

For Discussion
on 24 January 2005

Legislative Council Panel on Economic Services

Amendments to the Carriage by Air Ordinance to Apply the Montreal Convention

Introduction

This paper briefs Members on the Government's proposal to amend the Carriage by Air Ordinance (Cap. 500, "the Ordinance") to apply the Convention for the Unification of Certain Rules for International Carriage by Air signed at Montreal on 28 May 1999 (the "Montreal Convention"). The proposed legislative amendment seeks to bring Hong Kong's aviation regulatory framework governing airlines' liabilities towards passengers and shippers in line with international standards.

Background

The Warsaw System

2. For many years, air carriers' liabilities with regard to international carriage of passengers, baggage and cargo are being governed by a set of international legal instruments commonly referred to as the Warsaw system. These international legal instruments, listed below, are applied to Hong Kong through the Ordinance :

- (a) Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw in 1929 (the Warsaw Convention);
- (b) Protocol to Amend the Warsaw Convention done at the Hague in 1955 (the Hague Protocol); and
- (c) Convention Supplementary to the Warsaw Convention signed at Guadalajara in 1961 (the Guadalajara Convention).

These three instruments provide internationally unified rules which govern the documents of international carriage (i.e. air tickets and air waybills); carriers' liability for injury or death of passengers, damage or loss of baggage and cargo, and losses caused by delays; as well as jurisdictions and time limit for bringing proceedings to claim compensation.

3. Since participation in the three instruments is limited to sovereign states, the application of these instruments to Hong Kong SAR has to be confirmed by the Central People's Government's notification to the depositories of these instruments.

The Montreal Convention

4. The Warsaw system dates back to the 1920's when civil aviation was at the embryonic stage. Over the years, there have been piecemeal efforts to up-date the system in response to aviation developments. In 1995, the International Civil Aviation Organisation (ICAO) began to revise the Warsaw system in a holistic manner, resulting in the drawing up of the Montreal Convention. The Convention consolidates and modernises the various instruments under the Warsaw system. It was signed on 28 May 1999 and came into force on 4 November 2003 upon ratification by the 30th contracting State. As of January 2005, 62 States, including many of Hong Kong's major aviation partners such as the EU, USA and Japan have ratified the Convention. The Central People's Government has also initiated the ratification process. Applying the Montreal Convention to Hong Kong would bring our regulatory framework on a par with international standards, which is of crucial importance to the maintenance of our status as an international aviation centre. The major benefits brought by applying the Montreal Convention are explained in details below.

(A) Improved Compensation Levels

5. The Montreal Convention substantially increases the out-dated compensation levels provided for under the Warsaw system. In the case of carriage of passengers, the compensation level in relation to death or injury, which is capped at HK\$188,500 equivalent under the Warsaw system, is replaced by a two-tier system : a first tier of liability of up to HK\$1.14 million which airlines cannot exclude or limit, and a second tier of fault-based, unlimited liability. The liability limit for baggage amage or loss is increased by about 50% to HK\$11,400 per passenger.

6. The Montreal Convention also introduces a new mechanism for regular review of the liability limits. Under this mechanism, the limits would be reviewed by ICAO every five years and be revised accordingly when a weighted inflation factor exceeds 10%. This would enable timely up-dating of the liability limits to reflect changing prices.

7. Once the Montreal Convention has been applied to Hong Kong, it would be our obligation to implement the revised liability limits as and when they are adjusted under the review mechanism. We therefore also propose to introduce a provision to enable the Director-General of Civil Aviation (DGCA) to update the Montreal limits through gazette notice as and when the limits are revised by ICAO.

(B) Additional Choice of Jurisdiction

8. The Warsaw system currently provides for the following four jurisdictions for passengers or shippers to claim compensation:

- (a) domicile of the carrier;
- (b) principal place of business of the carrier;
- (c) the carrier's place of business through which the contract of carriage was made; and
- (d) destination of the carriage.

The Montreal Convention introduces a fifth avenue by allowing legal actions in relation to the death or injury of passengers to be brought in the place of the passenger's residence. This additional jurisdiction makes it easier for a Hong Kong resident to seek redress in a local court against a foreign carrier.

(C) Recognition of Electronic Tickets

9. To keep pace with the new developments in the aviation industry, new provisions have been introduced in the Montreal Convention to recognise electronic tickets and air waybills, in addition to physical tickets and air waybills, as proof of carriage.

