

The Carrier's Liability for Damage Caused by Delay in International Air Transport

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Abstract

Delay in the air transport occurs when passengers, baggage or cargo do not arrive at their destination at the time indicated in the contract of carriage. The causes of delay in the carriage of passengers are booking errors or double booking, delayed departure of aircraft, incorrect information regarding the time of departure, failure to land at the scheduled destination and changes in flight schedule or addition of extra landing stops. Delay in the carriage of baggage or cargo may have different causes: no reservation, lack of space, failure to load the baggage on board, loading baggage on the wrong plane, failure to off-load the baggage or cargo at the right place, or to deliver the covering documents at the right place.

The Montreal Convention of 1999 Article 19 provides that 'The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or 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'.

The Montreal Convention Article 22 provides liability limits of the carrier in case of delay for passengers and their baggage and for cargo. In the carriage of persons, the liability of the carrier for each passenger is limited to 4,150 SDR. In the carriage of baggage, the liability of the carrier is limited to 1,000 SDR for each passenger unless a special declaration as to the value of the baggage has been made. In the carriage of cargo, the liability of the carrier is limited to 17 SDR per kilogram unless a special declaration as to the value of the cargo has been made.

The Montreal Convention Article 19 has shortcomings: it is silent on the duration of

the liability for carriage, and it does not make any distinction between persons and good. It does not give any indication concerning the circumstances to be taken into account in cases of delay, and about the length of delay. In conclusion, it is desirable to define the period of carriage with accuracy, and to insert the word 'unreasonable' in Article 19.

Key Words: Air carrier, Liability for delay, Warsaw Convention, Montreal Convention, Limit of liability, Overbooking, Conditions of carriage

I. Introduction

Since 1929, air carriers have been carrying passengers, baggage and cargo on the basis of an aviation liability system which originated in the Warsaw Convention.

This system is about to change. In 1999, ICAO organized a diplomatic conference in Montreal, which agreed on the adoption of a new convention, called the Montreal Convention of 1999. This new convention is designed to replace the Warsaw Convention and all the amendments thereto so as to create a uniform aviation liability system. Its structure and provisions are based upon those of the Warsaw Convention, as amend, and other international agreement.

The Montreal Convention of 1999 with 29 ratifications as at April 2003, is expected to enter into force in 2003 upon the 30th ratification¹.

Considering that the air carrier's customer has chosen the carriage by air because of its speed and to save time, Article 19 of the Warsaw Convention and the Montreal Convention declares the carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo.

Delay occurs when passengers, baggage or cargo do not arrive at their destination at the time stipulated in the contract of carriage. 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 departure, failure to land at the scheduled destination, and changes in the flight schedule or addition of extra land stops.

However, delay in the carriage of baggage or cargo may occur due to different causes, e. g. no reservation, lack of space, failure to load the baggage on board, loading baggage on the wrong plane, failure to off-load the baggage or cargo at the right place, or to deliver the covering documents at the right place².

¹ Article 53(6) of the Montreal Convention provides that this Convention shall enter force on the sixtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Depositary between the States which have deposited such instrument.

² I. H. Ph. Diederiks Verschoor, "The liability for Delay in Air Transport", *Air & Space Law*, VolumeXXVI, Number6, November 2001, Kluwer Law International, p.300.

The Warsaw Convention does not provide a special limit of the carrier's liability for delay in the carriage of passengers, baggage or cargo, while the Montreal Convention of 1999 fixes a special limit of the liability for delay.

This paper intends to describe the liability regime of the carrier for delay in the international air transport under the Warsaw Convention and the Montreal Convention, comparing the differences between them. Also this paper deals with the issues of the Convention and conditions of carriage which are relevant for the liability of the air carrier for relay.

II. Causes of Flight Delays

As shown in Table 1 'the statistics of flight delays by airport of 2002' reported by the Korea Airports Authority,³ the causes of delays of international flights in Korean airports are composed of weather, aircraft connection, aircraft maintenance, passenger processing, multiple causes, and others.

