

# Update and a Primer on Cargo Liability for International Air Freight

## International Air Freight Limitations of Liability under the Montreal Convention Increase, Effective December 28, 2019

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On December 28, 2019, the limitation of liability for cargo lost or damaged during international air transportation between countries that are signatories to the Montreal Convention (the “Convention”) [i] will increase from 19 Special Drawing Rights (“SDRs”)[ii] per kilogram to 22 SDRs per kilogram, based on the weight of the package lost or damaged. The value of an SDR is approximately \$1.38 U.S. Dollars (“USD”), resulting in a new limitation of liability of approximately \$30 USD per kilogram, up from approximately \$26 USD per kilogram.

Simply put, this adjustment in SDR will potentially expose air transport providers to approximately 14% greater cargo claims exposure and correspondingly yield greater recovery for shippers. When viewed through a real-world economic lens, this increase in the number of SDRs is actually very close to what it was in 2009, taking into account inflation and the addition of the Chinese renminbi to the basket of currencies that make up an SDR. Nevertheless, parties involved in commercial air transportation should review and update their current air waybills, contracts, or other service terms and conditions to conform with this change. In the absence of carefully updating terms, the parties to air transport risk falling appreciably outside market, which may impact volumes of tender, or “leaving money on the table” for cargo claims, which may impact the total cost of transportation.

**History.** Liability of air carriers for cargo lost or damaged during transit has been limited since the dawn of commercial air transportation. The original Warsaw Convention[iii] limited liability to 250 French gold Francs per kilogram. The Montreal Protocol to the Warsaw Convention[iv] set the limitation at 17 SDRs per kilogram. On December 30, 2009, the limitation was increased to 19 SDRs per kilogram. Now, as of December 28, 2019, the limitation under the current Convention will be 22 SDRs per kilogram.

**Which shipments are affected?** The Convention[v] governs all international carriage[vi] of persons, baggage, or cargo performed by aircraft for reward between or within member countries.[vii] It also governs gratuitous carriage by aircraft performed by an air transport undertaking.[viii] The Convention replaces the Warsaw Convention, the Hague Protocol, the Guadalajara Convention, the Guatemala City Protocol, and the Montreal Protocols in regards to air transportation. [ix]

**Who has responsibility for preparing air waybills and what if they do it wrong?** Under the Convention, the consignor (not the carrier) is required to prepare an air waybill or cargo receipt showing (1) the

places of departure and destination, (2) at least one stopping place (if departure and destination are within the same country, but carriage includes a stopping place in another country) and (3) the weight of the shipment.[x]

The consignor, when necessary, must comply with the requirements of customs, the police, and similar public authorities regarding documentation. No duty, obligation, or liability on the part of the carrier is created by the article of the Convention governing the creation of documentation.[xi]

The consignor is required to create three original parts of the air waybill. The first part must be marked “for the carrier” and be signed by the consignor. The second part must be marked “for the consignee” and signed by the consignor and the carrier. The third part must be signed by the carrier, who must hand it to the consignor after the cargo has been accepted by the carrier.[xii]

***For what events is the carrier liable?*** The carrier is liable for loss or damage to the cargo if the loss or damage took place during the carriage by air. Carrier defenses to liability are (1) inherent defect, quality or vice of that cargo; (2) defective packing of that cargo performed by a person other than the carrier or its servants or agents; (3) an act of war or an armed conflict; (4) an act of public authority carried out in connection with the entry, exit or transit of the cargo.[xiii]

The carrier is exonerated in whole or in part if it can prove the damage was caused or contributed to by the claimant.[xiv]

***Exactly what are the limits of liability and why have they changed?*** The Convention retained the limitation of liability for cargo of 17 SDRs per kilogram that was contained in Montreal Protocol No. 4, subject to the same proviso, “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 has 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.”[xv]

The Convention requires that the established limitation of liability be reviewed at five-year intervals, taking into account the rate of inflation. A review will also take place any time one-third of the parties request a review and the rate of inflation has exceeded 30 percent since the previous revision.[xvi]

The first review of limits of liability conducted by the International Civil Aviation Organization in accordance with Article 24, revised limits of liability, effective December 30, 2009, to 19 SDRs per kilogram for cargo loss or damage. As noted above, the latest review has resulted in an increase, effective December 28, 2019, from 19 SDRs to 22 SDRs per kilogram as the minimum limitation of liability.

In determining the limits of liability, the weight to be taken into consideration is the total weight of the package or packages concerned, not the total weight of the shipment, unless the loss or damage affects the value of other packages in the shipment.[xvii]

A carrier may agree to higher limits of liability or to no limits whatsoever.[xviii] However, any provision attempting to set a lower limit is null and void.[xix]

***What are the time limits for filing cargo claims and commencing litigation?*** Complaints must be filed in writing and sent to the carrier within strict time limits.

In the case of damage, the person entitled to delivery must complain to the carrier within fourteen days of receipt. In the case of delay, the complaint must be made within twenty-one days from the date the cargo is delivered.<sup>[xx]</sup> Any legal action must be brought within two years from the date of arrival at destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.<sup>[xxi]</sup>

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<sup>[i]</sup> Convention for the Unification of Certain Rules for International Carriage by Air, Done at Montreal on 28 May 1999.

<sup>[ii]</sup> Special Drawing Rights as defined by the International Monetary Fund. The currency value of the SDR is determined by summing the values in U.S. dollars, based on market exchange rates, of a basket of major currencies (the U.S. dollar, Euro, Japanese yen, pound sterling and the Chinese renminbi). The SDR currency value is calculated daily (except on International Monetary Fund (“IMF”) holidays or whenever the IMF is closed for business) and the valuation basket is reviewed and adjusted every five years. If a country is not a member of the IMF, that country may fix the limitation at an amount that corresponds to 250 monetary units per kilogram. A monetary unit is equal to sixty-five and a half milligrams of gold of millesimal fineness nine hundred.

<sup>[iii]</sup> Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929.

<sup>[iv]</sup> Montreal Protocol No. 4 to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, as Amended by the Protocol Done at the Hague on 28 September 1955, Signed at Montreal on 25 September 1975.

<sup>[v]</sup> Convention for the Unification of Certain Rules for International Carriage by Air, Done at Montreal on 28 May 1999.

<sup>[vi]</sup> The instrument of ratification of the United States contains the following declaration: “Pursuant to Article 57 of the Convention, the United States of America declares that the Convention shall not apply to international carriage by air performed and operated directly by the United States of America for non-commercial purposes in respect to the functions and duties of the United States of America as a sovereign State.”

<sup>[vii]</sup> More than 90 countries are now signatories to the Convention, including the United States, European Union, Australia, Canada, China, Japan, and Mexico.

<sup>[viii]</sup> Montreal Convention, Art. 1.

<sup>[ix]</sup> Montreal Convention, Art. 55.

<sup>[x]</sup> Montreal Convention, Art 5.

- [xi] Montreal Convention, Art. 6.
- [xii] Montreal Convention, Art. 7.
- [xiii] Montreal Convention, Art. 18.
- [xiv] Montreal Convention, Art 20.
- [xv] Montreal Convention, Art. 22, para. 3.
- [xvi] Montreal Convention, Art. 24.
- [xvii] Montreal Convention, Art 22, para 4.
- [xviii] Montreal Convention, Art 25.
- [xix] Montreal Convention, Art 26.
- [xx] Montreal Convention, Art. 31.
- [xxi] Montreal Convention, Art 35.