delay in the carriage of passengers. In this case, the liability of the carrier for each passenger is limited to 4,150 units of account.³¹⁾ Nevertheless, if any carriage in which according to the contract of carriage with the passenger, the place of departure, the place of destination and the

27) Article 906 of Commercial Act of Korea.

28) Article 23 paragraph 1 of Enforcement Decree of Commercial Act of Korea.

29) Paul Stephen Dempsey and Michael Milde, *op .cit.*, p.203.

30) I.H.Ph. Diederiks-Verschoor, *op. cit.*, p.177.

31) The 4,150 SDR for each passenger limitation on damages provided under Article 22 paragraph 1 of Montreal Convention was increased at the end of calendar 2009 to 4,694 SDR for each passenger. See *supra* note 23.

agreed stopping place are situated within the territory of Korea, the liability of the carrier for each passenger is limited to 500 units of account. The carrier shall not be liable for delay under paragraph 1 of this Article if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures. The provision of paragraph 1 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result.³²⁾

This provision has adopted Article 19, Article 22 paragraphs 1 and 5 of Montreal Convention. However, Article 22 paragraph 1 of Montreal Convention does not contain the provision relating to the limit to the liability of the carrier in the case of damage occasioned by delay in the domestic carriage by air of the passenger.

Article 19 of Montreal Convention significantly changed the language of Article 20 of Warsaw Convention. The traditional defense the carrier or its agents has “taken all necessary measures to avoid the damage or that it was impossible for them to” do so, has been replaced by language exonerating the carrier if it or its agents “took all measures that could reasonably be required to avoid the damage or that it was impossible” to do so.³³⁾

The Hague Protocol clarified what was intended by the “wilful misconduct” provision of Article 25 of Warsaw Convention with language establishing carrier liability where plaintiff proves “that the damages resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result.” In *Ospina v. Trans World Airlines, Inc.*, the court held that willful misconduct exists only where the airline “omitted to do an act (1) with knowledge that the omission of that act probably would result in damage or injury, or (2) in a manner that implied a recklessly disregard of the probable consequences³⁴⁾.

32) Article 907 of Commercial Act of Korea.

33) Paul Stephen Dempsey and Michael Milde, *op. cit.*, p.177.

34) *Ospina v. Trans World Airlines, Inc.*, 975 F. 2d 35 at 37(2d Cir. 1992).

Article 19 of the Montreal Convention states that the carrier is liable for damage occasioned by delay in the carriage by air. However, the Convention provides no definition of delay. It is submitted that under the common law, in the absence of any express contract, the carrier is only bound to perform the carriage within a reasonable time having regard to all the circumstances of the case: accordingly, delay means failure to complete the carriage in a reasonable time.³⁵⁾

The causes of delay in the carriage of passengers may be booking errors or double bookings, delayed departure of aircraft, incorrect information given to passengers regarding the time of departures, failure to land at the scheduled destination, and changes in the flight schedule or addition of extra land stops.³⁶⁾

IV. Liability of the Carrier for Damage Caused to Baggage

1. Liability for Loss or Damage to Baggage

The carrier is liable for damage sustained by loss or damage to baggage during the carriage by air of baggage. The carrier is liable for damage sustained in the case of loss or damage to checked baggage on condition only that the event which caused the loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier. However the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, the carrier is liable if the damage resulted from its fault or that of its servants or agents.³⁷⁾

This provision has adopted Article 17 paragraph 2 of Montreal Convention.

35) Shawcross & Beament, *Air Law*, Fourth edition, Volume 1, Butterworth & Co(Publishers) Ltd., 1989, paras. 192-193.

36) I.H.Ph. Diederiks-Verschoor, "The Liability for Delay in Air Transport," *Air & Space Law*, Volume XXVI, Number 6, November 2001, Kluwer Law International, p.300.

37) Article 908 of Commercial Act of Korea.

2. Liability for Delay in the Carriage of Baggage

The carrier is liable for damage occasioned by delay in the carriage by air of baggage. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.³⁸⁾

This provision has adopted Article 19 of Montreal Convention.

