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Air Carrier's Contractual Liability: International and Indian Legal Perspective

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ABSTRACT

In the aviation industry a massive development has been seen in over past decades globally and also there has been increase in commercial air transportation of passengers and cargo. Further, along with this development a hike in the incidents of death, injury on board and also delay of air carriers has been observed. Earlier, the air carriers had a very limited liability in cases of death and injury and the passengers had to suffer loss and there was no prescribed compensation for accidents on board such as death, injury, delay etc. and also the interest of victims was overlooked by the airlines and for the same purpose a uniform liability regime was required. The Warsaw Convention, 1929 was the first attempt made towards creating liability on part of air carrier in cases of accidents on board and also brought in the concept of "Contractual Liability". There have been various other Protocols and Conventions which have contributed to the growth of contractual liability regime keeping in view the interest of passengers and also of the airlines. Moreover, along with liabilities there are certain rights and protections well entrusted to airlines, because imposing heavy liabilities could have been a hindrance in growth of aviation industry and we would not have boom in industry as we witness it in present era.

In this research paper, the author will deliberate upon aspects of contractual liability regime, evolution of International contractual liability regime, International Conventions, Protocols and provisions in respect to determination of liability and payment of compensation by airline in cases of death, injury, delay etc. Further, the author will elucidate upon the application of international contractual liability regime including its application in domestic sector with specific locus on India with the assistance of recent judicial trends and precedents from the courts around the world and India in respect to aviation accidents.

***Keywords**: Air Carrier, Liability, Rights, Conventions, Accidents, Aviation.*

I. INTRODUCTION

The aviation sector has grown tremendously in the Twenty-first Century but the aviation activities have started dating back to eighteenth century. First in 1783, Montgolfier brothers

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made a prototype of a hot air balloon but that could not be used to carry passengers or goods. During this period the first development was hydrogen balloons which were used to carry people or goods to high mountain altitudes and to other places. Later, by 19th century these balloons became and means of spying during the wars and battles as people could easily observe the activities of other side from air.[2] Moreover in 1898, the first bilateral international agreement was signed between Germany and Austria to regulate the air traffic and crossing of international borders.[3]

In 1903, the Wright brothers made first controlled and powered heavier than air manned flight in North Carolina, United States. Later the first air transportation company was founded in the year 1909 named Deutschland Luftschiffahrts AG.[4] The expansion and development of the modern day aircrafts started in early 20th century and the development of aircrafts accelerated during this period.[5]

In 1910 the Paris Peace conference was held in which it was presented that there should be freedom to access the airspace, the airspace shall be divided in air zones and there shall be air sovereignty of each state of airspace above its territory.[6] In 1919 the treaty of Versailles was signed in furtherance to the Paris Peace Conference which had a noteworthy effect on the civil and military aviation as it had provided with various constrains and terms with respect to civil and military aviation operations.[7]

Later in 1919, Paris Convention was signed which was first multilateral international treaty concerning the civil aviation law.[8] The 1919 Convention was the first Convention which gave provisions with respect to the aviation activities and it also led to creation of International Commission for Air Navigation (ICAN).[9] Later, various other conventions also came such as Madrid Convention, 1926 and Havana Convention, 1928 which contributed to the development of the laws with respect to aviation.

The aviation industry had grown tremendously by this time but there was no law with respect

[2]JACO AEROSPACE & INDUSTRIAL, https://www.e-aircraftsupply.com/history-of-aviation-aircrafts-through-time (last visited 05th February, 2023).
[3]BENJAMYN I. SCOTT AND ANDREA TRIMARCHI, INTERNATIONAL AVIATION LAW AND POLICY, 19
[4] Ibid.
[5] Supra Note 1.
[6]BENJAMYN I. SCOTT AND ANDREA TRIMARCHI, INTERNATIONAL AVIATION LAW AND POLICY, 21
[7]BENJAMYN I. SCOTT AND ANDREA TRIMARCHI, INTERNATIONAL AVIATION LAW AND POLICY, 22
[8]BENJAMYN I. SCOTT AND ANDREA TRIMARCHI, INTERNATIONAL AVIATION LAW AND POLICY, 24
[9] See the Paris Convention 1919, 'Convention Relating to the Regulation of Aerial Navigation'

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to aviation accidents such as death, injury, delay etc. So, a need for a uniform liability regime was felt where the passengers' rights are being protected and the airlines also have some obligation towards passengers and on the same hand the airlines gets rights and privileges which aids to the growth of the aviation industry. So in order to aid the expansion of the aviation industry there was need to develop the relationship of trust between the consumer and the service provider for that the co existence of a contractual relationship between them was necessary where certain rights, liabilities and protections are provided, and this was made certain by the emergence of the liability regime which ensured a contractual relationship between the consumer and the service provider.

