

Montreal Convention 28/5/1999

(9/5/2007)

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Circular



To: Transport Industry Operators

9 March 2007

Seminar

Montreal Convention 28/5/1999

The Montreal Convention means the Convention for the Unification of Certain Rules for International Carriage by Air done at Montreal on 28/5/1999. More than 60 countries have ratified the Montreal Convention ("MC"). On 15/12/2006, Hong Kong put the MC into force as the law under the Carriage by Air Ordinance.

This is such an International Convention that every air forwarder and airline in Hong Kong should know about. It in many cases determines the liability of carrier under air waybill in respect of cargo claims. As part of our risk management services to the transport industry, we together with the Hong Kong Shippers' Council will hold a seminar about the basics of MC in relation to cargo claims. The details are as follows:

1. Date : Wednesday, 9 May 2007 (2:15pm – 4:30pm)
2. Venue : YMCA of Hong Kong – Assembly Hall, 4/F North Tower
41 Salisbury Road, Tsimshatsui, Kowloon, Hong Kong
3. Speaker : Mr Richard Chan
4. Language : Cantonese
5. Fee : HK\$200 per person
6. Outline : MC application
: Air Waybill
: cargo disposal right between consignor and consignee
: 17 Special Drawing Rights per kg as carrier's liability limitation
: 4 defences available to carrier
: 14 day notice time limit for damage
: 21 day notice time limit for delay
: 2 year suit time limit

Please fill in the attached enrollment form and send it to Sun Mobility Insurance and Claims Services Limited or the Hong Kong Shippers' Council with your cheque for payment of the attendance fee.

Yours faithfully

For and on behalf of

SUN MOBILITY INSURANCE AND CLAIMS SERVICES LIMITED

A handwritten signature in black ink, appearing to be 'Richard Chan'.

Richard Chan

Director

Email: richardchan@sun-mobility.com

A handwritten signature in black ink, appearing to be 'Simon Chan'.

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Seminar – 9 May 2007

Montreal Convention 28/5/1999

Carriage by Air Ordinance Chapter 500

- effective 15/12/2006, Montreal Convention has force of law in Hong Kong, irrespective of nationality of aircraft performing carriage

Montreal Convention (“MC”)

- Convention for Unification of Certain Rules for International Carriage by Air done at Montreal on 28 May 1999

Application

- all international carriage of persons, baggage or cargo performed by aircraft
- international carriage means any carriage in which place of departure and place of destination are situated either:
 - ▶ within two States Parties; or
 - ▶ within a single State Party if there is an agreed stopping place within another State even if that State is not a State Party

Air Waybill

- an air waybill shall be delivered in respect of the carriage of cargo
- any other means which preserves a record of carriage may be substituted for an air waybill
- air waybill shall include:
 - ▶ places of departure and destination
 - ▶ if these two places are within a single State Party, at least one stopping place within another State
 - ▶ weight of consignment
- air waybill shall be made out in three original parts
 - ▶ first part shall be marked “for the carrier” and signed by consignor
 - ▶ second part shall be marked “for the consignee” and signed by consignor and carrier
 - ▶ third part shall be signed by carrier who shall hand it to consignor
- non-compliance with documentary requirements regarding air waybill shall not affect existence or validity of contract of carriage, which shall still be subject to MC including those rules relating to limitation of liability
- consignor is responsible for correctness of particulars and statements relating to cargo and shall indemnify carrier against all damage suffered by carrier due to irregularly, incorrectness or incompleteness of particulars and statements furnished by consignor
- air waybill is prima facie evidence of conclusion of contract, of acceptance of cargo and of conditions of carriage
- any statements in air waybill relating to weight, dimensions, packing and number of packages of cargo are prima facie evidence of facts stated
- statements relating to quantity, volume and condition of cargo do not constitute evidence against carrier except they have been, and are stated in air waybill to have been, checked by carrier in presence of consignor, or they relate to apparent condition of cargo