An interesting case concerning checked baggage was the following. A passenger flying from Alaska to Frankfurt carried a parcel with deep frozen salmon as checked baggage. He signed a 'Limited Release' at the check-in-counter. Due to a two-day delay the salmon was spoilt when the passenger took delivery of his luggage. The Court ruled that the air carrier was entitled to exclude its liability for damages to perishable goods in case of delay.³⁹⁾

3. Limit of Liability for Baggage

In the case of damage to baggage under Article 908 and 909, the liability of the carrier is limited to 1,000 units of account for each passenger.⁴⁰⁾ Nevertheless, if the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination, the carrier will be liable to pay a sum not exceeding that declared, if it is proved that the damage resulted from an act or omission of the carrier, its servants and agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result.⁴¹⁾

This provision has adopted Article 22 paragraphs 2 and 5 of Montreal Convention.

38) Article 909 of Commercial Act of Korea.

39) Amtsgericht Frankfurt am Main, 10 November 1995; *TranspR*, 1996, p.348; *Air and Space Law*, Vol. XXIII(1998), p.40; I.H.Ph. Diederiks-Verschoor, "The Liability for Delay in Air Transport," *Air & Space Law*, Volume XXVI, Number 6, November 2001, Kluwer Law International, p.306.

40) The 1,000 SDR for passenger limitation on damages provided under Article 22 paragraph 2 of Montreal Convention was increased at the end of calendar 2009 to 1,131 SDR for each passenger. See supra note 21.

41) Article 910 of Commercial Act of Korea.

4. Notice in Relation to Loss or Damage to Part of Checked Baggage

If the passenger discovers loss or damage to part of checked baggage, he must dispatch the notice of its outline in writing or by electronic document to the carrier without delay after the receipt of checked baggage. Nevertheless, if the loss or damage to checked baggage can not be discovered immediately, the notice must be dispatched within seven days from the date of receipt of checked baggage. In the case of delay, the complaint must be made within twenty-one days from the date on which the checked baggage has been placed at disposal.⁴²⁾

This provision has adopted Article 31 paragraph 1 of Montreal Convention.

In *Moses v. Air Afrique*, the court dismissed passenger's untimely filed claim on grounds that, "the fact that airline personnel witnessed the destruction of the baggage does not obviate the requirement that the passenger make a formal written complaint to the carrier."⁴³⁾

V. Liability of the Air Carrier for Damage Caused to Cargo

1. Liability for Loss or Damage to Cargo

The carrier is liable for damage sustained by loss or damage to cargo upon condition only that the damage was sustained during the carriage by air. However, the carrier is not liable if it proves that the loss or damage to the cargo resulted from one or more of the following: (i) inherent defect, quality or vice of that cargo; (ii) defective packing of that cargo performed by a person other than the carrier or its servants

⁴²⁾ Article 911 of Commercial Act of Korea.

⁴³⁾ *Moses v. Air Afrique*, 99 Civ. 541(JG), 2000 WL 306853(E.D.N.Y. Mar. 21, 2000).

or agents; (iii) an act of war or an armed conflict; (iv) an act of public authority carried out in connection with the entry, exit or transit of the cargo; (v) force majeure. The carriage by air under paragraph 1 of this Article comprises the period during which the cargo is in the charge of the carrier.

The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. However, if such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, such carriage is presumed, subject to proof to the contrary, to be within the period of carriage by air. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.⁴⁴⁾

This provision has adopted Article 18 of Montreal Convention.

In *Magnus Electronics, Inc. v. Royal Bank of Canada*, plaintiff had a freight forwarder, which, under a through-air waybill, contracted with an airline to ship goods to a bank in Argentina, which mistakenly allowed delivery to the buyer before payment. The court held that so long as the goods remain in the air carrier's actual or constructive possession pursuant to the terms of the carriage contract, the period of transportation by air does not end.⁴⁵⁾

In *Siemens Ltd. v. Schenker International(Aust) Pty Ltd.*, the High Court of Australia reviewed a damage claim involving shipment of the communications equipment from Germany to Australia. The defendant collected the freight at Tullamarine Airport, and moved it by truck to its bonded warehouse, some 4 kilometers away. After leaving the airport and before arriving at the warehouse, the equipment fell off the truck and was damaged. The Australian High Court concluded that at the time of the damage, the movement was not transportation by air, and that the Warsaw Convention ceased to apply once the freight has left Tullamarine Airport.⁴⁶⁾

44) Article 913 of Commercial Act of Korea.

