

Indonesia, Malaysia Airline's aircraft accidents and the Indonesian, Korean, Chinese Aviation Law and the 1999 Montreal Convention

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I . Indonesia AirAsia (QZ8501) Jet's Crash and Aviation Law

AirAsia QZ8501 Jet departed from Indonesia Juanda International Airport, Surabaya, at 05:35 on Dec. 28, 2014 and was scheduled to arrive at Singapore Changi International Airport at 08:30 same day. The Airbus A320-200 crashed into the Java Sea on Dec. 28, 2014 carrying 162 people from Indonesia's second city Surabaya to Singapore. Searchers are hunting for the "black box" flight data recorders to determine the cause of the crash.¹⁾

An initial report on the Web site of Indonesia's meteorological agency BMKG suggested the weather at the time the plane went down sparked the disaster after it appeared to fly into storm clouds. "Based on the available data received on the location of the aircraft's last contact, the weather was the triggering factor behind the accident, which referred to infra-red satellite pictures showing peak cloud temperatures of minus 80 to minus 85 degrees Celsius at the time.

Only according to a report from Indonesian meteorological expert cause of the tragic of AirAsia flight QZ 8501 the most likely was not turbulence (as was previously believed), but actual chunks of ice inside the Airbus A320's engine. AirAsia QZ8501: Plane crash blamed on weather. Bad weather was the biggest factor in the crash of AirAsia flight QZ8501, the Indonesian weather agency believes.²⁾

The AirAsia jet was reported to be the lowest-flying plane in the region at the time of its disappearance. It was in an area near the equator known for thunderstorms, where trade winds from the northern and southern hemispheres intersect. The pilot contacted air traffic control at 06:12 local time to request permission to climb to 38,000ft (11,000m) from 32,000ft to avoid big storm clouds - a common occurrence in the area.

1) http://en.wikipedia.org/wiki/Indonesia_AirAsia_Flight_8501

2) <http://www.bbc.com/news/world-asia-30665499>

The recovery efforts, led by the Indonesian military and the Indonesian search and rescue agency, have been severely hampered by bad weather and heavy seas.³⁾ Australia, the US, Russia, Singapore, South Korea and China are helping with the search. Planes and ships are conducting visual and radar surveillance, as well as using sonar equipment. About 30 vessels, including three warships, and more than 20 aircraft, including helicopters, PS Orions, Hercules C-130s and a Russian Beriev Be-200 amphibious plane, have been involved.

Indonesia AirAsia jet carrying 162 people lost contact with ground controllers on Dec. 28, 2014. An Indonesia government official confirmed that the debris was from Flight 8501. The debris was found about 66 miles from the plane's last detected position. The 155 passengers and 7 crew aboard Flight QZ 8501, which vanished from radar 42 minutes after departing Indonesia's second city of Surabaya bound for Singapore early Dec. 28, 2014. AirAsia QZ8501 was 137 adult passengers, 17 children and 1 infant, along with 2 pilots and 5 crew in the airplane of the majority Indonesian.

On board Flight QZ8501 were 155 Indonesian, three South Koreans, and one person each from Singapore, Malaysia and Britain. The co-pilot was French. About 30 ships and 21 aircraft from Indonesia, Australia, Malaysia, Singapore, South Korea and the United States have been involved in the search of up to 10,000 square nautical miles. The plane, whose engines were made by CFM International, co-owned by General Electric and Safran of France, lacked real-time engine diagnostics or monitoring, a GE spokesman said. Such systems are mainly used on long-haul flights and can provide clues to airlines and investigators when things go wrong.

Indonesia AirAsia is 49 percent owned by Malaysia-based budget carrier AirAsia. The AirAsia group, including affiliates in Thailand, the Philippines and India, had not suffered a crash since its Malaysia budget operations began in 2002. Entering of search and rescue mission, the National Search and Rescue

3) <http://www.theguardian.com/world/2015/jan/02/airasia-flight-8501-rescue-teams-recover-bodies-java-sea>

Agency (BASA RNAS) Republic of Indonesia confirms that they have recovered 72 remains from the search area. The search process is still underway with the Russian SAR team joining the mission, strengthening the operation led by BASARNAS. Members of a search team carried seats from AirAsia aircraft on Jan. 8, 2015 after pieces of the wreckage were airlifted to the airport in Pangkalan Bun, Indonesia.

Indonesian Navy divers inspect their gear upon arrival for the search operation for the victims of AirAsia flight QZ 8501 at the airport in Pangkalan Bun, Indonesia (AP).⁴⁾ So far 41 bodies of victims have been recovered in Java Sea on Jan. 8, 2015. The process of identifying victims continues: Indonesian personnel transfer numbered coffins in Surabaya Members of the National Transportation Safety Board inspect the portion of the Crashed AirAsia Flight 8501 on the deck of rescue ship Crest Onyx at Kumai port in Pangkalan Bun, Indonesia, Jan. 11, 2015.

Parts of AirAsia Flight 8501 was seen on the deck of rescue ship Crest Onyx at Kumai port in Pangkalan Bun, Jan. 11, 2015.

A day after the tail of the crashed AirAsia plane was fished out of the Java Sea, the search for the missing black boxes intensified with more pings heard. Searchers have now recovered both so-called black boxes from AirAsia Flight QZ8501 in Java Sea and may have located the fuselage of the plane, an Indonesian official said on January 12(TUE), 2015, adding more pieces to help solve the puzzle of what caused the disaster. Divers retrieved the cockpit voice recorder, which is designed to retain all sounds on a plane's flight deck.

The two flight recorders have been taken to a lab in Jakarta, the Indonesian capital, for analysis. Investigators say they have successfully downloaded the contents of both devices. But Mr. M. Siswosuwarno, a senior official at Indonesia's National Transportation Safety Committee cautioned that interpreting the information requires much more time from one month to six month or one year.

4) <http://www.theguardian.com/world/2015/jan/23/airasia-qz8501-crash-divers-enter-fuselage-first-time-six-bodies>

The aircraft's black box is composed of ① Flight Data Recorder (FDR), ② Cockpit Voice Recorder (CVR) and ③ Screaming of Pilot. The cause of the crash remains mysterious, with an experienced pilot flying a young and tested A320 aircraft into a storm before losing contact with air traffic controllers without transmitting a distress signal. Indonesia has deployed a pinger locator to look for the plane's underwater locator beacon, which should help locate the plane's "black box" flight recorder. Civilian aircraft carry two "black boxes" - the flight data recorder and the cockpit voice recorder - each weighing about 15lb (7kg) and protected by steel casing designed to resist water pressure in depths up to 20,000ft (6,100m). Search and rescue officials have confirmed that the Cockpit Voice Recorder of QZ 8501 has been found and was lifted from the seafloor on January 17 (TUE), 2015.

It has since been retrieved and sent to Jakarta for further investigations by Indonesia's National Transportation Safety Committee. According to BASARNAS, the recorder was found about 20 meters from where the plane's flight data recorder was found the day before. BASARNAS chief Henry Bambang Soelistyo reassured the families of the victims that retrieving the passengers remains would remain a chief priority even as underwater currents and bad weather hampered rescue efforts.⁵⁾

II . Disappearance of Malaysia Airlines Aircraft (Flight MH 370)

The Malaysia Airlines Flight Aircraft (MH370) departed from Kuala Lumpur International Airport on March 8, 2014 at 00:41 local time and was scheduled

5) <https://sg.news.yahoo.com/contact-with-airasia-flight-qz8501-bound-for-singapore-from-surabaya-lost-033803688.html? page=all>

to land at Beijing Capital International Airport at 06:30 local time. The Malaysia Airlines also marketed as China Southern Airlines (中國南方航空公司) Flight 748 (CZ748) through a code-share agreement, was a scheduled international passenger flight that disappeared on 8 March 2014 en route from Kuala Lumpur International Airport to Beijing Capital International Airport (a distance of 2,743 miles: 4,414 km). The aircraft, a Boeing 777-200ER last made contact with air traffic control less than an hour after takeoff. Operated by Malaysia Airlines (MAS), the aircraft carried 12 crew members and 227 passengers from 15 nations. There were 227 passengers, including 153 Chinese and 38 Malaysians, according to the manifest.⁶⁾ Nearly two-thirds of the passengers on Flight 370 were from China. Seven were children. Other passengers came from Indonesia 7, Australia 6, India 5, France 4, USA 3, Iran 2, Canada 2, New Zealand 2, Ukraine 2, Russia 1, The Netherlands 1 and Taipei 1.

The flight MH370, a Malaysia Airlines Boeing 777, en route from Kuala Lumpur to Beijing, lost contact with air traffic control about 2 hours after takeoff. The missing flight carried 227 passengers-153 from China, 38 from Malaysia, 7 from Indonesia & Australia, 5 from India, 4 from US. There were 12 crew members. On 24 March, 2014, the Malaysia government confirmed analyses by the AAIB and Inmarsat satellite which concluded "beyond any reasonable doubt" that the aircraft had gone down in the southern Indian Ocean with no survivors. Since 22 March, 2014, there have been almost daily sightings of marine debris in the search area made by various countries' satellites.