II. INTERNATIONAL LIABILITY REGIME FOR AIR CARRIERS

When civil aviation head started and was in initial stage of its expand there was high frequency of mishaps such as death, injury on board taking place of parties concerned. The passengers needed a uniform legal protection and limited liabilities of airlines both were crucial for the growth of civil aviation industry by increasing the air transportation traffic. So, considering all such increasing incidents, the States around the globe united, worked together and brought in the Convention for Unification of Certain Rules relating to International Carriage by Air, which is commonly known as Warsaw Convention in 1929. The Convention had a fundamental goal to unify the international laws in respect to airlines' liability.[10] The below mentioned Conventions and Protocols are applicable on all the signatory parties and are of binding nature in order to ensure efficient growth of the Aviation industry around the globe.

The various Conventions which contributed to the International Contractual liable regime for airlines are as follows-

1. Warsaw Convention, 1929

The first International Conference on Private Air Law was held in Paris in 1925 where a resolution was passed to form CITEJA. The Convention was drafted by deliberate efforts of Committee of legal experts of CITEJA[11] at the Second International Conference on Private Air Law held at Warsaw, Poland. The Convention was adopted on 12 October 1929 and it came in force from 13 February 1933.[12] As of 2015 the Convention has been ratified by 152 countries.[13]

[10] Aprajita Mishra, Indian Journal of Law, Polity and Administration An overview of Air Carrier's Liability (2020).
[11] The Comité International Technique d'Experts Juridiques Aériens (CITEJA)
[12] Stephen Latchford, The Warsaw Convention and the C.I.T.E.J.A, 6 J. AIR L. & COM. 79 (1935) https://scholar.smu.edu/jalc/vol6/iss1/4
[13] ICAO, https://www.icao.int/secretariat/legal/List%20of%20Parties/WC-HP_EN.pdf (last visited on 7th February 2023).

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The Convention was brought in force with an intent to operate the relationship between the passengers (consumers) and the service providers (airlines) in case incidents of death, damage, injury or death etc. Further, the Convention also lays down a uniform procedure for the purpose of various kinds of documentation and claims and related limitations. Moreover, the Convention also provides provision for liability of Carrier in case of damage etc.[14]

Under the Convention the liability has been imposed on the airlines in case of accidents but the liability is limited, along with the protection provided for passengers. The Convention is inclining towards the airlines in order to ensure expansion of the aviation operations and growth of Aviation industry.[15] In case of accident the jurisdiction as per the Convention[16] are-

a. Territory of the States Parties
b. Court of domicile of carrier
c. Principal place of business of carrier
d. Before court of place of destination

In cases of death or injury to passengers the air carrier is liable to pay compensation maximum of 125,000 Frans[17] for each passenger which is equivalent to 1,35,092.50 USD. Further, under the Convention the Carrier is liable to pay compensation in case of damage caused due to delay in carriage by air of passengers, goods or luggage.[18] The air carriers are entitled to take defense if they have taken all necessary measures to thwart the incident from taking place.