45) *Magus Electronics, Inc. v. Royal Bank of Canada*, 611 F. Supp. 436 at 438 N.D.III.(1985).

46) *Siemens Ltd. v. Schenker International(Aust) Pty Ltd.*, 2004 HCA 11, 206 A.L.R 232(High Court

As the Montreal Convention failed to include the “act of God” defense, this brings aviation law much more in harmony with the law of carrier liability in other modes of transportation. Perhaps it was thought that turbulence and similar events might be construed as an act of God, thereby relieving air carriers from liability for most damage claims. It should be also noted that the common law concept of “act of God” has its equivalent in civil law as “force majeure”- a very vague term that would exonerate the carrier in an unforeseeable spectrum of situations.⁴⁷⁾

2. Liability for Delay in the Carriage of Cargo

The carrier is liable for damage occasioned by delay in the carriage by air of cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.⁴⁸⁾

This provision has adopted Article 19 of Montreal Convention.

In *Mfrs. Hanover Trust Co. v. Alitalia Airlines*, the phrase “all necessary measures” has been defined as “all precautions that in sum are appropriate to the risk, i.e., measures reasonably available to defendant and reasonably calculated, in cumulation, to prevent the subject loss.”⁴⁹⁾

3. Limit of Liability for Cargo

In the case of damage to cargo under Articles 913 and 914, the liability of the carrier is limited to a sum of 17 units of account per kilogram.⁵⁰⁾ However, if any carriage in which, according to the contract of carriage with the consignor, the place

of Australia 2004).

47) Paul Stephen Dempsey and Michael Milde, *op. cit.*, p.168.

48) Article 914 of Commercial Act of Korea.

49) *Mfrs. Hanover Trust Co. v. Alitalia Airlines*, 429 F. Supp. 964 at 967 (D.C.N.Y. 1977).

50) The 17 SDR per kilogram limitation on damages provided under Article 22 paragraph 3 of Montreal Convention was increased at the end of calendar 2009 to 19 SDR per kilogram. See *supra* note 23.

of departure, the place of destination and the agreed stopping place are situated within the territory of Korea, the liability of the carrier is limited to a sum of 15 units of account per kilogram. Nevertheless, if the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination, the carrier will be liable to pay a sum not exceeding the declared sum, if it proves that the sum is greater than the consignor's actual interest in delivery at destination. The weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the weight of the package concerned,. Nevertheless, when the loss, damage or delay of a part of the cargo, or of an object contained therein, affects the value of other packages covered by the same air way bill, or the same receipt or, if they were not issued, by the same record preserved by the other means referred to in Article 924, the weight of such package shall also be taken into consideration in determining the limit of liability.⁵¹⁾

This provision has adopted Article 22 paragraphs 3 and 4 of Montreal Convention. However, Article 22 paragraph 3 of Montreal Convention does not contain the provision relating to the limit to the liability of the carrier in the case of damage to cargo sustained during the domestic carriage by air of the cargo.

The general rule under the Montreal Convention is that the limits of liability(of 17 SDRs) for cargo loss or damage are unbreakable, even under circumstances where the carrier or its employees engaged intentional or reckless misconduct.⁵²⁾

Astute air freight shippers procure insurance or declare a higher value before handling valuable goods over to the carrier. If they have declared a higher value, the carrier usually charges a higher rate reflecting the de facto insurance premium. In such circumstances, if the goods are lost or damaged, the shipper may recover its actual losses up to the higher declared value. If the shipper has independently procured insurance, it will submit its claim to the insurer, who upon payment will be subrogated to the claim against the carrier.⁵³⁾

51) Article 915 of Commercial Act of Korea.

52) Paul Stephen Dempsey and Michael Milde, *op. cit.*, p.197.