Two Iranian men were found to be travelling on false passports. But further investigation revealed two Iranian were headed for Europe via Beijing, and had no apparent links to terrorist groups. Among the Chinese nationals was a delegation of 19 prominent artists who had attended an exhibition in Kuala Lumpur. On the day that contact with the aircraft was lost, a joint search and

6) McQuirk, Rod; Wright, Stephen (9 March 2014). *"Behind jet's passenger list is rich human tapestry"*. Associated Press. Retrieved 17 January 2015.

rescue effort, later reported as the largest in history, was initiated in the Gulf of Thailand and the South China Sea. The search area was later extended to include the Strait of Malacca, Andaman Sea, and the Indian Ocean. Two satellite images taken on 16 March and 18 March 2014 showed potential aircraft debris in the southern Indian Ocean southwest of Western Australia, prompting increased search activity in the area.

Malaysian Prime Minister N. Razak said that the Inmarsat and Air Accidents Investigation Branch (AAIB) have concluded that Malaysia Airlines MH370 flew along the southern corridor, and that its last position was in the middle of the Indian Ocean, west of Perth.⁷⁾ The 15 nations have sent 43 ships and 58 aircraft to search for the missing airplane in the Indian Ocean and South China Sea. Malaysia has sent 18 aircraft and 27 ships. China has deployed 8 ships and 2 military aircraft and up to 10 satellites. British satellites from Inmarsat revealed it was picking up hourly 'pings' from the aircraft's systems 7 hours and a half hours after takeoff.

On April 5, 2014 what could be the wreckage of ill-fated Malaysia Airlines Flight MH370 has been spotted drifting in a remote section of the Indian Ocean. A Chinese ship traveling within the search area inside the Indian Ocean discovered what has been described as a "series of sounds." Just 56 miles away, the ship also spotted debris they described as white objects floating in the water. An unmanned submarine has completed its first search for debris from missing Malaysia Airlines flight MH370 in the southern Indian Ocean. Chinese patrol ship Haixun 01 is pictured during a search for the missing Malaysia Airlines flight MH370, in the south Indian Ocean April 5, 2014. Lack of evidence in determining the cause of Flight 370's disappearance, indeed even physical evidence that the aircraft crashed, raises many issues regarding responsibility for the accident and payments made by insurance agencies. Under the Montreal

7) <http://www.ibtimes.co.uk/missing-malaysia-airlines-flight-mh370-facts-revealed-biggest-aviation-mystery-history-1481167>

Convention, it is the carrier's responsibility to prove lack of fault in an accident and each passenger's next-of-kin are automatically entitled, regardless of fault, to a payment of approximately US\$175,000 from the airline's insurance company – a total of nearly US\$40 million for the 227 passengers on board.⁸⁾

III. U.S. Law Firm plans to bring suit against Boeing, Malaysia Airlines

A U.S.-based Law Firm said it expects to represent families of more than half of the passengers on board the missing Malaysia Airlines flight in a lawsuit against the carriers and Boeing Company, alleging the plane had crashed due to mechanical failure. The Beijing-bound flight MH370 disappeared more than few weeks ago, and was announced to have crashed into the remote southern Indian Ocean with all 239 on board presumed to have died. Chicago-based Ribbeck Law has filed a petition for discovery against Boeing Co., manufacturer of the aircraft, and Malaysia Airlines operator of the plane in a Cook County, Illinois Circuit Court in the United States. The petition is meant to secure evidence of possible design and manufacturing defects that may have contributed to the disaster, the Law Firm said.

Though both Boeing and Malaysia Airlines were named in the filing, the focus of the case will be on Boeing, Ribbeck's lawyers told reporters, as they believe that the incident was caused by mechanical failure. Though both Boeing and Malaysian Jee Kinson, 13, and Jee Kinland, 11, accused the civil aviation department of negligence for failing to try and contact the plane within a reasonable time after it disappeared from radar while flying from Kuala Lumpur

8) Missing Malaysia Airlines flight MH370 puzzle raises legal problems". *Sydney Morning Herald*. 11 May 2014. Retrieved 17 July 2014.

to Beijing on March 8 with 239 people on board.

The suit filed at the Kuala Lumpur High Court alleges the airline was negligent and failed to take all due measures to ensure a safe flight. They committed gross neglect and breach of duty. "We have waited for eight months. A big plane missing in this age of technology is really unacceptable," their lawyer Arunan Selvaraj said. The boys are seeking damages for mental distress, emotional pain and the loss of support following the disappearance of their father. Steve Wang, a Chinese man whose mother was on the plane, said many Chinese families had retained lawyers but he didn't think any of them had filed a lawsuit yet.

Airlines were named in the filing, the focus of the case will be on Boeing, Ribbeck's lawyers told reporters, as they believe that the incident was caused by mechanical failure. "Our theory of the case is that there was a failure of the equipment in the cockpit that may have caused a fire that rendered the crew unconscious, or perhaps because of the defects in the fuselage which had been reported before there was some loss in the cabin pressure that also made the pilot and co-pilot unconscious," Monica Kelly, head of Global Aviation Litigation at Ribbeck Law, told reporters. Kelly said the conclusion was made based on experience on previous incidents, dismissing the possibilities of hijacking or pilot suicide. The lawsuit, soon to be filed, would seek millions of dollars of compensation for each passenger and ask Boeing to repair its entire 777 fleet. The Law Firm said it expected to represent families of more than 50 percent of the passengers on board the flight, but declined to give details on how many families have sought their representation in the case.

A spokesman for Malaysia Airlines could not immediately be reached for comment. Aircraft manufactures may be liable for the violation of duty as manufactures in general. Thus they may be liable for their negligence, they may be behold to strict liability in tort, and they may be liable for breach of express or implied warranties. Product liability is the area of law in which manufacturers,

vendors, and others who make products available to the public are held responsible for the injuries those products cause.

Regulation of product liability on a national level have been devised in a number of countries including the UK, EU, Germany, France, China etc, like the Model Uniform Liability Act in the United States of America. In Korea Product Liability (PL) is regulated by the Product Liability Act, which was enacted in 2000 and then revised on May 22, 2013. It was enacted against strong opposition of business community to protect consumers from injury and damage caused by defective products based on strict liability, and to enhance the safety standards of products, thereby contributing to the competitiveness of manufacturers.

IV. The venue of the jurisdiction and amount of compensation for damage caused by aircraft's accidents of Indonesia and Malaysia Airlines

1. Venue of the jurisdiction for the Indonesia and Malaysia Airline's case

As South Korea, China, Indonesia, Malaysia and the USA are party states of 1999 Montreal Convention, so the case of the Indonesia and Malaysia Airline case will be applied by the Article 33 (Jurisdiction) of the 1999 Montreal Convention as the following.

Article 33—Jurisdiction (第33條 - 裁判管轄權)

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before ① the court of the domicile of the carrier (Asiana airlines) or of ② its principal place of business (Asiana airlines), or ③ where it has a place of business through which the contract has been made or ⑤ before the court at the place of destination.
2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has ⑤ his or her principal and permanent residence.

Indonesian, Malaysia, Chinese, Korean and American's victims may raise a lawsuit relating to the compensation for damage at the abovementioned option's five venue of the victims to the Indonesian, Malaysia, Chinese, Korean and the United States' court. Though the United States had adopted the limited liability system for air carrier's liability in the international flight based on the 1999 Montreal Convention, but the United States had been adopted the unlimited liability systems for air carrier's liability in the domestic flight in order to protect American passengers.

Already in 1971 at the Guatemala City Diplomatic Conference the US delegation insisted on the inclusion of the 5th jurisdiction-the place of residence of the claimant. The delegations realized at that time that the consequence of this proposal was that every US claimant will be able to establish the jurisdiction within the US Courts that were known for awarding compensations far in excess of the awards common in other countries.

During the preparatory work on the new Convention and at the opening of the Diplomatic Conference the US delegation made clear its belief that including the fifth jurisdiction in any new convention represents an essential element in

moving forward with a revised convention and that a Convention without this provision or with a limit of liability would, therefore, not be acceptable to the United States.⁹⁾

The question of the 5th jurisdiction thus became a non-negotiable issue and the Diplomatic Conference gradually rallied to it. Eventually even France withdrew its strong objections but was anxious to prevent the creation of a precedent for other fields of liability for that reason it proposed to insert the words or having regard to the specific characteristics of air transport in the new Article. The introduction of the 5th jurisdiction in Article 33 paragraph 2 of the new Convention hardly deserves much theoretical attention and is in no way revolutionary.

Under most legal systems the claimant can always bring an action in the place of his principal and permanent residence if the opponent has some (commercial) presence in the same place. In fact Article 28 of the Warsaw Convention was needlessly depriving the claimant of this logical jurisdiction.¹⁰⁾ However, the acceptance of the 5th jurisdiction is a diplomatic victory for the US and it can be realistically expected that claimants' lawyers will use every opportunity to file the claim in the US jurisdiction—it brings advantages in the liberal system of discovery, much wider scope of compensable non-economic damages than anywhere else in the world and the jury system prone to very generous awards. In the long run it will be the consumer who will pay for high insurance costs for such increased risk exposure.