Consignor’s cargo disposition right

- prior to cargo arrival at place of destination, consignor has right to dispose of cargo by
 - ▶ withdrawing cargo at airport of departure or destination, or
 - ▶ stopping it in course of journey on any landing, or



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- ▶ calling for cargo to be delivered to a new consignee, or
- ▶ requiring cargo to be returned to airport of departure
- consignor must not exercise its right of disposition in such a way as to prejudice carrier or other consignors and must reimburse any expenses
- if carrier carries out consignor's cargo disposition instructions without requiring production of part of air waybill delivered to consignor, carrier will be liable for any damage caused to any person who is lawfully in possession of that part of air waybill

Consignee's cargo disposition right

- on arrival of cargo at place of destination, consignee is entitled to require carrier to deliver cargo to consignee
- carrier has duty to give notice to consignee as soon as cargo arrives

Resumption of consignor's cargo disposition right

- if consignee declines to accept cargo or cannot be communicated with, consignor resumes its right of disposition

Carrier's liability and defences

- carrier is liable for destruction or loss of, or damage to, cargo if event took place during carriage by air
- carriage by air comprises period when cargo is charge of carrier
- carriage by air does not extend to any carriage by land, sea or inland waterway outside an airport
- carrier is not liable for cargo destruction, loss or damage resulting from
 - ▶ inherent defect, quality or vice of cargo
 - ▶ defective cargo packing
 - ▶ war or armed conflict
 - ▶ public authority's act relating to entry, exit or transit of cargo
- carrier is liable for cargo delay unless carrier proves that it and its servants and agents took all measures that could reasonably be required to avoid delay or that it was impossible for it or them to take such measures

Carrier's liability limitation

- carrier's liability for cargo destruction, loss, damage or delay is limited to 17 Special Drawing Rights ("SDR") per Kilogram unless consignor has made, at time when cargo was handed over to carrier, a special declaration of interest in delivery at destination and has paid a special supplementary sum
- carrier's liability limitation shall be based on total weight of packages of cargo destructed, lost, damaged or delayed
- however, when destruction, loss, damage or delay of a part of cargo affects value of other packages covered by same air waybill, total weight of such packages shall also be taken into consideration in determining limit of liability

Invalidity of contract terms

- any contract terms tending to relieve carrier of liability or to fix a lower limit than that of MC shall be null and void

Freedom to contract

- nothing in MC shall prevent carrier from laying down contract terms which do not conflict with Convention

Basis of claims

- any action for damages however founded, whether under MC or in contract or in tort or otherwise, can only be brought subject to conditions and such limits of liability as set out in Convention



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- punitive, exemplary or any other non-compensatory damages shall not be recoverable

Servants and agents

- servant or agent of carrier shall be entitled to conditions and limits of liability which carrier itself is entitled to invoke under MC
- aggregate of amounts recoverable from carrier, its servants and agents shall not exceed carrier's limits of liability under Convention

Timely notice of complaints

- receipt of cargo by consignee without complaint is prima facie evidence that cargo has been delivered in good condition
- in case of cargo damage, consignee must complain to carrier within 14 days from date of cargo receipt
- in case of cargo delay, complaint must be made within 21 days from date when cargo has been placed at consignee's disposal
- every complaint must be made in writing and given or dispatched within times aforesaid
- if no complaint is made timely as aforesaid, no action shall lie against carrier, save in case of fraud on carrier's part

Jurisdiction

- an action for damages must be brought, at option of Plaintiff, in one of States Parties, either before court of domicile of carrier or of its principal place of business, or where it has a place of business through which contract has been made or before court at place of destination

Arbitration

- parties to contract of carriage for cargo may stipulate that any dispute relating to carrier's liability under MC shall be settled by arbitration
- such agreement shall be in writing

Suit time limit

- right to damages shall be extinguished if an action is not brought within a period of two years, from date of arrival at destination, or from date on which aircraft ought to have arrived, or from date on which carriage stopped