53) Commercial Union Insurance Co. v. Alitalia Airlines, 347 F.3rd 448(2nd Cir. 2003); Paul Stephen

In *Motorola, Inc. v. Fed. Express Corp.* involving the shipment of \$5million in cellular telephones from Dallas, Texas to Tokyo Japan, the U.S. Court of Appeals for the Ninth Circuit has held that “Article 22 of the Warsaw Convention provides for liability limitation based on the entire weight of the shipment where, as here, the damaged portion of the cargo affects the value of the entire shipment.”⁵⁴⁾

4. Notice in Relation to Loss or Damage to Part of Cargo

If the consignee discovers loss or damage to part of cargo, he must dispatch the notice of its outline in writing or by electronic document to the carrier without delay after the receipt of cargo. Nevertheless, if the loss or damage to cargo can not be discovered immediately, the notice must be dispatched within fourteen days from the date of receipt of cargo. In the case of delay, the complaint must be made within twenty-one days from the date on which the cargo has been placed at disposal. If no complaint is made within the times under paragraph 1 of this Article, no action shall lie against the carrier, save in the case of malice on its part.⁵⁵⁾

This provision has adopted Article 31 paragraphs 2, 3 and 4 of Montreal Convention.

Failure of the carrier to provide an air waybill does not relieve the shipper from filing notice of claim within the time period prescribed. Willful misconduct also does not negate the notification defense.⁵⁶⁾

In *Commercial Union Insurance Co. v. Alitalia Airlines*, the court held that even where goods are accepted for delivery and a notice of receipt in “apparent good order” is made by the consignee, it nonetheless has the right to file a concealed damage claim within seven days of receipt.⁵⁷⁾

Dempsey and Michael Milde, *op. cit.*, p.190.

54) *Motorola, Inc. v. Fed. Express Corp.*, 308 F.3d 995 at 997(9th Cir.2002).

55) Article 916 paragraphs 1 and 4 of Commercial Act of Korea.

56) *Highlands Ins. Co. v. Trin & Tobago Airways Corp.*, 739 F.2d 536 at (11th Cir. 1984); Paul Stephen Dempsey and Michael Milde, *op. cit.*, p.216.

57) *Commercial Union Insurance co. v. Alitalia Airlines*, 347 F.3rd 448 at 468(2nd Cir. 2003).

VI. Conclusion

On an international scale, the importance of the Montreal Convention no longer requires emphasis. It unifies various political, legal and social regimes under the same umbrella of legal principles. The fundamental objectives which the Montreal Convention seeks to establish a leveling off of the compensation awarded to certain victims.

Claimants save time and administrative complications are held to a minimum by the insertion of the principles of the Montreal Convention into national legislation. It is, therefore, desirable that the principles be extended further by all states.

A number of states have adopted into their legislation the entire text of the Montreal Convention, or certain of its principles, with the object of regulating their national air transport. The principles of the liability of the air carrier under the Montreal Convention have been adopted into national legislations by the United Kingdom, Germany, France, Canada, Russia, China, Korea and etc.

In the field of liability of the carrier under national legislation, differences can also exist as to the maximum amount of liability. Certain countries limit the liability of the carrier, either by adopting the limit of liability of the carrier contained in the Montreal Convention and its amendments or else by fixing a proper limit.

Korea has made a new national legislation relating to the liability of the air carrier in respect of the carriage by air. The main principles of the liability of the air carrier under the Montreal Convention have been adopted into the national legislation of the Part VI the Carriage by Air of the Commercial Act of Korea. However, there have been some issues on the limit to the liability of the carrier in the case of damage to cargo sustained during the domestic carriage by air of the cargo, and the limit to the liability of the carrier in the case of damage occasioned by delay in the domestic carriage by air of the passenger.

Therefore, such provisions relating to the limit to the liability of the carrier in the case of the domestic carriage by air have been contained in the Part VI the Carriage

by Air of Commercial Act of Korea as follows : In the case of the domestic carriage by air, the liability of the carrier for damage to cargo is limited to 15 units of account per kilogram, and the liability of the carrier for damage occasioned by delay in the carriage of the passenger is limited to 500 units of account for each passenger.

