

A New Implementation of Article 22 of Montreal Convention in the UAE

Yazan Al Saoudi - Partner, Transport & Insurance - Insurance
y.saoudi@tamimi.com - Dubai International Financial Centre

Malek Zreiqat - Senior Counsel
m.zreiqat@tamimi.com - Dubai International Financial Centre

Background

A shipper contracted with a carrier to ship cargo from New York to Abu Dhabi. After the shipment was declared 'lost', the consignee was compensated by his insurance company to an amount equivalent to the cargo value. The insurer consequently filed a subrogation claim against the carrier. The relevant air waybill ("the Air Waybill") for the shipment in question included a declaration of the cargo value under the box marked "Declared Value for Customs". However, there was no value inserted into the "Declared Value for Carriage" box.

In principle, any contract of carriage from New York to Abu Dhabi is governed by the provisions of the Montreal Convention 1999, which is formally known as the Convention for the Unification of Certain Rules for International Carriage by Air. The Montreal Convention has become domestic law in the United Arab Emirates by virtue of Federal Decree No. 13 of 2000, which was published in the Official Gazette on 31st January 2000.

The Montreal Convention provides an exclusive and uniform framework for liability in international air carriage. Article 22.3 of Montreal Convention provides that "In the carriage of cargo, the liability of the carrier in the case of destruction loss damage or delay is limited to a sum of 19 Special Drawing Rights per kilogramme, unless 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, and paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the consignor's actual interest in delivery at destination."

Based on this article, a carrier's liability is limited to 19 SDRs per kilogramme. However, if the consignor has made a special declaration in the Air Waybill regarding the cargo's value and paid supplementary fees to the carrier, the carrier will be liable to pay the declared cargo value and the limit of liability will no longer apply.

The carrier in this case argued that Article 22.3 of the Montreal Convention should apply to the claim and that the carrier's liability should be limited to 19 Special Drawing Rights (SDRs) per kilogramme. SDRs are an international type of monetary reserve currency created by the International Monetary Fund and are used by the Montreal Convention to set liability limits. The current value of one SDR in US dollars is approximately \$1.423140 (this figure is revised daily).

The carrier argued that the declaration made by the consignor under the Air Waybill was solely made for customs purposes and that no special declaration of interest or value for carriage purposes had been made under the Air Waybill, nor had a supplementary sum been paid to the carrier. On the fact of the document the box entitled "Declared Value For Carriage" had been filled with the letters "NVD" meaning 'no value declared', and the box marked "Amount of Insurance" was filled in with "XXX". Consequently, the carrier asserted that the limit of liability of 19 SDRs/kilogramme should apply to the claim at hand. It is pertinent to mention that, under Article 10.1 of the Montreal Convention, the consignor was responsible for the correctness of the particulars and statements relating to the cargo inserted by it.

Assuming that the Montreal Convention limits of liability applied, the carrier's liability would be calculated as follows:

Weight of Cargo (ex. 100kg) X 19 SDRs (USD 1.423140) = approximately USD 2703

In contrast, the claimant argued that the Montreal Convention limits of liability should not be applied and that the declared value for customs should be taken into account, resulting in the carrier being obliged to pay the declared sum or value of the cargo. In the case at hand the declared value for customs was around USD 140,000.

Whilst accepting that the Montreal Convention applies to the contract of carriage, the Abu Dhabi Court of First Instance held that the carrier should be liable to pay the declared value of cargo and that the limit of liability provided under Article 22.3 of the Montreal Convention should not apply in the present case for two reasons: firstly, because the value of the cargo had been declared under the Air Waybill (i.e. the declared value for customs), and, secondly, because the carrier did not prove that a supplementary fee was applicable on the shipment and that the consignor failed to pay such fee.

The Court of First Instance's judgment is not yet conclusive as it is subject to two stages of appeal. Nonetheless, it may be alerting to air carriers if it is ultimately upheld by the higher courts in Abu Dhabi, the Court of Appeal and the Court of Cassation. The judgment appears to propose that any declaration of value on the Air Waybill might qualify as a special declaration for the purpose of Article 22.3 of the Montreal Convention. The verdict also appears to suggest a strange burden of proof on the carrier that an extra insurance fee is applicable on the cargo. This may eventually mean that air carriers might be obliged to take preventive measures and to revisit their terms and conditions of carriage and the particulars of their air waybills in order to maintain the limits of their liability in accordance with the Montreal Convention. Such measures may include the addition of new terms and boxes on the contractual documentation. For instance, it might be expedient to introduce a new box entitled "Special Declaration per Article 22.3 of Montreal Convention", or to clearly state under the terms of carriage that the declared value for customs is strictly made for customs purposes and requirements and that it does not qualify as a special declaration within the terms of Montreal convention.