Successive carriage

- in case of carriage to be performed by various successive carriers, carriage is deemed to be one undivided carriage if it has been regarded by parties as a single operation, whether it had been agreed under form of a single contract or of a series of contracts
- consignor will have a right of action against first carrier
- consignee will have a right of action against last carrier
- consignor or consignee may take action against carrier which performed carriage during which cargo destruction, loss, damage or delay took place
- these carriers will be jointly and severally liable to consignor or consignee

Combined Carriage

- MC applies only to carriage by air in case of combined carriage partly by air and partly by any other mode of carriage
- nothing in Convention shall prevent parties from inserting in document of air carriage conditions relating to other modes of carriage

Contracting carrier & Actual carrier

- a contracting carrier as a principal makes a contract of carriage with a consignor



- an actual carrier performs, by virtue of authority from contracting carrier, whole or part of carriage
- acts and omissions of actual carrier and of its servants and agents shall be deemed to be also those of contracting carrier
- acts and omissions of contracting carrier and its servants and agents shall, in relation to carriage performed by actual carrier, be deemed to be also those of actual carrier
- any special agreement under which contracting carrier assumes obligations not imposed by MC or any waiver of rights or defences conferred by Convention or any special declaration of interest in delivery at destination shall not affect actual carrier
- any complaint to be made or instruction to be given under Convention to carrier shall have same effect whether addressed to contracting carrier or to actual carrier
- however, instructions relating to consignor's cargo disposition right shall only be effective if addressed to contracting carrier
- in relation to carriage performed by actual carrier, any servant or agent of actual carrier or of contracting carrier shall be entitled to avail themselves of conditions and limits of liability which are applicable under Convention to carrier
- aggregate of amounts recoverable from actual carrier and contracting carrier and from their servants and agents shall not exceed highest amount which could be awarded against either contracting carrier or actual carrier under Convention
- an action for damages may be brought, at option of Plaintiff, against actual carrier or contracting carrier or against both together or separately
- if action is brought against only one of carriers, that carrier shall have right to join other carrier to proceedings
- any action for damages against actual carrier may be brought before court where actual carrier has its domicile or its principal place of business

Mandatory application

- any clause contained in contract of carriage by which parties purport to infringe MC, whether by deciding law to be applied or by altering rules as to jurisdiction shall be null and void

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Multi-modal transportation involves far more complicated liability regime than port-to-port or airport-to-airport carriage. Pure international sea or air transport often affords better protection by international conventions. Conversely, multi-modal transport entails a variety of operational risk elements on top when the cargo is in- transit warehouse and during overland delivery. Fortunately, these risks are controllable but not without deliberate efforts. Sun-Mobility is the popular risk managers of many multi-modal operators providing professional assistance in liability insurance, contract advice, claims handling, and as a matter of fact risk consultant for their staff around-the-clock.

31 May 2007
Ref : Chans advice/77

To: Transport Industry Operators

**Montreal Convention 28/5/1999 Seminar
9 May 2007 - Q & A**

The Montreal Convention (MC) joint seminar was the second between the Hong Kong Shippers' Council and Sun Mobility. The topic was hand picked and seminar quickly organized in advance of our normal schedule. The hasty arrangement was prompted by the fact that the MC has been made part of the Hong Kong law since December 2006 and we felt the urgency to call for its awareness among air freight/forwarders. Covered were the essences of the MC in contrast with the Amended Warsaw Convention. For those who missed the seminar, the handouts are accessible to the Chans Advice readership through www.sun-mobility.com.

The MC Seminar epitomized Sun Mobility's impetuous pursuit of service excellence by continuous knowledge improvement. We are glad that the logistics industry has cast its continuous support to our drive. The seminar as usual saw a diverse mix of participants. However, over 90% this time were airfreight forwarders, showing the importance of the MC to the trade.