9) DCW Doc No.12

10) DCW Doc No.36; in one version this wording was accepted but was deleted in the final text surprisingly.

2. The amount of compensation for damage caused by aircraft accident of Indonesian and Malaysia Airlines

The Indonesia and Malaysia Airline must pay to the families and victims of those on board around 113,100 SDR (\$155,000) under a multilateral treaty known as the 1999 Montreal Convention. Compensation for loss of life is vastly different between US. passengers and non-U.S. passengers. "If the claim is brought in the US. courts, it's of significantly more value than if it's brought into any other court." And for US. citizens there is no problem getting into the US. court. There were passengers of 15 different nationalities on board the flight, Malaysia Airlines said, with the majority - 152 - Chinese. There were also 38 passengers from Malaysia, seven were Indonesian, six were from Australian and three Americans were on board, among other nationalities. American lawyer Ms. Rolfe estimated that an American court could pay out between \$8-10 million on a per-passenger basis, but compensation would be a fraction of this outside of the U.S.

The 1999 Montreal Convention on international air transport stipulates that air carriers are strictly liable for damages of up to 113,100 Special Drawing Rights (SDR).¹¹⁾ The SDR is an international reserve asset, created by the International Monetary Fund (IMF) in 1969 to supplement its member countries' official reserves. 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 and pound sterling).

The SDR currency value is calculated daily and the valuation basket is reviewed and adjusted every SDRs are a mix of currency values established by the International Monetary Fund and 113,100 SDR of them are worth approximately US \$157,209¹²⁾ per passenger.

11) SDR (Special Drawing Right) is the currency unit of the UN International Monetary Fund.

12) http://www.imf.org/external/np/fin/data/rms_five.aspx#cvscdr; 1 SDR=US \$1,39 exchange rate on December 15, 2015.

Furthermore I would like to explain the air carrier's liability and the amount of the compensation for damage of air carrier under the Korean revised commercial act and Chinese civil aviation law for Korean victims in Indonesian air crash case. Although the Korean and Chinese victims or survivors would like to file the lawsuit in order to get the amount of compensation for damage against Indonesian and Malaysia Airlines to the Korean or Chinese court.

First of all trial of this case will be applied by the 1999 Montreal Convention because of affiliation it by the South Korea and China, but judges of the South Korea and China will be referred to the contents of the Korean Revised Commercial Act including air transport regulations and Chinese Civil Aviation Law. As there were 227 passengers on board MH370, which vanished on March 8 and is believed to have plunged in the southern Indian Ocean based on latest satellite analysis from Britain, Malaysia Airlines' liability could come close to US\$40 million. But if an airline is found to be guilty of negligence, its liability can be much higher, says the Bloomberg report.

The cap of about 113,100 SDR (US\$155,000) in damages per passenger as stipulate in the Montreal Convention may no longer apply in this scenario, as family member of the affected passengers may sue and demand much higher compensation.

The air carrier said it has "*adequate insurance coverage in place to meet all reasonable costs*" of the disaster, including assisting families amid the search. Malaysia Airlines has already made financial-assistance offers to families of about US\$ 5,000 each. Survivors' best chance for seeking more would be to find a way to sue in the U.S., where awards and settlements can be more generous than in two Asian countries.

V. Air carrier's liability under the Indonesian and Chinese Civil Aviation Law

I would like to introduce briefly the main contents of the Indonesian Aviation Law relating to the air carrier's liability in the Indonesia and Malaysia airlines' aircraft crash case.

1. Indonesia Aviation Law of 2009

Any carrier shall be liable for indemnity for death of passengers, permanent defects, or injuries caused by incidents on board the aircraft and/or while getting on or off the aircraft.

Any beneficiary/next of kin of the victim or the victim suffered due to air transportation incident as meant in loss shall submit a law suit to the court in order to get additional compensation other than the pre-determined compensation for losses (Article 141).

Any carrier shall be liable for any losses suffered by any passenger due to loss, destruction, or damage of any checked-in baggage as a result of air transportation activities while the checked-in baggage is under supervision of the carrier (Article 144). Any carrier shall be liable for damages/losses suffered by any cargo shipper for losses, destruction, or damages of cargo caused by any air transportation activity while the cargo is under supervision of the carrier (Article 145).

Any carrier shall be liable for losses incurred due to any delay of the transportation of passengers, baggage, or cargo, except when the carrier can prove that the delay is caused by weather and operational technical factors (Article 146). The amount of indemnity for each passenger who died,

permanently disabled, bodily injured shall be stipulated under a Ministerial Regulation (Article 165, 1). The right to file law suit for damages suffered by a passenger or shipper against the carrier shall be declared expired after a period of 2 (two) years from the date the cargo and the baggage should have arrived at the place of destination (Article 177).

Passengers who are in a lost aircraft, shall be considered dead, if within 3 months after the date the aircraft is supposed to land at the final destination there is no news of the passengers concerned, without any court decision being needed (Article 178, 1). The rights to receive compensation may be claimed after a period of 3 months has been passed (Article 178, 2).

Air carriers shall be obligated to insure their liabilities towards passengers and cargo they are transporting (Article 181).

Anybody who is operating an aircraft shall be responsible for damages/loss suffered by a third party as a result of the aircraft operation, aircraft accident, or falling down of other objects from the aircraft being operated. The compensation/indemnity on damages/loss suffered by a third party as meant in item (1) shall be given in accordance with the actual damages/loss suffered.

2. The Chinese Civil Aviation Law (中國民用航空法)

I would like to introduce briefly an air carrier's liability under the civil aviation law of the People's Republic of China (PRC) adopted in 1995 is the fundamental law in the area of civil aviation.¹³⁾

Article 124~129 of the Chinese Civil Aviation Law, Section 3 Liability of the Carrier

Article 124, The carrier shall be liable for the death or personal injury of a passenger, if the accident took place on board the civil aircraft or in the course

13) Chrystal Zhang, Weimin Diao "Deficiencies of China's General Aviation Law and Its Improvement, The Korean Journal of Air & Space Law and Policy (Vol.28, No2), 147.

of any of the operations of embarking on or disembarking from the civil aircraft; provided that the carrier is not liable if the death or injury resulted solely from the state of health of the passenger.¹⁴⁾

{Example of Legislation (立法例)}

Article 17 of the 1929 Warsaw Convention, Article 21 of the 1999 Montreal Convention, Article 45 of the 2012 Revised German Air Transport Law, 904~912 of the Korean Revised Commercial Law

Article 129, In international air transport, the liability of the carrier shall be as the following:

- (1) The liability of the carrier for each passenger is limited to the sum of 16,600 units of account. Nevertheless, the passenger may agree with the carrier in writing to a limit of liability higher than that prescribed by this sub-paragraph,
- (2) The liability of the carrier for each kilogram of checked baggage or cargo is limited to a sum of 17 units of account.
- (3) The liability of the carrier for carry-on baggage of a passenger is limited to 332 units of account per passenger.¹⁵⁾

Article 129. (2) The liability of the carrier for each kilogram of checked baggage or cargo is limited to a sum of 17 units of account. If the passenger or shipper 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, the carrier shall be liable to pay

14) 第三節 承運人的責任

第一百二十四條因發生在民用航空器上或者在旅客上、下民用航空器過程中的事件，造成旅客人身傷亡的，承運人應當承擔責任；但是，旅客的人身傷亡完全是由於旅客本人的健康狀況造成的，承運人不承擔責任。

15) 第一百二十九條 國際航空運輸承運人的賠償責任限額按照下列規定執行：

每名旅客的賠償責任限額為16,600計算單位；但是，旅客可以同承運人書面約定高於本項規定的賠償責任限額

(二) 對托運行李或者貨物的賠償責任限額，每公斤為17計算單位。

(三) 對每名旅客隨身攜帶的物品的賠償責任限額為332計算單位。

a sum not exceeding the declared sum, unless he proves that the sum declared by the passenger or shipper is greater than the actual interest of the checked baggage or cargo in delivery at destination.¹⁶⁾

{Example of Legislation: 立法例}

Article 7 of the 1975 Montreal Protocol, Article 21~23 of the 1999 Montreal Convention,

Article 47, 4 of German Revised Air Transport Law, Article 124~129 (2) of Chinese

Civil Aviation Law

Comparison between Chinese and the Korean Air Transport Law on the Limited Sum of Compensation for Damage of the Air Carrier

Civil Aviation Law (CAL) in China 中華人民共和國民用航空法 August 27, 2009, Amendment	Part 6, Air Transport, the Korean Revised Commercial Law on May 20, 2014, Revision
16,600 Unit of Account: Death or Injury Per Passenger, Article 129 (1) of the Civil Aviation Law in China	Raising: 113,100 Unit of Account, Death or Injury Per Passenger, Article 905 of the Korean Revised Commercial Law
17: Destruction, Loss, Damage/Delay of Cargo Per 1kg, Article 129 (2) of the Civil Aviation Law in China	Raising: 19 Unit of Account, Destruction, Loss, Damage/Delay of Cargo Per 1kg, Article 905 of the Korean Revised Commercial Law
332 Unit of Account: The Limited Indemnity of Baggage Per Passenger, Article 129, 3 of the Civil Aviation Law in China	Raising: 4,694 SDR, The Limited Indemnity of Baggage Per Passenger
	Raising: 4,694 Unit of Account, Indemnity, Delay, Per Passenger, Article 907, 2 of the Korean Revised Commercial Law

16) 第一百二十九條 (二)對托運行李或者貨物的賠償責任限額, 每公斤為17計算單位。旅客或者托運人在交運托運行李或者貨物時,特別聲明在目的地交付時的利益,并在必要時支付附加費的,除承運人證明旅客或者托運人聲明的金額高于托運行李或者貨物在目的地交付時的實際利益外, 承運人應當在聲明金額範圍內承擔責任。

VI. The Korean Revised Commercial Act including Air Transport and Chinese Civil Aviation Law

As I formally proposed a “*Draft for Revised the KRC Code on the Air Transport Law*” including air contractual liability and air tort liability to the Ministry of Justice of the Korean government on July 30, 2007, so the Ministry of Justice has accepted my proposal (opinion) and then they decided to revise the KRC Law so as to include the air transport law in 2008.