In this statistics of flight delays, standard for delay of international flight refers to delay of more than one hour, and multiple causes refer to the compound of aircraft connection, passenger connection, passenger processing, and ground waiting, and others refer to passenger connection, ground handling, runway, air traffic control, ground waiting, and aviation security, and weather refers to fog, snow, rain and others.

Among the causes of total delays of international flights in Korean airports, the ratio of delayed flights due to aircraft connection compared to the total international flights is 1.29% which is the biggest specific gravity, and the ratio of delays due to weather is 0.36%, the ratio of delays due to aircraft maintenance is 0.33%, the ratio of delays due to passenger processing is 0.05%, and the ratio of delays due to multiple causes is 0.001%, and the ratio of delays due to other causes is 0.40%.

Particularly, in Incheon International Airport opened on March 29, 2001, as hub airport in Korea, the ratio of delays due to weather is 0.31%, and the ratio of delays due to aircraft connection is 1.29%, and the ratio of delays due to aircraft maintenance is 0.34%, and the ratio of delays due to passenger processing is 0.05%, and the ratio of delays due to other

³ Korea Airports Authority, *Airport Traffic Report 2002*: <http://www.airport.co.kr>

causes is 0.45%.

<Table 1> International Flight Delays by Airport in Korea

2002. 1-2002. 12

Note: Excludes unscheduled and cargo flights.

Source: Korea Airports Corporation, *Airport Traffic Report 2002*:

<http://www.airport.co.kr>

III. Meaning of 'Delay in the Carriage by Air'

Article 19 of the Warsaw Convention and 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.

Speed is an essential part of the carriage by air. In case of delay the carrier is liable according to the Convention, but according to case law and jurisprudence the delay must be 'unreasonable'.

The question of what is to be considered as 'unreasonable' delay will

Airport	Aircraft Movements	Weather	Flight Connection	Aircraft Maintenance	Passenger Processing	Multipule Causes	Other	Total
Incheon	97,045	309	1,257	335	54	0	442	2,397
Gimhae	11,764	70	123	30	2	1	5	231
Jeju	2,131	8	24	2	0	0	2	36
Daegu	1,489	10	44	8	1	1	4	68
Gwang-ju	565	3	7	1	0	0	0	11
Cheong-ju	511	9	17	2	0	0	9	37
Yang-yang	12	0	1	0	1	0	0	2
Total	113,517	409	1,473	378	58	2	462	2,782

depend on all sorts of circumstances, e.g. the distance of carriage, the manner in which the transportation is carried out, the weather conditions,

the season, the availability of other means of transport, etc.⁴

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.⁵

This rule, found in the cases on the carriage by land and sea, was applied to the carriage by air in *Panalpina International Transport Ltd. v. Densil Underwear Ltd.*⁶ In the case the court, stressing that air transport is used because of its speed, held that a delay in the delivery of cargo to Nigeria, from 2 December to 21 December, leading to the loss of Christmas trade, was in the circumstances an undue and unreasonably delay.⁷

Several interpretations can be attributed to the phrase of 'delay in the carriage by air'. It can mean: (a) that the delay must occur whilst passengers, baggage or cargo are airborne, or (b) that 'carriage by air' in Article 19 must be read together with Article 18(2) which defines the period of liability for loss of, or damage to, any checked baggage or any goods, or (c) that liability for delay exists whenever passengers or goods do not arrive on time at the point of destination.⁸

The first and third interpretation have been rejected by the courts in several jurisdictions, while a number of cases have favored the second interpretation.⁹ The courts have used the definition of 'carriage by air' in Article 18(2) to ascertain whether the delay had occurred during that period.

Article 18(2) defines the period of carriage by air of checked baggage or cargo as 'the period during which the baggage or cargo is in charge of

⁴ I. H. Ph. Diederiks Verschoor, *supra* note 2, p.301.