After 105 minutes of lecture, questions were fired from the floor. We managed to answer 8 questions on the spot within the time permitted by the venue. Subsequently, the remaining 25 questions were replied by email directly to the participants after the seminar, and are compiled in this issue of the Chans Advice for the benefit of our readership.

1Q. Will chargeable weight be considered in case of establishing carrier's liability?

- A. According to Articles 22(3) and 22(4) of the Montreal Convention, it is clear that the carrier's liability limitation for the cargo loss, damage, delay or destruction is 17 Special Drawing Rights per kilogramme of the total weight of the package(s) of the cargo(es) lost, damaged, delayed or destroyed. Therefore, the liability limitation should be based on the actual weight in terms of kilogramme.

2Q. Before a shipment is officially released to the consignee or its representative, is the airline the cargo owner? Can the airline have the right to carry out or make arrangement for customs clearance on the cargo (of course being customs constrained) at the liberty of the consignee (ie without any prior consent of the consignee)?

- A. The airline is the carrier carrying the cargo. The airline is not the party which owns the cargo. It is usually the sale of goods contract that determines who is the cargo owner. All this will not be changed by whether or not the cargo has been released to the consignee.

It is usually the cargo owner that has the duty to do the Customs clearance. However, it all depends on the particular country's Customs laws, rules and regulations. If a particular country's Customs authority requires the airline to do Customs clearance for the consignee, then it appears the airline has no choice but to follow the Customs' requirement. However, if the Customs has not asked the airline to do the Customs clearance for the cargo, the airline should not touch this subject which should be the job of the cargo owner.

3Q. Who is authority to make the claim to the forwarding, either shipper or consignee? In pre-paid case or collect case.

- A. It all depends on who is the party which has suffered losses in the cargo loss, damage or delay case. For example, if the consignee has suffered the losses, then it has the right to claim against the forwarder under the HAWB.

The question of freight pre-paid or freight collect should not affect the issue of who has the right to make the cargo claim. The term of pre-paid or collect is only relevant to the payment of freight charges to the carrier. It should have nothing to do with the cargo claim.

4Q. Would MC apply to an air carriage between Hong Kong and Beijing? Assume no intermediate stopping place.

- A. The air carriage from Hong Kong to Beijing without any intermediate stopping place is not an international carriage by air. The Montreal Convention should not apply. However, Section 13 of the Carriage by Air Ordinance (Chapter 500) makes the non-international carriage by air also subject to the Montreal Convention. Therefore, the Montreal Convention applies to the air carriage from Hong Kong to Beijing even without any stopping place.

5Q. Would trucking from a HKG forwarder's export CFS to on board the plane be covered by MC? Assume the CFS is inside the HK airport.

- A. The Montreal Convention basically applies to the period from the departure airport to the destination airport. Therefore, anything that happens inside the Hong Kong airport including the trucking from the CFS to the plane is subject to the Montreal Convention.

6Q. Please advise terms and conditions to be written on HAWB in HK as far as MC99 & AWC are concerned.

- A. You may have to obtain legal advice from your lawyer. However, you may consider something like "As far as the carriage by air is concerned, the Carrier's liability shall be determined by the Montreal Convention or any legislation making the Montreal Convention or the Warsaw Convention compulsorily applicable to this Air Waybill. Warsaw Convention means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12/10/1929 or that Convention as amended by the Hague Protocol of 28/9/1955, whichever may be legally applicable. Montreal Convention means the Convention for the Unification of Certain Rules for International Carriage by Air done at Montreal on 28/5/1999."

7Q. Any time bar for resumption of consignor's cargo disposition right?

- A. According to Article 12(4) of the Convention, the consignor resumes its right of disposition if the consignee declines to accept the cargo or cannot be communicated with. The Montreal Convention does not have any provision stipulating any time bar regarding this right of the consignor. We think if the shipper does not take cargo delivery after say one or two months of the carrier's notification of the consignee's uncollection of cargoes, the carrier may dispose of the uncollected cargoes in accordance with the AWB terms.