The Korean Government submitted a “*Draft for the KRC Code including Air Transport Law*” to the National Assembly on Dec. 31, 2008 and so *the Draft for the Revised Commercial Code including Part VI, Air Transport* (40 Articles)” was passed by the majority resolution of the Korean National Assembly on April 29, 2011 after reviewed deliberately it almost for 4 years by them.

Since the Korean government has proclaimed it on May 23, 2011, so it was enforced by the South Korean territory from Nov. 24, 2011.¹⁷⁾ But the Korean Government revised KCC based on the Article 24 of the 1999 Montreal Convention on May 20, 2014.

1. Liability and limited sum of compensation for passenger's damage of air carrier

Article 904~907 of the Korean Revised Commercial Act

- (1) It was necessary to define the air passenger carrier's liability and limited sum of the compensation for damage caused aircraft accidents such as death, bodily injury and delay in the South Korea.

17) 김두환, 『국제·국내항공법과 개정상법(항공운송편)』, 한국학술정보(주), 2011년, 392~393면.

- (2) For damages due to bodily injury or death of passenger that occurred in the course of embarking or disembarking, the liability of air carrier for each passenger is limited to the sum of 113,100 unit of account (Special Drawing Right: SDR)¹⁸⁾, the air carrier is liable for no-fault liability in the case of the damage has been calculated as the excess of 113,100 unit of account and the air carrier could exempt from liability, if it proved that the negligence does not exist.¹⁹⁾
- (3) On the other hand, in the case of damage caused by delay of air carrier for passenger, liability of the carrier for each passenger is limited to 4,694 unit of account.²⁰⁾ It is regulated newly that air carrier is exempted 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 (wilful misconduct).²¹⁾

[Comment]

For damages in the case of death or bodily injury of passenger caused by the aircraft accidents, air carrier is then burden the strict liability until 113,100 unit of account each passenger, in excess of 113,100 unit of account for the damages of the bodily injury or death of passengers that occurred in the accident aircraft, the Korean Revised Commercial Code received the principle of the negligence

18) http://www.imf.org/external/np/fin/data/rms_five.aspx#cvdsdr; 1 SDR=US \$1,39 exchange rate on December 15, 2015. 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, and pound sterling). The SDR currency value is calculated daily (except on IMF holidays or whenever the IMF is closed for business) and the valuation basket is reviewed and adjusted every five years;

19) 소제선·이창규, “항공운송인의 손해배상책임 면제에 관한 법적 고찰”, 『항공우주정책·법학회지』, 제 30권제1호, 항공우주정책·법학회, 106면.

20) 소제선·이창규, “항공운송인의 손해배상책임 원인에 관한 법적 고찰”, 『항공우주정책·법학회지』, 제 28권제2호, 항공우주정책·법학회, 21~24면.

21) Wilful misconduct generally means a knowing violation of a reasonable and uniformly enforced rule or policy. It means intentionally doing that which should not be done or intentionally failing to do that which should be done, knowing that injury to a person will probably result or recklessly disregarding the possibility that injury to a person may result. The term is applied in various legal contexts, such as torts and public offices.

presumption responsibility and unlimited liability provisions adopted in order to protect the victims. Furthermore the Revised Commercial Code are to receive also the principle of two tier liability system in the Montreal Convention 1999.

The major provisions of the 1999 Montreal Convention had adopted the two-tiered liability regime. The principle of the air carrier's unlimited civil liability in the event of bodily injury; this splits into two tiers:

- a first tier of strict carrier liability for damages of up to 100,000 SDRs (Special Drawing Rights) as defined by the International Monetary Fund (IMF).
- in excess of that amount, a second tier of liability based on the presumed fault of the carrier, which the latter may avoid only by proving that it was not at fault (the burden of proof is on the carrier).²²⁾

[Example of Legislation: 立法例]

Article 17 of the 1929 Warsaw Convention, Article 21 of the 1999 Montreal Convention, Article of 45 of the German Revised Air Transport Act (Luftverkehrsgesetz) of 2012,

- The Chinese Civil Aviation Law (中國民用航空法),

Section 3 Liability of the Carrier, Article 128~129 of the Chinese Civil Aviation Law,

Article 124. The carrier shall be liable for the death or personal injury of a passenger, if the accident took place on board the civil aircraft or in the course of any of the operations of embarking on or disembarking from the civil aircraft; provided that the carrier is not liable if the death or injury resulted solely from the state of health of the passenger.

The carrier shall be liable for the destruction or loss of, or damage to, any cargo if the occurrence took place during the transport by air;

22) Doo Hwan Kim, "Essay for the Study of the International Air and Space Law", Korea Studies Information Co. Ltd. (2008), at 236; I.Ph.Diederiks-Verschoor, "*An Introduction to Air Law*", Kluwer Law International (2001), The Hague/London/New York, at 113.

provided that the carrier is not liable if he proves that the destruction or loss of, or damage to, the cargo resulted solely from one or more of the following:

- (1) Inherent defect, quality or vice of that cargo;
- (2) Defective packing of that cargo performed by a person other than the carrier or his servants or agents;
- (3) An act of war or an armed conflict; or
- (4) An act of public authority carried out in connection with the entry, exit or transit of the cargo.²³⁾

2. The payment of the advance payment

Article 906 of the Korean Revised Commercial Act

- (1) It is necessary for us to regulate newly that in the case of aircraft accidents resulting in death or injury of passengers, the air carrier shall make advance payments without delay to the victims who are entitled to claim compensation in order to meet the immediate economic needs of such victims. Such advance payments shall not constitute a recognition of liability and may be offset against any amounts subsequently paid as damages by the carrier.
- (2) If the injury or death of passengers were occurred by the aircraft accidents, clarified that air carrier have an obligation to pay an advance payment to victims and procedures and a scope of advance payments was as prescribed by the Presidential Decree.

23) 第三節承運人的責任

第一百二十四條因發生在民用航空器上或者在旅客上、下民用航空器過程中的事件，造成旅客人身傷亡的，承運人應當承擔責任；但是，旅客的人身傷亡完全是由於旅客本人的健康狀況造成的，承運人不承擔責任。

因發生在航空運輸期間的事件，造成貨物毀滅、遺失或者損壞的，承運人應當承擔責任；但是，承運人證明貨物的毀滅、遺失或者損壞完全是由於下列原因之一造成的，不承擔責任：

- (一) 貨物本身的自然屬性、質量或者缺陷；
- (二) 承運人或者其受雇人、代理人以外的人包裝貨物的，貨物包裝不良；
- (三) 戰爭或者武裝衝突；
- (四) 政府有關部門實施的與貨物入境、出境或者過境有關的行為。

- (3) By substantially solves the familiar economic difficulties due to accident or their families is expected to contribute to the protection of the interests of victims.

[Comment]

If the death or injury of passengers caused by aircraft accident occurs, prescribes the legal basis that can be paid in advance the cost of treatment of the injured and bereaved families for burial expense needed urgent time.

[Example of Legislation: 立法例]

Article 28 of the 1999 Montreal Convention

3. Air carrier's liability and limited sum of liability for destruction, damage and delay of baggage

Article 908~910 of the Korean Revised Commercial Act

- (1) It was necessary to define the liability and the limited sum for the compensation of air carrier relating to the damage caused by the destruction, damage and delay of the baggage in the air passenger transport in South Korea.
- (2) Air carrier's no-fault liability and immunity reason set forth the grounds in the case of air passengers transport and loss or damage of the baggage or checked baggage during the period under the control of the air carrier.
- (3) It is regulated that in the case of unchecked baggage, including personal items, the air carrier burden faulty liability if the damage resulted from its fault.
- (4) It is specified that in the carriage of baggage, the liability of the carrier in the case of destruction, loss, damage or delay is limited to 1,131 unit of account for each passenger.