2. The Hague Protocol, 1955

The Protocol was to amend the Convention for the Unification of Certain Rules relating to International Carriage by Air. The Protocol was adopted on 28th September 1955 and came in force on 1 August 1963. The Protocol has been rectified by 137 State parties where most of the States are party to the Warsaw Convention, 1929 as well.[19]

The main objective behind Hague Protocol was to raise the liability caps as the liability limits were too low as given under the Warsaw Convention. The Protocol is only applicable to the

[14] Convention for the Unification of Certain Rules Relating to International Carriage by Air, Warsaw Convention 1929, Chapter III, Article 17-30 (Liability of the Carrier),
[15] Supra Note 9
[16] Convention for the Unification of Certain Rules Relating to International Carriage by Air, Warsaw Convention 1929, Chapter III, Article 28
[17] Convention for the Unification of Certain Rules Relating to International Carriage by Air, Warsaw Convention 1929, Chapter III, Article 22
[18] Convention for the Unification of Certain Rules Relating to International Carriage by Air, Warsaw Convention 1929, Chapter III, Article 19
[19] BENJAMYN I. SCOTT AND ANDREA TRIMARCHI, INTERNATIONAL AVIATION LAW AND POLICY, 155

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signatories to the Warsaw Convention. The Protocol has not been ratified by United States but on all international carriers providing air transportation service. The Hague Protocol was also favourable towards the carriers in same way as the Warsaw Convention, 1929 but the Protocol increased the liability amount to 250,000 Frans.

Further various other conventions also came which amended the Warsaw Convention and were a part of the Warsaw system such as-

3. Guadalajara Convention, 1961

The Convention was supplementary to the Warsaw Convention. The Convention was ratified by 86 State parties. The distinction between the actual carrier and contracting carrier was introduced by way of this Convention.[20]

4. Guatemala City Protocol, 1971

The Protocol also was to amend the Warsaw Convention, 1929. It also aimed towards raising the liability caps up to 1.5 million Gold Frans. The Protocol is not in force in present.

5. Montreal Additional Protocol, 1975

In 1975 in order to amend and modernize the Warsaw system four additional protocols were adopted under which monetary standards in SDR[21] were introduced, liability caps were amended etc.[22]

Under the International Contractual liability regime after the Warsaw system the Montreal System emerged which was a modernized and amended system which best suited the growing Aviation industry under which the passengers and airlines both are provided with protections and rights, whereas the airlines under the system are under certain obligations as air transportation service providers towards passengers (consumers) but they are also provided with various defenses.

6. Montreal Convention, 1999

The ICAO adopted the Convention on 28 May 1999 with intent to modernize the Warsaw system in respect to modern day dynamics in the Aviation industry. The Montreal Convention was an attempt to modernize the applicability of the Warsaw Convention, 1929.

The 1999 Convention neither replaces nor suspends the earlier convention, rather both the

[20] BENJAMYN I. SCOTT AND ANDREA TRIMARCHI, INTERNATIONAL AVIATION LAW AND POLICY, 156

[21] The SDR (Special Drawing Rights) is an international reserve asset created by the IMF to supplement the official reserves of its member countries.

[22] Chapter I, Article 1(1) of The Warsaw Convention as amended by The Hague Protocol, 1955

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Conventions are in force and have independent applicability. Further, the Convention is applicable on the international carriage by air between the State parties to this Convention and also to States party to the Conventions and Protocols of Warsaw system.[23]

The Convention provides provision regarding the international carriage by aircraft for reward and for gratuitous international carriage. It provides with various provisions with respect to delay, damage, baggage, cargo etc. Chapter 3 (Article 17-37) of the Montreal Convention, 1999 provides for liability of Carrier and extent of Compensation payable for Damage etc. In case of death or injury to the passenger the carrier will be held liable for that accident if no due diligence was taken by the carrier or agent.

As per Article 17, "the carrier will be liable for any damage caused in case of death or any injury caused on board the aircraft or in course of any of the operations of embarking or disembarking".

There are certain per conditions given for considering the accident under Article 17 as follows-

a. There must be an accident
b. The accident must cause the damage
c. The damage must result from to death or bodily injury of the passenger.
d. The accident must occur on board the aircraft or during embarking, or disembarking.

In case of any accident as per this Convention the case may also be filed at the place of residence of passenger.[24] Further there shall be a causal link or connection between the accident and the damage. The Convention also holds carrier liable for any damage or loss to the checked in baggage, but the liability can be waived off if the defect was pre existing, or if the carrier beyond reasonable doubt prove that the damage was not caused due to negligence of airline or its agents.