The national legislation relating to the liability of the air carrier by the Korean government will contribute to settle efficiently the dispute on the carrier' liability in respect of the carriage of passengers, baggage and cargo by air, and to provide proper compensation to the passenger or consignor who has suffered damage, subject to the defenses and limitations it sets out.

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Abstract

The Liability Regime of the Air Carrier under the National Legislation of Korea by Adopting the Montreal Convention

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The Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air was adopted in 1929. In 1999, the ICAO adopted the Montreal Convention for the Unification of Certain Rules for International Carriage by Air vastly modernizing the unification of private air law. The Montreal Convention replaced the instruments of the Warsaw system, and came into force on 4 November 2003.

The Montreal Convention is not only an international convention. It has also exercised a considerable influence on national legislation.

Korea has made the national legislation of the Part VI the Carriage by Air of Commercial Act on April 29, 2011, and it has brought into force on November 24, 2011. The national legislation of the Part VI the Carriage by Air of Commercial Act of Korea has the provisions on the liability for damage caused to passenger, the liability for damage caused to baggage, and the liability for damage caused to cargo.

The main feature of the liability regime of the air carrier under the Montreal Convention is the two-tier liability system for death or injury of the passenger with strict liability up to 100,000 SDR and presumptive liability with a reversed burden of proof without any limit above that threshold.

The national legislation of the Part VI the Carriage by Air of the Commercial Act of Korea has adopted the main principles of the liability of the air carrier under the Montreal Convention.

In conclusion, the national legislation relating to the liability of the air carrier by

the Korean government will contribute to settle efficiently the dispute on the carrier's liability in respect of the carriage of passengers, baggage and cargo by air, and to provide proper compensation to the passenger or consignor who has suffered damage, subject to the defenses and limitations it sets out.

Key Words : Liability Regime, Air Carrier, National Legislation, Montreal Convention, Warsaw Convention, Commercial Act of Korea

초 록

몬트리올 협약을 수용한 한국의 국내 입법상 항공운송인의 책임제도

이강빈*

국제항공운송에 관한 규칙의 통일을 위한 바르샤바 협약이 1929년에 채택되었다. 1999년에 국제민간항공기구(ICAO)는 항공사법의 통일을 광범위하게 현대화하는 국제항공운송을 위한 규칙의 통일을 위한 몬트리올 협약을 채택하였다. 몬트리올 협약은 바르샤바 체제 조약 문서를 대체하였으며, 2003년 11월 4일 발효되었다.

몬트리올 협약은 다만 국제협약일 뿐만 아니라, 또한 국내입법에 상당한 영향을 주었다.

한국은 2011년 4월 29일 상법 제6편 항공운송편의 국내 입법을 하였으며, 2011년 11월 24일 발효되었다. 한국 상법 제6편 항공운송편의 국내 입법은 여객에게 생긴 손해에 대한 책임, 수하물에 생긴 손해에 대한 책임, 화물에 생긴 손해에 대한 책임에 관한 규정들을 두고 있다.

몬트리올 협약상 항공운송인의 책임제도의 주요특징은 100,000 특별인출권(SDR)까지 절대책임을 지는 여객의 사망 또는 상해에 대한 2단계 책임제도이며, 그 절대책임액 이상은 아무런 제한없이 반대의 입증부담을 지는 추정적 책임이다.

한국 상법 제6편 항공운송편의 국내 입법은 몬트리올 협약상 항공운송인의 주요 책임원칙을 수용하고 있다.

결론적으로, 한국 정부에 의한 항공운송인의 책임에 관한 국내입법은 여객, 수하물 및 화물의 항공운송에 대한 운송인의 책임에 관한 분쟁을 효과적으로 해결하고, 동법이 규정하는 방어와 책임제한에 따라 손해를 입은 여객 또는 송하인에게 적절한 보상을 제공하는데 기여할 것이다.

주제어 : 책임제도, 항공운송인, 국내입법, 몬트리올 협약, 바르샤바 협약, 한국 상법

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