8Q. If the airline report loss of cargo for a month, then the cargo appear to another airport, they shipped them to right destination. Can we file claim for delay to airline (due to airline's liability)?

- A. It is clear that the airline should have the liability for the one month delay. However, the important thing is to prove what are the losses resulting from this one month delay. Usually, this will be the cargo devaluation e.g. the original buyer cancels the contract and the seller

can only find another buyer with lower price. The cargo devaluation claim should still be subject to the 17 SDR/kg liability limitation under the Convention, which should be available to the airline.

9Q. If only survey (3rd party) report in Terminal presented, without the written complaint within 14 days, is the claim be valid?

A. According to Article 31(4) of the Montreal Convention, if no written complaint is given or dispatched to the carrier within 14 days for cargo damage, no action shall lie against the carrier except in the case of fraud on the part of the carrier. It would be difficult for a survey report to serve the purposes of the written complaint as required by the Convention.

10Q. If delay happens in origin's warehouse, carrier seems not liability because the delay is not caused by air?

A. If the origin warehouse is outside the airport, we think the Montreal Convention would not apply to the delay that happens there. Whether or not the carrier should still have liability for the delay will depend on the carriage contract terms e.g. AWB.

11Q. For shipper and consignee's cargo disposition right, doesn't it depend on the Incoterm?"

A. Incoterms e.g. FOB, CIF, FCA are the contract terms in the sale of goods contract between the seller and the buyer. These should not affect the carrier to carry out its cargo delivery job according to the carriage contract terms e.g. AWB and the Montreal Convention. The carrier should only follow the carriage contract terms and the Convention in doing its job of cargo delivery. The carrier does not need to look at the cargo sale contract terms which have nothing to do with the carrier.

12Q. Carrier's liability and defences, if it's proved liable for delay, shall it be settle based on 250 Gold Francs or SDR 17/kg, but consequential loss?!

A. According to Article 22(3) of the Montreal Convention, the carrier liability for cargo delay (including consequential losses) is limited to 17 SDR per Kilogramme of the cargo delayed. The liability limitation of 250 gold francs is the one under the Amended Warsaw Convention.

13Q. As mentioned in Montreal Convention, carrier's liability does not extent outside airport. However, in general, carrier may provided "to door" service. In this connection , if damage found outside airport and there is no other contract except HAWB, what is standard liability of the carrier?

A. For those cargo damage that happens outside the airport, the Montreal Convention will not apply. Such cargo damage will be subject to the carriage contract terms e.g. the HAWB in your example. It is quite often to find the carrier's liability limitation fixed at US\$20/kg in the AWB contract terms.

14Q. Signed POD with remark can served as written complaint?

A. According to the Montreal Convention, every complaint must be made in writing and given or dispatched within the times (e.g. 14 days for cargo damage or 21 days for cargo delay). We think a signed POD (Proof of Delivery) with written remarks clearly complaining in detail the cargo damage or delay should serve the purposes of written complaint as required by the Montreal Convention. However, for safety sake, a separate notice of detailed written complaint should timely be sent to the carrier.

15Q. Would the shipper's deposition of cargo limit by the contractual terms of payment between shipper and consignee?

- A. The contract terms of payment between the shipper and the consignee presumably under the sale of goods contract have nothing to do with the carrier. The carrier does not need to look at these terms when the carrier performs the job of cargo delivery. The carrier only needs to follow the carriage contract terms e.g. AWB or the Montreal Convention.

16Q.Any Chinese Version of court cases?

- A. We regret we have no Chinese version of the court cases mentioned in our monthly newsletters Chans advices.

17Q.If misdelivery, what's our liability (such as no bank release / endorsement)?

- A. The Montreal Convention does not provide any liability limitation to the carrier for cargo misdelivery. The carrier needs to look at its own carriage contract terms e.g. AWB to see if the carrier can limit liability for the cargo misdelivery.