The 1999 Convention provides with Two- tier liability regime which is limited or strict liability and unlimited liability. Under strict liability regime in cases of death or injury to passengers the air carrier is liable to pay compensation maximum of 100 000 Special Drawing Rights[25] for each passengers which is equivalent to 134,482 USD. Further, under the Convention the Carrier is also liable to pay compensation in case of damage caused due to delay which is 4150 SDR.[26]

The air carriers are entitled to take defense if they have taken all necessary measures to thwart

[23] Montreal Convention, 1999, Article 55.
[24] Montreal Convention, 1999, Article 33.
[25] Montreal Convention, 1999, Article 21.
[26] Montreal Convention, 1999, Article 19.

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the incident from taking place. Under the Convention the carrier can escape the unlimited liability as well if it proves that the damage was not due to negligence or act of the airline or its agents, but the burden of proof lies on the airline.

III. INDIAN LIABILITY REGIME FOR AIR CARRIER'S AND RELATED LEGISLATIONS

In India the contractual relationship between the Airlines and the passengers is looked up by the Carriage by Air Act, 1972 considering the growing aviation activities and the country becoming one of the largest aviation markets. The Act was enacted in order to give effect to the Convention for the Unification of certain rules relating to International carriage by air[27], Hague Protocol, 1955 and the Montreal Convention, 1999.[28] Under the 1972 Act the rules of the above Conventions and Protocol have been applied in their respective original form.[29]

The rules relating to the rights, liabilities of carriers and passengers given under the First Schedule[30] are applicable in India as well. Further, the amended convention[31] as given under Second Schedule and the Montreal Convention, 1999 provided under Third Schedule are also applicable in India.

In India as the Conventions and Protocol governing the Contractual relationship among the airlines and passengers are being adopted in the same way, moreover, the rules related to liability of the air carrier in case of death or injury caused remains the same.

The Air Carrier are held liable for the accidents caused because of the negligence of the airline or its agents resulting in death, any kind of injury caused to body or any psychological injury to the passengers on board.

The compensation under the Act is also as per the adopted Conventions and Protocol. As the liability caps were revised under The Hague Protocol and the Montreal Convention the compensation also differs in all three schedules.

For instance, under the First Schedule the compensation payable in case of death or injury is up to 125,000 Frans[32], under Second Schedule it is about 2,50,000 Frans[33] and under Third Schedule the amount of compensation is up to 1,00,000 SDR[34]. But in case of any existing contract more compensation may also be payable and in case of willful negligence on part of

[27] Warsaw Convention, 1929
[28] The Carriage by Air, 1972, Section 3 & 4.
[29] The Carriage by Air Act, 1972
[30] Supra Note 25.
[31] Hague Protocol, 1955
[32] The Carriage by Air Act, 1972, Rule 17 of the First Schedule
[33] The Carriage by Air Act, 1972, Rule 17 of the Second Schedule
[34] The Carriage by Air Act, 1972, Rule 21(1) of the Third Schedule

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Air carrier or their agent then it attracts unlimited liability.

In case of delay the air carrier is liable to pay damages in form of compensation to the passengers for the baggage delay or for delay caused to passengers.[35] But they can be exempted from it if they prove all necessary measures to avoid the situation were taken by the airline beyond reasonable doubt.

Under the Act, the jurisdiction to file a case is determined as per the rules[36] given under Convention. The compensation is also determined as per the provisions of the Convention but there is no uniformity in determining the computation of compensation payable.

IV. JUDICIAL PERSPECTIVE OF INTERNATIONAL AND INDIAN LIABILITY REGIME FOR AIR CARRIERS

The judgments in respect to contractual liability from the courts around the globe acts as precedents in determining the compensation payable in cases of aviation accidents. The following cases give a judicial perspective in respect to International and Indian contractual liability regime and also determine various rights of passengers and defenses available for the airlines.

In the case of Ypma v. Martin Air[37], a passenger got injured in course of keeping the baggage in the overhead bin and it dropped on the shoulder and head of the passenger. After the incident the passenger de boarded the plane and claimed damages from the airline. In this matter the Court held that the incident took place in the air carriage was just a matter of coincidence. Further, the court stated that there should be a connection between the aircraft's operations and the incident as also considered the provision given under Article 17[38] and hence the Airline was not held liable to pay damages for the injury caused.