⁵ Shawcross & Beamont, *Air Law*, Fourth Edition, Volume 1, Butterworth & Co (Publishers) Ltd., 1989, para. 192-193.

⁶ [1981]1 Lloyd's Rep(QBD); Shawcross & Beamont, *supra* note 4, para. 192-193.

⁷ *Ibid.*

⁸ Georgette Miller, *Liability in International Air Transport*, Kluwer Law and Taxation Publishers, 1977, p.158.

⁹ *Bart v. British West Indian Airways, Ltd.*, 23[1967] 1 Lloyd's Rep. 239(Guyana Ct. App. 1966); *Brunwasser v. Trans World Airlines, Inc.*, 10a, 541 Supp1388(WD Pa, 1982), 17 *Avi* 17,723.

the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatever'; but the period does not extend to any carriage by land, sea or river performed outside an airport (Article 18(3)). This period includes time after the arrival of goods at the airport of destination.

The application of Article 18(2) to delay solves the problem for the carriage of baggage and cargo, but not for the carriage of passengers. It has been advocated that the delay in passenger cases should be ascertained by reference to Article 17, which defines the period of liability for the carriage of passengers.¹⁰

Article 17 does not expressly define the period of carriage by air of passengers, but refer to an equivalent period, referring to accidents taking place 'on board the aircraft or in the course of any of the operations of embarking or disembarking.

It is submitted that 'delay in the carriage by air' in Article 19 means delay during the period mentioned in Article 17 in the case of passengers, and means delay during the period mentioned Article 18 in the case of checked baggage or cargo.¹¹

IV. Liability of the Carrier for Delay under the Convention

1. Limit of Carrier's Liability for Delay

The Warsaw Convention provides no special limit of the carrier's liability for delay in the carriage of passengers, baggage or cargo. So the same limit applies where the liability is based on delay as applies in cases of death or injury, and of loss or damage.¹² However, the Montreal Convention provides explicitly the limit of the carrier's liability for delay in Article 22: In the carriage of persons, the liability of the carrier for each passenger is limited to 4,150 SDR; In the carriage of baggage, the liability of the carrier is limited to 1,000 SDR for each passenger unless the passenger has made a special declaration of interest in delivery at

¹⁰ Georgette Miller, *supra* note 7, p.159.

¹¹ Shawcross & Beaumont, *supra* note 4, para.191.

¹² Article 22 of the Warsaw Convention provides that : in the carriage of passengers the liability for each passenger is limited to 125,000 francs(8,300SDR); in the carriage of checked baggage and cargo the liability is limited 250 francs(17SDR)per kilogram; in the unchecked baggage the liability is limited to 5,000 francs(332SDR).

destination and has paid a supplementary sum; In the carriage of cargo, the liability of the carrier is limited to 17 SDR per kilogram unless the consignor has made a special declaration of interest in delivery at destination and has paid a supplementary sum.

Under Article 22(5) of the Montreal Convention, the foregoing limit of the liability for delay in the carriage of persons and baggage does not apply if it is proved that the damage by delay 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.

The carrier is liable without limitation for delay of baggage when his employer had specifically informed the passenger that his baggage was on board the aircraft while it had been removed therefrom and was delivered after the passenger had returned to his home at the end of the holiday, the misinformation having been given deliberately and recklessly.¹³

In *Oddvin Lokken v. Federal Express Corporation*¹⁴ the court has held that an air carrier's failure to timely delivery an international shipment did not, without more, constitute willful misconduct under the terms of the Warsaw Convention. The shipper presented no evidence beyond speculation and conclusive assertions that would permit a jury to reasonably conclude that the carrier's failure to deliver the package resulted from willful misconduct. Consequently, the Convention governed the claim and limited the carrier's liability.

2. Exoneration of Carrier's Liability

The carrier is not 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 was impossible for it or them to take such measures under Article 19 of the Montreal Convention.

¹³ Florida Court of Appeals, 3rd District, *Compania de Aviation Faucett v. Mulford*, 29 July 1980: 15 *Avi* 18,358.