Legislative Amendments to Apply the Montreal Convention

10. Under the existing Ordinance, the provisions of the Warsaw instruments applied to Hong Kong are reproduced in a number of Schedules. The Ordinance also contains necessary implementing provisions which give effect to the Warsaw instruments, define parties eligible to enforce the liabilities in the case of fatal accidents, specify power of the court in determining the liability and time limits for bringing proceedings, and provide for the conversion of monetary units. These Schedules and implementing provisions would need to be retained to govern international carriage between Hong Kong and countries which have yet to ratify the Montreal Convention. To apply the Montreal Convention, it is proposed that a new Schedule be added to the Ordinance to reproduce the Montreal Convention. Implementing provisions similar to those in the existing Ordinance would also be made.

Other Proposed Amendments

(A) Mandatory Advance Payment Scheme

11. The Montreal Convention provides that in the event of an aircraft accident resulting in passenger death or injury, the carrier shall, *if required by its domestic law*, make advance payments to persons entitled to claim compensation to meet their immediate economic needs. Although a mandatory advance payment scheme is discretionary under the Convention, ICAO has passed a resolution encouraging individual governments to take measures under their domestic law to promote the making of advance payments by airlines. Most European countries have introduced a mandatory scheme. The Consumer Council supports the introduction of a mandatory scheme. In practice, Hong Kong airlines are prepared to provide advance payments on a voluntary basis, but they do not support a mandatory scheme. As an international aviation centre, we consider that we should benchmark the highest world standard and provide legal protection to passengers. Specifically, we propose a mandatory scheme with the following features :

- (a) carriers based in Hong Kong are required to make advance payment in the event of aircraft accidents which result in death or injury of passengers;

- (b) payments should be made without delay, and in any event not later than 15 days from the identification of the persons entitled to compensation, in order to meet their immediate economic needs on a basis proportional to the hardship suffered;
- (c) in the event of death, such advance payment should not be less than 15% of the liability limit for the carriage of passengers. Using the existing Montreal limit, the minimum payment would be around HK\$171,000. The amount would be automatically adjusted in future as and when the liability limits are revised according to the review mechanism;
- (d) advance payments shall not constitute recognition of liability and may be off-set against any amounts subsequently paid as damages by the carrier; and
- (e) advance payments are non-returnable except where it is found that the victim has contributed to the damage, or the recipient is not the person entitled to compensation.

(B) Application of Montreal Convention to Non-international Carriage and Carriage of Postal Packages

12. The existing Ordinance also governs carriage not covered by the Warsaw system (i.e. non-international carriage including carriage within Hong Kong and carriage between Hong Kong and the Mainland, Taiwan and Macau) and carriage of postal packages through a separate Schedule which contains provisions largely adapted from the Warsaw instruments. As a matter of principle, passengers and shippers should be accorded the same level of protection regardless of whether the carriage is international or non-international, and whether the consignments are ordinary cargoes or postal packages. We therefore propose that the Warsaw provisions in this particular Schedule be replaced by the Montreal provisions. We further propose that the mechanism for up-dating liability limits and the mandatory advance payment scheme should be equally applicable.

(C) Repeal of Provisions regarding Designation of Contracting Parties

13. The Ordinance empowers the Government to make subsidiary legislation to certify the contracting parties to the various Warsaw instruments. So far no subsidiary legislation has been made. With the advance of technology, the information can be conveniently obtained from the depositories of the various Conventions and ICAO. We therefore do not see the need to invoke the power to make the subsidiary legislation and propose to delete the empowering provisions.

(D) Repeal of Two Orders on Conversion of Monetary Units

14. The liability limits contained in the Warsaw system are expressed in special drawing rights or gold francs. To convert these monetary units into local currency, the Ordinance provides for the Hong Kong Monetary Authority (HKMA) to issue certificates specifying the Hong Kong dollar equivalents of these units on a particular day. In parallel, the Ordinance also contains provisions which provide the basis for two Orders made back in 1984 to specify the conversion rates then. The rates contained in these two Orders are out-dated. To avoid confusion, we propose to repeal the provisions and the two Orders. The HKMA would continue to exercise its power to specify the Hong Kong dollar equivalents as and when required.

Consultation

15. The Aviation Advisory Board was consulted on the above proposed framework on 11 October 2004 and gave its support for the proposal. Other concerned parties, including the airline industry, Consumer Council and trade organisations representing the travel industry and shippers, were consulted between 1999 and 2001 on the proposal to apply the Montreal Convention to Hong Kong. They generally supported the proposal. We are now consulting them again on the framework of the proposed legislative amendment. Based on the feedback we have received, the major concern is the mandatory advance payment scheme as explained in paragraph 11 above. We will continue to consult the airline industry on the detailed drafting of the Bill.

Legislative Timetable

16. We would introduce the amendment bill into the Legislative Council during the current legislative session.

Advice sought

17. Members are invited to comment on the above legislative proposal.

Economic Development and Labour Bureau
14 January 2005