18Q.When there is a case occur, which convention will apply, Warsaw or Montreal?

- A. If both the countries of departure and destination have adopted the Montreal Convention, then the Montreal Convention applies.

If both the countries of departure and destination have adopted the Warsaw Convention, then the Warsaw Convention applies.

If both the countries of departure and destination have adopted both the Warsaw and Montreal Conventions, then the latest Convention i.e. the Montreal Convention should apply.

If one of the countries has adopted the Warsaw Convention whereas the other country has adopted the Montreal Convention, then no Convention should apply unless the contract of carriage e.g. AWB has incorporated a particular Convention e.g. the Montreal Convention into the contract to apply.

19Q.How to define the delayed?

- A. It would be difficult to have an exact answer to define delay. It all depends on the court hearing the case. A court in one country may rule that one week should not be regarded as delay. However, one court in another country may hold an opposite view. Having said that, we think most of the courts would regard one or two months as delay for air carriage.

20Q.For international air carriage, if the AWB is not traveled with the goods (ie. electronic copy of AWB is sent to the parties at destination), is there any legal / insurance / claim issue?

- A. According to Article 7(2) of the Montreal Convention, the second original of the AWB should be for the consignee. However, if the consignee and the carrier agree to accept only the electronic copy of the AWB, this should be in order. Nevertheless, it is advisable to make sure the consignee to have a legible copy of both the front and back page terms of the AWB.

21Q.If claim successfully, can the freight charges be refund also too?

- A. Freight charges and cargo claims are two separate issues. Even if the carrier agrees to pay a cargo claim, the carrier should still be entitled to the freight charges according to the contract of carriage terms. The carrier should have no need to refund the freight charges to the shipper or consignee even if there is cargo claim or cargo claim settlement.

22Q.When will the case be go to the court? If Airline / agent fulfill the claim to the Shipper, then, is it no need to court?

A. If the airline settles the cargo claim with the shipper amicably, there is no need to go to court. However, if the airline refuses to settle the cargo claim, the shipper may sue the airline in court.

23Q.If the HAWB without mentioned Montreal Convention, it's to apply Warsaw Convention?

A. Even if the HAWB does not mention the Montreal Convention, the Montreal Convention will still apply if the countries of departure and destination have adopted the Montreal Convention. Of course, if the countries of departure and destination have adopted the Warsaw Convention, then the Warsaw Convention applies. In case neither the Montreal Convention nor the Warsaw Convention is compulsorily applicable, then it depends on whether the HAWB has incorporated the Warsaw Convention into the contract. If yes, the Warsaw Convention will apply.

24Q.Does liability limit by MC cover trucking sector operated by an airline?

A. It depends on whether the accident happens inside the airport. If the airline trucking has an accident that happens inside the airport, the Montreal Convention will apply. However, if the same accident happens outside the airport, the Montreal Convention will not apply.

25Q.Is Montreal Convention 1999 the same as Montreal Protocol?

A. We are not so sure about the Montreal Protocol. There is the Hague Protocol, namely the Protocol to Amend the Warsaw Convention done at the Hague on 28/9/1955 i.e. the Amended Warsaw Convention. However, we cannot find the Montreal Protocol. We can only find the Montreal Convention of 28/5/1999.

The Sun Mobility seminar is to create risk awareness among airfreight forwarders. Better grasp of the MC as part of the rules of transport game would no doubt give you better hands in any airfreight claim. Or else we would not have similar but expanded audience in our seminars. Why? Because there are equal chances for any one to face or to encounter similar issues. Sun Mobility seminars attempted to give answers.

Our belief remains unchanged. Better knowledge does minimize risk exposure. Prevention is always better than cure. The competitive world and rising consumer rights have made all businesses and transport operations susceptible to legal threats. Your time could be spent better in profit-making activities. A forwarder liability insurance brings more than a protection – talk to us for a cost effective solution.

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Photos