In case of Air France v. Saks[39] the term accident was defined as, "*an even, physical circumstance that occurs unexpectedly, which takes place, not in accordance with the usual course of things"*. Further, it was held by the U.S. Supreme Court that, "*the liability under article 17 arises only if the passengers injury is caused by an unexpected event or happening that is external to the passenger and not where the injury results from the passengers on internal reaction to the usual and expected operation of the aircraft".*

[35] The Carriage by Air Act, 1972, Rule 19 of First, Second and Third Schedule.
[36] The Carriage by Air Act, 1972, Rule 33(2) of the Third Schedule.
[37] Ypma v. Martin Air SES 2004/56.
[38] See, Warsaw Convention, 1929, Article 17.
[39] Air France v. Saks 470 U.S. 392 (1985).

In another case of Morris v. KLM[40] the plaintiff was a 15 year old girl, and she was sexually assaulted by a male passenger on board because of which she suffered clinical depression as she claimed. But there were no physical injuries and further, there was no connection between the aircraft's operation and the incident. Hence, her claim was rejected and the mental injury caused didn't fall within the ambit of Article 17.

In case of National Aviation Company of India Ltd. v. S. Abdul Salam & others[41] an international flight from Dubai to Mangalore crashed where approximately 158 people were killed and as many as 1059 were injured including the crew members.

The lower court awarded the compensation of 1 lakh SDR. Later, the respondents filed a writ petition to Kerala High Court, where the court stated that certain factors needs to be considered in awarding of the compensation such as age, education, salary, economic status etc. of the deceased. Further, in this case the accident was caused due to negligence of the pilot who is considered as an agent of the airline. In this case the controversy was with regards to application of Article 21(1) of the Third Schedule of Act. The High Court ruled in this case that the airline is liable to pay compensation irrespective of reason of accident to the claimants which was 1 lakh SDR.

In Airport Authority of India v. Ushaben Shirishbhai Shah[42] an appeal was filed by widow and sons of deceased Shirishabhai who lost his life in an air crash of an Indian Airlines flight near Ahmedabad Airport in 1988. In the matter it was proved that the accident occurred due to negligence of the airline and Airport Authority of India. The compensation was decided on basis of the income and financial status of family of deceased. The Airport Authority was also held responsible in matter and was directed to pay compensation.

In case of Sangeeta Barring v. Air India Ltd.[43] a flight from Singapore to Mumbai met with an accident at Mumbai Airport due to the actions of the pilot. The passenger suffered injuries and hence claimed medical expenses she incurred with compensation of 90 lakh rupees. The Court held that the airline is liable to pay compensation to the passenger and also they are liable to pay for the medical expenses incurred. Further, the Court also directed to pay the full salary during pendency to the passenger.

[40] Morris v. KLM, (2002) 2 AC 628 (U.K. House of Lords 2002).
[41] National Aviation Company of India Ltd. v. S. Abdul Salam & others, 2011 (4) KLJ 235.
[42] Airport Authority of India v. Ushaben Shirishbhai Shah, AIR 2009 Guj 264.
[43] Sangeeta Barring v. Air India Ltd., 103 (2003) DLT 5.

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V. CONCLUSION AND SUGGESTION

The aviation industry have witnessed tremendously increase in air traffic in past decades globally and, with the contractual liability regime provide the passengers and the airlines with uniform legal protection which have provided with rights and liabilities which protects and preserves the contractual relationship which exist between passenger and airline. Globally, majority of States have been a party to the various Conventions and Protocols governing the contractual liability regime, but still there is not worldwide acceptance by various nations. Even after the amendments the contractual liability regime has a long way to go for a worldwide acceptance and global uniform applicability.

In India, the legal regime concerning the contractual liability regime is not in par yet. There is need for more uniform laws and legislations to govern the domestic aviation sector. Moreover, in order to determine the compensation there is no uniformity and the cases related to aviation accidents are dealt by Consumer forums as deficiency in service, which causes a delay in justice delivery as seen in Ushaben case. In accordance with the growth of Indian aviation market a separate tribunal shall be made to provide speedy justice to the victims of aviation accidents because as it is said, "justice delayed is justice denied". The existing laws and rules should be amended considering the interest of passengers and airlines as it will ensure protection of rights of both passengers and airlines.

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