¹⁴ U. S. District Court, Southern District of New York, No. 99 Civ. 0585(THK), 16 February 2000: 27 *Avi* 17, 596.

The only way in which the carrier can be relieved of liability is to prove that he has taken all necessary measures to avoid the delay, or that it was impossible for him to take such measures. It is not enough for the carrier to prove that after the cause of delay had occurred, everything possible was done to minimize the damage. The carrier must prove that there was no negligence in the occurrence of the delay itself.

If the delay is caused before departure or after arrival by a thorough and lengthy inspection of the aircraft by the customs authorities, the carrier can not be held responsible. As the customs authority is not a servant or agent of the carrier, he can not take measures to avoid damage by delay.¹⁵

The carrier was held liable when part of the cargo arrived 17 days late and the carrier did not prove that he had diligently tried to have the goods carried on another aircraft or by another airline: 'considering that there exist many direct and indirect aerial links between Paris and Teheran, he has manifestly acted negligently and with complete disregard of his duties under the contract of carriage'.¹⁶

If the carrier proves that the damage by delay 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 claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage under Article 20 of the Montreal Convention.

Once the existence of damage due to delay is proved, the carrier is presumed to be liable on the basis of Article 19. The carrier can only escape by showing that he took the necessary measures to avoid the damage, or that it was impossible to take such measures, or that the damage was due to the contributory negligence of the injured person.

3. Carrier's Liability for Delay due to Overbooking.

¹⁵ Landgericht Frankfurt am Main, 14 November 1990; ZLW, 1991, p.188; Transp R, 1991, p. 146; *Air Law*, Vol. XVI, 1991, p. 142; I. H. Ph. Diederiks Verschoor, *supra* note 2, p. 306.

¹⁶ Court of Appeals, Paris, *Iran Air v. Societe generale de Geophysique*, 14 November 1974: 1975 RFDA 60 ; Rene H. Mankiewicz, *The Liability Regime of the International Air Carrier*, Kluwer Law and Taxation Publishers, 1981, p.193.

Many airlines adopt the practice of overbooking flights to counter act 'no shows': passengers with bookings but who do not present themselves, so as to maximize seat-occupancy and to minimize the loss of revenue they would otherwise suffer.¹⁷ Overbooking is one of the causes of delay, and it has become a rather common occurrence in the airline business these days.

The U.S. Courts have held that the carrier is liable for delay of an overbooked passenger, because his refusal to issue a boarding pass was in open violation of the carrier's own priority rules with respect to embarkation of overbooked passengers.¹⁸

A German court has held that the carrier is liable for any delay caused by his refusal to permit embarkation on the flight on which the passenger held a confirmed seat, whether the flight was overbooked or not.¹⁹

In *Carmia Fields v. Bwia International Airways Limited*²⁰ a claim for emotional injuries by a passenger who was denied boarding on an international flight to attend her father's funeral was preempted by the Warsaw Convention. The passenger asserted that the Convention was inapplicable because her claim arose the carrier's nonperformance of a contractual obligation. However, the carrier performed its obligations under the contract for carriage when it transported the passenger to her destination on later flight. Consequently, the Convention governed the claim because it arose from delayed transportation. Since the passenger alleged no physical injury or pecuniary loss as required for recovery under the Convention, the claim was barred.

The compensation on account of overbooking has been regulated in the EC and the U.S.A. In the U.S.A. the CAB laid down some rules, which were one of the sources for the later European Community rules to be based on.²¹

¹⁷ Shawcross & Beamont, *supra* note 4, para. 198.1.

¹⁸ United States Supreme Court, *Nader v. Allegheny Airlines*, 7 June 1796: 14 *Avi* 17, 148; U.S. Court of Appeals, Seventh Circuit, *Karp v. North Central Air Lines*, 31 August 1978: 15 *Avi* 17, 355.