[Comment]

While working in the loading or discharge of baggage to aircraft or during the air carrier's management, in the case of air transport accidents occurred, we have defined the relationship between the liability of the carrier for the destruction, loss or damage of baggage.

[Example of Legislation: 立法例]

Article 22 of the 1999 Montreal Convention,

- The Chinese Civil Aviation Law (中國民用航空法)

Article 125. The carrier shall be liable for the destruction or loss of, or damage to, any carry-on articles of the passenger, if the occurrence took place on board the civil aircraft or in the course of any of the operations of embarking on or dis-embarking from the civil aircraft of the passenger. The carrier shall be liable for the destruction or loss of, or damage to any checked baggage of the passenger, if the occurrence took place during the transport by air.²⁴⁾

4. Air carrier's liability and limited sum of liability for the damage of cargo

Article 913~915 of the Korean Revised Commercial Act

- (1) The air carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air.
- (2) However, the carrier is not liable if and to the extent it proves that the destruction, or loss of, or damage to, the cargo resulted from one or more

24) 第一百二十五條因發生在民用航空器上或者在旅客上、下民用航空器過程中的事件，造成旅客隨身攜帶物品毀滅、遺失或者損壞的，承運人應當承擔責任。因發生在航空運輸期間的事件，造成旅客的托運行李毀滅、遺失或者損壞的，承運人應當承擔責任。

of the following:

- ① inherent defect, special quality or concealing vice of that cargo;
 - ② defective packing or incomplete mark of that cargo performed by a person other than the carrier or its servants or agents;
 - ③ an act of war, riot, civil war or an armed conflict;
 - ④ an act of public authority carried out in connection with the entry, exit, quarantine or custom clearance of the cargo;
 - ⑤ an Act of God (force majeure).
- (3) It is codified newly that in the air carriage of cargo, the liability of the air carrier in the case of destruction, loss, damage or delay is limited to a sum of 19 Unit of Account per Kilogram, unless the consignor has made, at the time when the package was handed over to the air carrier, a special declaration of interest in delivery at destination and has paid a sum not supplementary sum if the case so requires. In that case the air carrier will be liable to pay a exceeding the declared sum, unless it proves that the sum is greater than the consignor's actual interest in delivery at destination.

[Comment]

- (1) Though the words called the act of God (force majeure) regulated in the ⑤paragraph 1 of this Article 913 had not specified originally a government bill, but the Legislation and Judiciary Committee of the National Assembly inserted newly the word act of God (force majeure) in order to take care of an aviation industry in the course of deliberation of it.
- (2) The Korean Revised Commercial Code specified the limited sum of compensation for damage of the air cargo carrier in consulting with the latest international treaty that was related to air transport and the legislation example of each developed countries.
- (3) The reason why the Korean Revised Commercial Code had adopted the

unit of account (SDR) as the limited sum of the compensation for damage of the domestic air cargo carrier was harmonized and accepted the part contents of the international treatise and legislation examples of developed countries in order to keep pace with global trend.

[Example of Legislation: 立法例]

The 1975 Montreal Additional Protocol No.1, No 2, No. 3 and Montreal Protocol No. 4, the 1978 Montreal Protocol, the United Nations on the Carriage of Goods by Sea (Hamburg Rule) of 1978, United Nations Convention on International Multimodal Transport of Goods of 1980, Montreal Convention of 1999, Unlawful Interference Convention and General Risk Convention of 2009, the 2010 German Revised Air Transport Law and Chinese Civil Aviation Law had adopted SDR as the limits sum of the compensation for damage of air carrier.

Article 7 of the 1975 Montreal Protocol, Article 21~23 of the 1999 Montreal Convention,

Article 47, 4 of the German Revised Air Transport Act, Article 124~129 of the Chinese

- Civil Aviation Law (中國民用航空法)

Article 129. (2) The liability of the carrier for each kilogram of checked baggage or cargo is limited to a sum of 17 units of account. If the passenger or shipper 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, the carrier shall be liable to pay a sum not exceeding the declared sum, unless he proves that the sum declared by the passenger or shipper is greater than the actual interest of the checked baggage or cargo in delivery at destination.

- (3) The liability of the carrier for carry-on baggage of a passenger is limited to 332 units of account per passenger.²⁵⁾

5. Raising of amount of the compensation for damage caused by the aircraft accident

(1) When the inflation rate of the consumer price index in the United States, the United Kingdom, European Union (EU) and Japan etc. which constitute SDR, in the case of every five years exceeds 10% in the 1999 Montreal Convention, the 24 article of the 1999 Montreal Convention was newly established for the gradual increase provision (Escalator Clause) so that the sum of the limited compensation for damage could be for corrected automatically.

Although the Montreal treaty was enacted on May 28, 1999 and it came into force all over the world on November 4, 2003, as a result of investigation for the inflation rate of the above- mentioned countries by the International Civil Aviation Organization (ICAO), after it's Convention came into force, the inflation rate of the abovementioned countries carries out by 13.1% ²⁶⁾going up during the period for the past five years, based on this, and raised the sum of the limited compensation for damage of the air carrier as follows.

25) 第一百二十九條 (二)對托運行李或者貨物的賠償責任限額, 每公斤為17計算單位。旅客或者托運人在交運托運行李或者貨物時, 特別聲明在目的地交付時的利益, 并在必要時支付附加費的, 除承運人證明旅客或者托運人聲明的金額高于托運行李或者貨物在目的地交付時的實際利益外, 承運人應當在聲明金額範圍內承擔責任。

26) The Montreal Convention contained a provision at Art.24(1) known as an *'escalator clause'*, 'permitting the International Civil Aviation Organization (ICAO) to review the limits at five-year intervals and make suitable changes. The ICAO based the increase on data suggesting a 13.1% increase in inflation during the period.; <http://www.magrathoconnor.com/2009/12/montreal-convention-1999-increase-in-imitation-on- liability>

Comparison with the Sum of the Limited Compensation
for Damage of the International Air Carrier

Past : the Limited Indemnity of the International Air Carrier	Raising of the Limited Indemnity of the International Air Carrier
100,000 SDR: Death or Injury Per Passenger, Article 21,1 of the Montreal Convention of 1999	Raising: 113,100 SDR, Death or Injury Per Passenger
17 SDR: Destruction, Loss, Damage/Delay of Cargo Per 1kg, Article 22,3 of the Montreal Convention of 1999	Raising: 19 SDR, Destruction, Loss, Damage/Delay of Cargo Per 1kg
1,000 SDR: The Limited Indemnity of Baggage Per Passenger, Article 22, 2 of the Montreal Convention of 1999	Raising: 1,131 SDR, The Limited Indemnity of Baggage Per Passenger
4,150 SDR: Delay Per Passenger, Article 22, 1 of the Montreal Convention	Raising: 4,694 SDR, Delay Per Passenger,

Although Germany have not ratified “*the Unlawful Interference Convention of 2009*” until now²⁷⁾, but Germany has revised the German Air Transport Act (Luftverkehrsgesetz) on August 7, 2013 in order to protect the victims caused by the sudden aircraft crash etc. According to the article 45 of the 2013 German Revised Air Transport Act, the sum of the limited compensation for damage per passenger was raised from 100,000 unit of account (Rechnungseinheiten) to 113,000 unit of account such as the abovementioned table.

As China is a country join the Montreal Convention of 1999, so it would be most desirable that when Chinese Civil Aviation Act will be amended in the near future, it should be raised the sum of the limited compensation for the personal and property damage caused by the air crash in order to protect the Chinese passengers or owners of baggage or cargo such as the above- mentioned table of comparison with the sum of the limited compensation for damage of the international air carrier.

²⁷⁾ <https://www.jurion.de/Gesetze/LuftVG/45?from=0:143508,120140601>

VII. Air Carrier's Liability under the Montreal Convention of 1999

1. Conclusion and Character of the 1999 Montreal Convention

The International Civil Aviation Organization (ICAO) achieved the main objective of the Diplomatic Conference which was held at Montreal on May 10~28, 1999 that of replacing six different legal instruments, collectively known as the Warsaw System, into a single legal instrument. Victims of international aircraft accidents will be better protected and compensated following a historic air law agreement Montreal Convention concluded on May 28, 1999 among the Contracting States of ICAO at Montreal, Canada.²⁸⁾ The new instrument adopted by the Diplomatic Conference on 28 May 1999 is a separate and distinct new Montreal Convention—not an amendment of the Warsaw System by a further Protocol. The ICAO succeeded in adopting a new regime for air carrier liability, replacing the Warsaw Convention and five other related legal instruments with a single convention that provided for unlimited liability in relation to passengers.

The Convention is the result of the efforts of the International Civil Aviation Organization to reform the Warsaw Convention through amendment rather than inter-carrier agreement. The stated goals of the Convention are the need to modernize and consolidate the Warsaw Convention and related instruments and recognition that collective State action for further harmonization and codification of certain rules governing international carriage by air through a new Convention is the most adequate means of achieving an equitable balance of interests.

28) <http://www.icao.org/cgi/goto.pl?icao/en/nr/nr99.htm>

The Montreal Convention is essentially the composition of the original Warsaw Convention of 1929 and the subsequent protocols, namely, the Hague Protocol, the Montreal Protocol Nos. 3 and 4, the Guatemala City Protocol, and the Guadalajara Supplementary Convention of 1961. Victims of international air accidents will be better protected and compensated as a result of the historic air law agreement adopted by among the Contracting State's delegates of ICAO.

From 11 to 28 May 1999 the ICAO headquarters at Montreal hosted a Diplomatic Conference convened to consider, with a view to adoption, a Draft Convention intended to modernize and replace the instruments of the *Warsaw* system. Some 525 participants from 121 Contracting States of ICAO attended,²⁹⁾ one non-contracting State, 11 observer delegations from international organizations, a total of 544 registered participants took part in the historic three-week conference which began on 10 May, 1999.³⁰⁾

The Montreal Conference was a success since it adopted a new *Convention for the Unification of Certain Rules for International Carriage by Air*. The new Montreal Convention adopted by the diplomatic conference will enter into force as soon as it has been ratified by 30 States. Fifty-two States including USA, China, ED etc. signed the new Montreal Convention at the conclusion of the historic diplomatic conference. This Montreal Convention entered into force on November 25, 2015. At present, 118 countries³¹⁾ including the United States, the United Kingdom, Canada, France, Germany, Korea, Japan, Italy, China, Sweden, Brazil, Spain etc. are affiliated with the 1999 Montreal Convention.³²⁾ Since the Korean government has proclaimed it on May 23, 2011, so it was enforced by the South Korean territory from Nov. 24, 2011.

But the Korean Government revised KCC based on the Article 24 of the 1999 Montreal Convention on May 20, 2014.

29) While this is a very impressive attendance, it represents only 65.4%—less than two-thirds—of the total ICAO membership which now stands at 185.

30) 김두환, 『최신국제법학론』, 한국학술정보(주), 2005년, 297~299면.

31) http://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf

32) <http://www.icao.int/icao/en/leb/mtl99.pdf>

2. Main Contents of the 1999 Montreal Convention

In developing this new Montreal Convention, we were able to reach a delicate balance between the needs and interests of all partners in international civil aviation, States, the travelling public, air carriers and the transport. The new Montreal Convention is divided into seven chapters with fifty seven articles: Chapter I – General Provisions; Chapter II – Documentation and Duties of the Parties Relating to the Passengers, Baggage and Cargo, Chapter III- Liability of the Carrier and Extent of Compensation for Damage; Chapter IV- Combined Carriage; Chapter V – Carriage by Air Performed by a Person Other than Contracting Carrier; Chapter VI – Other Provisions; and Chapter VII – Final Clauses. The Montreal Convention also includes the following main elements;

3. Liability of the Air Carrier

(1) Liability Regime for Passengers

The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which cause the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking (Article 17 of the Convention).³³⁾ This basic provision on liability of the carrier does not represent any innovation and in fact is a serious step back from the text of the 1971 Guatemala City Protocol.

The words damage sustained in themselves assure that only compensatory damage is recoverable to the exclusion of any punitive, exemplary or other non-compensatory damages.³⁴⁾

The major provisions of the 1999 Montreal Convention had adopted the two – tiered liability regime. The principle of the air carrier's unlimited civil liability

33) Article 17, paragraph 1 of the Montreal Convention.

34) See also the Preamble and Article 29 of the Montreal Convention.

in the event of bodily injury; this splits into two tiers:

- a first tier of strict carrier liability for damages of up to 113,100 SDRs (special drawing rights, as defined by the International Monetary Fund, i.e. 158,340 USD on May 6, 2015)³⁵⁾;
- in excess of that amount, a second tier of liability based on the presumed fault of the carrier, which the latter may avoid only by proving that it was not at fault (the burden of proof is on the carrier).

The carrier is strictly liable up to 113,100 SDR's (Special Drawing Rights) for death or injury of a passenger resulting from an accident. The injured passenger bears the burden of establishing provable damages and the carrier may only escape or reduce its liability based on the contributory negligence of the passenger. For provable damages over 113,100 SDR's, the carrier is liable based on fault that is, it is not obligated to pay any damages in excess of 113,100 SDR's where the carrier establishes that the damage was not the result of its negligence or wrongful act or omission, or was the result of the "sole" negligence or wrongful act of a third party. The SDR limit is subject to review and revision every five years.

(2) Quantum of compensation in case of death or injury of passengers

The most visible and welcome contribution of the new Convention is that it removes the antiquated and unjustified limitation of liability for death and personal injury of passengers—in harmony with the Japanese initiative of 1992, the IATA *Passenger Liability Agreement* of 1995 and the EC Regulation 2027 of 1997.

The Convention accepts two-tier system of compensation: up to 113.100 SDR the carrier is strictly liable and cannot exclude or limit his liability.³⁶⁾ Beyond

35) http://www.imf.org/external/np/fin/data/rms_five.aspx#cvhdr

the sum of 113.100 SDR the liability is based on fault with reversed burden of proof: the carrier is not liable above the sum of SDR 113.100 if he proves that the damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents. In view of the technical and operational complexity of aviation this burden of proof will never be easy to discharge-the complicated chain of facts and their mutual causal nexus in aircraft accidents frequently leaves doubt about the complete absence of any negligence, wrongful act or omission.

While there is no monetary limit of liability in the second tier, it would not be realistic to expect astronomically high compensations under the new Convention-the claimants will recover actual proven compensatory damage-punitive, exemplary and other non-compensatory damages are specifically excluded.

However, it is to be expected (as is the situation at present) that the actual compensations will widely vary in different jurisdictions-some limit compensation to economic damage, others award substantial compensations for non-economic damage, such as pain and suffering, loss of enjoyment of life, loss of parental guidance, loss of companionship, etc and the awards may be unforeseeably high in particular when juries are involved in the decision. A novel element of the new Convention is that the carrier may not be obliged to pay compensation beyond SDR 113.100 if he proves that the damage was solely due to the negligence or other wrongful act or omission of a third party.³⁷⁾

(3) Delay

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 servant and agents took

36) Except under the specific provision of Article 20 in case of fault or contributory fault of the claimant.

37) Article 19 of the Montreal Convention.

all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measured.³⁸⁾ In case of damage caused by delay as specified in Article 22, paragraph 1 of the Montreal Convention in the carriage of persons, the liability of the carrier for each passenger is limited to 4,694 Special Drawing Rights. The air carrier cannot possibly be strictly liable for any delay in the carriage by air since such a system would not encourage all necessary safety precautions for the flight.

There is no accepted definition of delay and of its duration and airline tariffs mostly indicate that the times of departure and arrival are approximate and are not guaranteed. The strong group of 53 African States in fact proposed to the Conference to delete any reference to liability for the delay.³⁹⁾

The compromise solution in the Convention is liability for delay in the carriage of passengers, baggage and goods based on fault with reversed burden of proof: the carrier is not liable if it proves that it and its servants and agents took all measures that could be reasonably required to avoid the damage or that it was impossible to take such measures. The term all measures that could be reasonably required is much less exacting than the words all necessary measures in Article 20 of the Warsaw Convention.

(4) Exoneration

The regime of liability accepted in the Convention is *strict liability*, not absolute liability. The carrier may be fully or partly exonerated from its liability if he proves that the damage was caused or contributed to by negligence or other wrongful act or omission of the claimant.⁴⁰⁾

Significantly, this defense can be explicitly also used in case of death or bodily injury of a passenger even for the first tier of liability under 113.100 SDR and it would be thus incorrect to argue (as was the case at the Conference) that

38) Article 21, paragraph 2(b) of the Montreal Convention.

39) DCW Doc No.22.

40) Article 20 of the Montreal Convention.

up to 113.100 SDR the carrier is placed in the position of an insurer without any defense.

4. Advance Payment

The Montreal Convention requires a carrier to make advance payments to passengers in the event of death or injury to meet the passengers immediate economical need. The amount of the payment will be subject to national law and will be deductible from any future settlement or award. In cases of aircraft accidents, air carriers are called upon to provide advance payments, without delay, to assist entitled persons in meeting immediate economic needs the amount of this initial payment will be subject to national law and will be deductible from the final settlement.

5. Comment the Personal Damage including Mental Damage in the 1999 Montreal Convention

I would like to comment a point for the legal interpretation and problems on the New Montreal Convention.

According to Article 17 of the Montreal Convention, air carrier is liable for damage sustained in case of death or bodily injury of passengers. The Guatemala City Protocol referred to "personal injury" a concept wider than "bodily injury" and it is a pity that the opportunity was not kept open for compensation of a debilitating mental trauma or other mental injuries.⁴¹⁾ While several delegations were inclined to include mental injuries,⁴²⁾ the International Union of Aviation Insurers (IUAI) welcomed that ICAO Special Group on the Modernization

41) Michael Milde, *op. cit.*, at 28.

42) E.g., all LACAC delegations in DCW Doc No.14, separately Colombia in DCW Doc No.31, Norway and Sweden in DCW..... Doc No.10.