¹⁹ Tribunal, Dusseldorf, 3 February 1971: ZLW 290, 293; Rene H. Mankiewicz, *supra* note 16, p.191.

²⁰ U.S. District Court, Eastern District of New York, No. 99-CV-2493(JG), 7 July 2000: 27 *Avi* 17,933.

²¹ I. H. Ph. Diederiks Verschoor, *supra* note 2, pp. 303-304.

The EC rules issued on 4 February 1991 provide that: 'EC passengers are entitled to a certain sum to be paid by the air carrier in case of overbooking, a part from an additional to any compensation for damage caused by the ensuing delay'. In case of flights of 3,500 kilometers or under the amount set at ECU 150, for longer flights at ECU 300. These amounts are halved if the passenger is offered alternative transportation enabling him to arrive with a delay of no more two hours in respect of his original time of arrival, or four hours in case of flights of more than 3,500 kilometers.²²

Towards the end of December 2001 the European Commission put forward a proposal for a regulation establishing common rules on compensation and assistance to air passenger in the event of denied boarding, cancellation and long delay of flights.²³

Briefly, the proposal would extend rights given to passengers by the current regulation on denied boarding (Council Regulation 295/91) by imposing an obligation on airlines to call for volunteers in exchange for agreed benefits and increasing compensation some five times to € 750 for short-haul flights and € 1,500 for long-haul flights. It would also create similar rights and obligations in respect of cancellation of flights otherwise than because of exceptional circumstances beyond the airline's responsibility. Further, it would entitle passengers subject to long delays (i. e. of two or more in the case of short-haul flights and four hours or more in the case of long-haul flights) to choose between an alternative flight and reimbursement, and to special assistance in the case of disabled passengers.²⁴

4. Timely Notice of Complaints

Under Article 31 of the Montreal Convention, in the case of delay, the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his disposal. Every complaint must be made in writing and given or dispatched within

²² Council Regulation No. 295/91; B.J.H. Crans and E.M.H. Loozen, "EC Aviation Scene", *Air Law*, Vol. XVI, 1991, Kluwer Law International, pp. 178-194.

²³ OJ No. C-103/E225, 30 April 2002.

²⁴ John Balfour, "EC Aviation Scene(No1:2002)", *Air & Space Law*, Volume XXVII, Number 4/5, September 2002, Kluwer Law International, p.250.

the times aforesaid. If no complaint is made within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on its part.

In *Oddvin Lokken v. Federal Express Corporation*²⁵ a shipper's failure to provide an air carrier with timely written notice of loss incurred due to a delayed shipment warranted the dismissal of his claim under the terms of the Warsaw Convention. The shipper's alleged timely verbal notice to the carrier followed by a written notice delivered five months after the shipment was made was insufficient to satisfy the Convention's requirements. Accordingly, the shipper was barred from recovering damages arising from the delayed delivery.

V. Effect of Conditions of Carriage Excluding Carrier's Liability for Delay

The Montreal Convention recognizes the freedom of the parties to enter into a contract that may stipulate specific dates and times for the carriage by air in Article 27, but provisions or general conditions of carriage specifying conditions under which the carrier would be relieved in whole or in part of liability for delay are null and void under Article 26 of Montreal Convention.²⁶

It is commonly provided in General Conditions of Carriage of the airlines that 'the times shown in timetable or elsewhere are approximate and not guaranteed and form no part of the contract of carriage, and schedules are subject to change without notice and the carrier assumes no responsibility for making connections'.²⁷

A clause in the carrier's tariff which limits compensation for delay to the refund of the ticket price when the flight was cancelled for technical reasons, is invalid and unenforceable because contrary to Article 19.²⁸

In *Russell Jones v. Britannia Airways*²⁹ the Judge of the County Court ruled that the passenger rights under the provisions of the Warsaw

²⁵ U.S. District Court, Southern District of New York, No.99 Civ.0585(THK), 16 February 2000: 27 *Avi* 17,596.

²⁶ The Warsaw Convention Article 23 (1) and Article 33.