(SGMW) and Consolidation of the 'Warsaw System' deleted from the draft the (Guatemala) expression personal or the Legal Committee's words mental injury and referred only to injury the IUAJ Observer urged that the adjective bodily should be added to injury in order to prevent the possibility of mental injury' finding its way back through an over-generous interpretation of the word injury.⁴³⁾

The Diplomatic Conference also deleted from the SGMW draft the sentence which would exonerate the carrier if (or to the extent that) the death or injury resulted from the state of health of the passenger.⁴⁴⁾ The result of the current drafting may well be that the air carrier is deemed to be an insurer of all risks on board, even if they are not related to aviation and are beyond his control. While the 30th Session of the Legal Committee affirmed "bodily or mental injury", the SGMW refused the adoption of the concept "mental injury." One expert told us at the fourth meeting of the SSG that the original French version which used the term "lesion corporelle" which is his view also encompassed some psychic elements.

When recalling that the Guatemala City Protocol adopted the term "personal injury" for its French version and the Montreal Additional Protocol No.3 endorsed the same term, it is appropriate that the term "bodily injury" should be replaced with the term "personal injury" within which also encompassed some psychic elements.

The fact that the words 'wounding or bodily injury', used in the Convention, were replaced 'by personal injury' in the passenger notice suggests an intention to clarify the type of injury which is capable of compensation. According to the Korean and Chinese ideas, airlines should not only pay compensation to passengers immediately after the accident, but also the so-called 'condolence' money to the next of kin. Condolence money is a gift to help a dead person's

43) DCW Doc No.28.

44) Michael Milde, "*The Warsaw System of liability in international carriage by air—history, merits and flaws-----and the new non-Warsaw Convention of 28 May 1999*", (unpublished paper), at 28. (Notes prepared for the Seminar at the National University of Singapore on 27 August 1999).

spirit in the hereafter: it is given on account of the grief and sorrow suffered by the next of kin, and it has risen considerably over the years.

The total amount of the Korean and Chinese claims in the case of death is calculated on the basis of the loss of earned income, funeral expenses and material damage (baggage etc.), plus condolence money.⁴⁵⁾

VIII. Conclusion

Some victims and survivors of the Indonesian and Malaysia airline's air crash case would like to sue the lawsuit to the United States court in order to receive a lot of amount of compensation for damage caused by the aircraft accidents in Java sea and Indian ocean and rather than to the Indonesia or Malaysia court. Though each victims and survivors of the Indonesian and Malaysia airline's air crash case will be received unconditionally 113,100 SDR as an amount of compensation for damage from Indonesia AirAsia airlines and Malaysia Airlines according to the Article 21, 1 (absolute, strict, no-fault liability system) of the 1999 Montreal Convention.

But if Indonesia AirAsia airlines and Malaysia Airlines could not prove as the following two points without fault based on Article 21, 2 (presumed faulty system) of the 1999 Montreal Convention, so Indonesia AirAsia airlines and Malaysia Airlines will be burdened the unlimited liability to the each victims and survivors of the Indonesian and Malaysia airline's air crash case such as ① such damage was not due to the negligence or other wrongful act or omission of the air carrier or its servants or agents, or ② such damage was solely due to the negligence or other wrongful act or omission of a third party.

45) Doo Hwan Kim, "The Liability of International Air Carriers in Changing Era", The Use of Airspace and Outer Space for all Mankind in the 21st Century, (Kluwer Law International, 1995, The Netherlands), at 102.

According to my personal opinion, in the aforementioned reasons, the Chinese, Indonesian, Malaysia and Korean etc. some victims and survivors of the Indonesian and Malaysia airline's air crash case will be received possibly from more than 113,100 SDR to 5 million US \$ from Indonesia and Malaysia airlines or Aviation Insurance Company based on decision of the American court. Furthermore the individual income of Chinese, Indonesian, Malaysia and Korean etc. will be increased gradually by the economic development based on the internet, avionics science and high-technology also will be advanced rapidly. In addition, the real value of life and human right will be enhanced substantially and respectfully. The amount of compensation for damage caused by aircraft accident has been increased in dollar amount as well as in volume. All air carrier's liability should extend to loss of expectation of human leisure activities, as well as to damage to property, and mental and physical injuries. Most of victims and survivors are not satisfied with the amount of the compensation for damage caused by aircraft accident for which an airline corporation is liable under the current liability system. I also would like to propose my opinion that it is reasonable and necessary for us to revise from bodily injury to personal injury based on Article 17 of the 1999 Montreal Convention so as to be included the mental injury and condolence in the near future.

At the end of this survey, one is forced to conclude that, at the moment, we are facing a situation where some developed countries have no limits of compensation, while other some countries maintains higher limits than the Warsaw system prescribed. The recent efforts to modernize the Warsaw System for long time by ICAO should be lauded and supported by all States. At last the ICAO have succeeded in modernizing and consolidating more than half century old Warsaw system into one unified legal instrument as a new Montreal Convention on 28 May 1999. It is necessary for us to revise of the 1999 Montreal Convention including mental loss in the new future.

Reference

<국내문헌>

- 김두환, 「국제 · 국내항공법과 개정상법(항공운송편)」, 한국학술정보(주), 2011
- 김두환, 「최신국제항공법학론」, 한국학술정보(주), 2005
- Doo Hwan Kim, *Essays for the Study of the International Air and Space Law*, Korean Studies Information Co. Ltd. 2008.
- Doo Hwan Kim, *Considerations for the 2009 Montreal Two New Air Law Conventions (Unlawful Interference and General Risk Conventions by ICAO)*, 한국항공운항학회지(제17권 제4호, 2009. 12. 31.), 94~106 pp.

<외국문헌>

- 金斗煥, 「韓國における航空運送人の民事責任に關する國內立法の諸問題」, 藤田勝利 · 工藤聰一編, 『航空宇宙法の新展開』, 八千代出判, 2005年
- 池田文雄, 「地上損害と事責任」, 空法(第1号、1955)、日本航空法學會發行.
大阪地判、1967年6月12日、つばめ号航空機事故損害賠償請求事件、下級民集第18卷
- 松岡誠之助, 「航空運送法の立法問題」, 空法(第17号、1974年)、日本空法學會發行.
- 板本昭雄, 『新しい國際航空法』, 有信堂, 1999年.
- 板本昭雄 · 三好晉, 『新國際航空法』, 有信堂, 1999年.
- 藤田勝利, 『新航空法講義』, 信山社, 2007年.
- Doo Hwan Kim, “*The Innovation of the Warsaw System and the IATA Inter-carrier Agreement*”, *The Utilization of the World's Air Space and Free Outer in the 21st Century (Book)*, Kluwer Law International, The Netherlands, 2000.
- Bin Cheng, *The Law of International Air Transport*, Stevens & Sons Limited, London, 1962

- Nicolas Mateesco Matte, *Treatise on Air-Aeronautical Law*, Institute and Centre of Air and Space Law, McGill University, Montreal, 1981.
- Shawcross and Beaumont, *Air Law*, Butterworths, London, 1983.
- Aleksander Tobolewski, *Monetary Limitations of Liability in Air Law*, De Daro Publishing, Montreal, 1986.
- Rod D Margo, *Aviation Insurance*, Butterworths, London, 1989.
- Lee S. Kreindler, *Aviation Accident Law*, Vol. I, II, Matthew Bender & Co., Inc. New York, 1997.
- Chia-Jui Cheng, *The Use of Airspace and Outer Space Cooperation and Competition*, Kluwer Law International, The Hague, 1998.
- Chia-Jui Cheng and Doo Hwan Kim, *The Utilization of the World's Air Space and Free Outer Space in the 21st Century*, The Hague, Kluwer Law International, 2000.
- I. H. Ph. Diederiks-Vershoor, *An Introduction to Air Law*, Kluwer Law and Taxation Publishers, Seventh Revised Edition, The Netherlands, 2001.
- Karl Heinz Böckstiegel, *Zeitschrift Für Luftund Weltraumrecht*, Köln, Institut für Luft-und Weltraumrecht der Köln Universität, 2001.
- P.P.C. Haanappel, *The Law and Policy of Air Space and Outer Space: A Comparative Approach*, Kluwer Law International, The Hague, 2003.
- Paul Stephen Dempsey and Michael Milde, *International Air Carriage Liability: The Montreal Convention of 1999*, Institute of Air and Space Law, McGill University, Montreal, 2005.
- Paul Stephen Dempsey, *Air Law*, Institute of Air and Space Law, McGill University, Montreal, 2008.
- International Civil Aviation organization (ICAO); <http://www.icao.int>
- International Air Transport Association (IATA); <http://www.iata.org>

초 록

인도네시아의 에어 아시아 QZ8501 제트여객기가 2014년 12월 28일, 오전 5시 35분에 인도네시아, Surabaya도시에 있는 Juanda 국제공항을 출발하여 같은 날 8시 반 싱가포르 Changi 국제공항에 도착할 예정이었다. 그러나 인도네시아의 에어아시아(에어버스 A320-200) 여객기는 인도네시아 제 2의 도시인 수라바야공항에서 승객 162명을 태우고 싱가포르를 향하여 비행도중 동년 12월 28일 Java 바다에 추락하였다.