²⁷ Korean Air Lines, General Conditions of Carriage for International Passenger, Article 11, Paragraph 1(1).

²⁸ New York Civil Court, *McMurray v. Capital Interational Airways*, 4 January 1980: 15 *Avi* 18,087.

²⁹ Case No. SH 714259, decision of 5 November 1998; Chester County Court, Judge Barnett ; I. H. Ph. Diederiks Verschoor, *supra* note 2, p. 302.

Convention, including Article 17 and 20, could not be limited by exclusions in the carrier's conditions of carriage (Article 23) and that the claimant was entitled to seek to prove his case under the provisions of Article 19 on the carrier's liability for damage caused by delay; the carrier would then have to prove (Article 20) that he did all he could to prevent the damage. The General Conditions of Carriage as laid down by the IATA expressly state that the times of departure and arrival do not form part of the contract of carriage. In present cases reference was made by the carrier to its own general conditions of carriage for passengers and baggage, including the 1991 edition which had similar conditions. This decision make it clear that all has to be done not only to avoid delay but also to avoid damage.³⁰

In *Ets Peronny v. Ste Ethiopin Airlines*³¹ the Paris Court of Appeal ruled that a clause in the air waybill stipulating that no time was fixed for the completion of the carriage, and that the carrier was authorized to select, or deviate from the route or routes of shipment, was invalid insofar as it related to cases where the performance of the air carriage took a great deal longer than the normal time and was far in excess of what the shipper could expect on the bases of his selection of that mode of transportation. Thus, the only effect produced by the provision of the Conditions of Carriage dealing with delay is to exonerate the carrier for cases of slight delay. In all cases where the delay is more than slight, the exonerating provisions of the Conditions of Carriage are not allowed to operate. The only way in which a carrier can be relieved of liability is to prove that he has taken all necessary measures to avoid the delay, or that it was impossible for him to take such measures, pursuant to Article 20(1) of the Warsaw Convention.³²

VI. Conclusion

The Montreal Convention Article 19 provides that the carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. However, this provision has some shortcomings as

³⁰ I. H. Ph. Diederiks Verschoor, *supra* note 2, p. 302.

³¹ (1975) 29 RFDA(C. A. Paris, 30 May 1975); Georgette Miller, *supra* note 7, p.155.

³² Georgette Miller, *supra* note 7, p.155.

follows³³: it is silent on the duration on the liability for carriage, and it does not make any distinction between persons and goods. It does not give any indication concerning the circumstances to be taken into account in cases of delay, and about the length of delay. Therefore, it is desirable to define the period of carriage with accuracy, and to insert the word 'unreasonable' in Article 19.

Although there will be no liability under Article 19 unless the delay is such that the carrier does not perform the carriage in a reasonable time, there may be liability under other provisions of the Convention. So if the delay, even if not unreasonable, causes the destruction or loss of checked baggage or cargo, there will prima facie be liability under Article 17(2) and 18(1) of the Montreal Convention.

The Montreal Convention provides the limit of liability for delay for passengers and their baggage and for cargo. The liability for delay of passengers is limited to SDR 4,150 per passenger, but the carrier has the defense of having taken all measures to avoid the delay. Baggage liability is raised to a limit of SDR 1,000 per passenger for both checked and unchecked baggage, while cargo liability is limited to an unbreakable limit of SDR 17 per kilogram.

Overbooking has become a general airline practice, and delay due to overbooking raises special problems. As overbooking is not a risk characteristic of air transport, as delay is, it should not be dealt with under the Convention, and the carrier can not rely on the terms of the Convention to limit his liability.

Where the Montreal Convention applies, any provision in the Conditions of Carriage tending to relieve the carrier of liability under the Convention is void. If the effect of the Convention is to make the carrier liable in cases of unreasonable delay, any contractual term seeking to restrict or exclude that liability can not be upheld.

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³³ I. H. ph. Diederiks Verschoor, *supra* note 2, p.301.

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