인도네시아의 에어아시아 제트여객기의 잔해가 Juanda 국제공항에서 약 66 마일 떨어진 위치에서 발견되었으며 이곳에서 12월 28일 지상에 있는 항공교통관제관 (ATC) 과 조정사간에 교신이 끊겼다. 레이더에서 사라진 여객기 (QZ 8501) 에는 승객 155명과 승무원 7명이 탑승했으며 희생된 여객 가운데에는 155명의 인도네시아어인, 3명의 한국인, 싱가포르인, 말레이시아인, 영국인이 각각 1명이었다.

말레이시아여객기 추락사건을 살펴보면, 말레이시아 여객기 (MH370) 는 현지 시간 2014년 3월 8일 밤 12시41분 쿠알라룸푸르 국제공항을 출발하여 같은 날 새벽 6시 30분 (현지시간) 중국 베이징수도국제공항에 착륙 할 예정이었다. 그러나 말레이시아 여객기 (MH370) 는 쿠알라룸푸르 국제공항을 출발하여 베이징수도국제공항을 향하여 비행도중 (쿠알라룸푸르와 북경 간에 비행거리: 4,414km 2,743마일) 갑자기 살아져 3월 8일 남인도양에 추락하였다.

이 말레이시아여객기는 쿠알라룸푸르 국제공항을 이륙한 후 1시간 만에 지상에 있는 항공교통관제관 (ATC) 과 조정사간에 교신이 두절되었으며 이 여객기에 227명의 승객 (15개국)과 12명의 승객이 타고 있었다. 상기 227명의 승객 가운데에는 중국인 153명, 말레이시아인이 38명, 인도네시아 인이 7명, 호주인 이 6명, 인도인이 5명, 프랑스인이 4명, 미국인이3명, 이란인이2명, 캐나다인이2명, 뉴질랜드인 이 2명, 우크라이나인이 2명, 러시아인이 1명, 네덜란드인이 1명, 대만인이 1명이었으므로 중국인 승객이 거의 3분의 2 이상을 차지하고 있었다. 본 인도네시아 및 말레이시아 여객기 추락사건에 있어 승객 및 승무원들은 전원 사망하였고 가해자(국)인 인도네시아 및 말레이시아뿐만 아니라 피해자(국) 인 중국, 한국, 호주인, 인도, 프랑스, 미국, 인도네시아 및 말레이시아 등이 모두 1999

년의 몬트리올조약의 가맹국이기 때문에 인도네시아 및 말레이시아의 항공사들은 동 조약 제21조에 따라 손해배상금액으로서 113,100 특별인출권 (SDR, 계산단위, 미화 155,000달러)를 유족들에게 무조건 지급하여야만 된다.

그러나 인도네시아 및 말레이시아 여객기 추락사건에 있어 유족들은 상기 배상금액에 만족하고 있지 않기 때문에 승객사망자에 대한 유족들의 손해배상청구소송 사건에 있어 일부 유족들은 자국법원에 소송을 제기하는 것보다는 손해배상금액을 많이 탈수 있는 미국 법원에 소송을 제기하고 있다. 미국은 현재 국제항공운송에 있어 항공여객운송인의 책임이 국제조약에 따라 유한책임 제도를 채택하고 있지만 국내항공운송에 있어서는 항공여객운송인의 책임이 무한책임제도를 채택하고 있다.

현재 미국법원은 국제 및 국내항공운송을 막론하고 항공여객운송인이 **Wilful-misconduct** (인식이 있는 중대한 과실) 범하였을 때에 무한책임을 인정하여 손해배상금액에 관한 판결내용이 30만 달러 내지 500만 달러를 상회하고 있음으로 유족들은 몬트리올조약 제33조 (재판관할권) 및 미국에서 제조한 여객기의 결함을 이유로 한 「제조물책임법」에 근거하여 본 소송사건에 있어 일부 유족들은 미국이변호사에 소송사건을 의뢰하여 미국법원에 손해배상청구소송사건을 제기한바 있다.

한편 필자의 의견으로는 1999년의 몬트리올조약 제17조에 규정되어 있는 국제항공운송인의 손해배상책임사유로 **bodily injury**라고 신체상의 상해만을 규정하고 있어 피해자 보호에 만전을 기할 수가 없음으로 앞으로 ICAO 법률위원회에서 가까운 장래에 몬트리올조약을 개정 할 때에 이 문구를 피해자의 정신적손해도 다 포함될 수 있도록 **personal injury** 라는 문구로 수정하는 것이 바람직하다고 본다.

주제어 : 인도네시아, 말레이시아 항공사의 항공기사고, 추락, 몬트리올조약, 특별인출권, 계산단위, 국제통화기금, 사망, 손상, 인식 있는 중대한 과실, 법원, 관할권, 손해배상

Abstract

Indonesia, Malaysia Airline's aircraft accidents and the Indonesian,
Korean, Chinese Aviation Law and the 1999 Montreal Convention

Kim, Doo-Hwan*

AirAsia QZ8501 Jet departed from Juanda International Airport in , Surabaya, Indonesia at 05:35 on Dec. 28, 2014 and was scheduled to arrive at Changi International Airport in Singapore at 08:30 the same day. The aircraft, an Airbus A320-200 crashed into the Java Sea on Dec. 28, 2014 carrying 162 passengers and crew off the coast of Indonesia's second largest city Surabaya on its way to Singapore. Indonesia's AirAsia jet carrying 162 people lost contact with ground control on Dec. 28, 2014. The aircraft's debris was found about 66 miles from the plane's last detected position. The 155 passengers and seven crew members aboard Flight QZ 8501, which vanished from radar 42 minutes after having departed Indonesia's second largest city of Surabaya bound for Singapore early Dec. 28, 2014. AirAsia QZ8501 had on board 137 adult passengers, 17 children and one infant, along with two pilots and five crew members in the aircraft, a majority of them Indonesian nationals. On board Flight QZ8501 were 155 Indonesian, three South Koreans, and one person each from Singapore, Malaysia and the UK.

The Malaysia Airlines Flight 370 departed from Kuala Lumpur International Airport on March 8, 2014 at 00:41 local time and was scheduled to land at Beijing's Capital International Airport at 06:30 local time. Malaysia Airlines also marketed as China Southern Airlines Flight 748 (CZ748) through a code-share agreement, was a scheduled international passenger flight that disappeared on 8 March 2014 en route from Kuala Lumpur International Airport to Beijing's

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Capital International Airport (a distance of 2,743 miles: 4,414 km).

The aircraft, a Boeing 777-200ER, last made contact with air traffic control less than an hour after takeoff. Operated by Malaysia Airlines (MAS), the aircraft carried 12 crew members and 227 passengers from 15 nations. There were 227 passengers, including 153 Chinese and 38 Malaysians, according to records. Nearly two-thirds of the passengers on Flight 370 were from China. On April 5, 2014 what could be the wreckage of the ill-fated Malaysia Airlines was found.

What appeared to be the remnants of flight MH370 have been spotted drifting in a remote section of the Indian Ocean. Compensation for loss of life is vastly different between US. passengers and non-U.S. passengers. "If the claim is brought in the US. court, it's of significantly more value than if it's brought into any other court."

Some victims and survivors of the Indonesian and Malaysia airline's air crash case would like to sue the lawsuit to the United States court in order to receive a larger compensation package for damage caused by an accident that occurred in the sea of Java sea and the Indian ocean and rather than taking it to the Indonesian or Malaysian court. Though each victim and survivor of the Indonesian and Malaysia airline's air crash case will receive an unconditional 113,100 Unit of Account (SDR) as an amount of compensation for damage from Indonesia's AirAsia and Malaysia Airlines in accordance with Article 21, 1 (absolute, strict, no-fault liability system) of the 1999 Montreal Convention.

But if Indonesia AirAsia airlines and Malaysia Airlines cannot prove as to the following two points without fault based on Article 21, 2 (presumed faulty system) of the 1999 Montreal Convention, AirAsia of Indonesia and Malaysia Airlines will be burdened the unlimited liability to the each victim and survivor of the Indonesian and Malaysia airline's air crash case such as ① such damage was not due to the negligence or other wrongful act or omission of the air carrier or its servants or agents, or ② such damage was solely due to the negligence or other wrongful act or omission of a third party.

In this researcher's view for the aforementioned reasons, and under the laws of China, Indonesia, Malaysia and Korea the Chinese, Indonesian, Malaysia and Korean, some victims and survivors of the crash of the two flights are entitled to receive possibly from more than 113,100 SDR to 5 million US\$ from the two airlines or from the Aviation Insurance Company based on decision of the American court. It could also be argued that it is reasonable and necessary to revise the clause referring to bodily injury to a clause mentioning personal injury based on Article 17 of the 1999 Montreal Convention so as to be included the mental injury and condolence in the near future.

Key words : Indonesia, Malaysia Airline's Aircraft Accidents, Crash, Montreal Convention, SDR, Unit of Account, IMF, Death, Compensation for Damage, Wilful-misconduct, Court, Jurisdiction, Suit.