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ANALYSIS OF THE NORMS GOVERNING LIABILITY OF AIRLINES ACCORDING TO THE 1929 WARSAW AND 1999 MONTREAL CONVENTIONS

Introduction

Today air transport is one of the most common means of transportation in the world. As of 2019, the number of air passengers was 4.56 billion.[1] It is true that as a result of the pandemic caused by the coronavirus, this indicator decreased to 1.8 billion in 2020, but in 2021-2022, but a growing trend can be observed again. According to data from the International Civil Aviation Organization (ICAO), compared to 2021, 47% more passengers were transported by airlines in 2022 and this growth is expected to be maintained in the coming years.[2] Along with the growth of the role and use of air transport, it is natural that there are frequent cases of various violations from airlines. For example, there may be loss of luggage, flight delay, passenger injury and etc. At such times, the question of airline liability will arise, so it is important to know where this liability of the airline comes from. When similar cases occur, the airline represents the so-called "strong side", because it has powerful resources, and in many cases passengers who have been harmed do not even know how to protect their rights. Thus, in order for the balance of power to be preserved, it became necessary to have such regulatory norms that would define the bases of responsibility of the airlines and oblige them to compensate the damages caused to the passengers. Regarding the liability of airlines, the paper will discuss 2 main conventions: the 1929 Convention for the Unification of Certain Rules Relating to International Carriage by Air, commonly referred to as the Warsaw Convention; And the second is the 1999 Montreal Convention also named as a convention "for the Unification of Certain Rules for International Carriage by Air", known as the Montreal Convention."

The purpose of this paper is, first of all, to briefly review and define what is international air carriage, as well as to characterize the meaning of liability in international law, to determine how the issue of liability is regulated according to the Warsaw and Montreal Conventions, and also to offer an overview of existing practical cases related to liability.

International air law and basic aspects of air carriage

International carriage by air is regulated by international air law. What is international air law? International air law is a part of international public law, which includes only international public legal norms, and the subject of its regulation is the relations between states, concerning issues related to the implementation of international air traffic and the use of air space. Although there is opinion, that international air law is the mix of international (public) legal norms and domestic legal norms. This position is shared by Professor Ronald Barsh. According to him, international air law is a combination of

[1] The World Bank, https://data.worldbank.org/indicator/IS.AIR.PSGR [15.07.2023];
[2] https://www.icao.int/Newsroom/Pages/ICAO-forecasts-complete-and-sustainable-recovery-and-growth-of-air-passenger-demand-in-2023.aspx [24.07.2023];

both international public and international private law. The abovementioned definition is derived from the fact that in international air regulation norms are used from both: from international public law and from domestic law as well.[1] The same approach is shared by the English lawyers Shawcross and Beaumont. In their opinion, international air law is a combination of international public and international private law.[2] As far as subject is still discussed in theory, we believe that international air law, only consists international public law type norms. The norms of international public character and domestic character are different from each other, by various of aspects, such as: subject of regulation, objects, methods of enforcement, ways of creation and etc. So mixing norms of international character and domestic character under international air law would not be correct. Just because these norms regulate the same area, does not mean that they are the same and should be united.[3]

International air carriage law is a part of international air law and includes set of norms that determine the regulation of international air carriage made by carriers. For instance, these norms concern the establishment of international flights, the use of "freedoms of the air", responsibility, safety, obligations of the air carrier, etc. These norms have international public law character, and include only relations between states and the internationally applicable rules established by them. Thus, international air law establishes a general framework of conduct in the context of air transportation.

We should also mention the importance of private law in practical application of international air carriage. As discussed before, air carriage law, sets general legal framework for air carriage, but on lower levels this framework is used by private individuals/companies. For example, when there is dispute between air carrier and it's customer, domestic courts review the dispute based on the norms of internationals air carriage law.

Liability under the Warsaw Convention

The liability component of the air carrier is one of the main parts of the Warsaw Convention. In this regard, the main objectives of the convention were to improve the legal status of passengers by establishing the presumption of liability of the carrier, to protect small airlines by limiting the scope of liability, and to achieve maximum uniformity in international air transportation.[4] Issues of responsibility are defined in chapter 3 of the convention, under articles 17-30. The named articles talk about the responsibility of the airline in the event of death or bodily injury of the passenger, as well as damage-destruction of the luggage, or damage caused because of the delay of transportation of the passenger, luggage and/or cargo. The mentioned articles, in particular articles 20 and 21, provide for cases when the air carrier is not liable for damages. According to Article 20, the air carrier is not liable if it proves that it and it's personnel did everything possible to avoid the damage, or it proves that it was impossible to take such measures. Article 21 speaks of another case of fully or partially excluding liability, when the damage is caused by the fault of the victim himself. These liability exclusion rules apply to all types of damage, starting with personal injury-death, ending with damage to luggage, etc. It is worth to mention the step forward established by the Warsaw Convention at that time, in particular, the imposition of the burden of proof on the air carrier. More precisely, in order to exclude the responsibility of the air carrier, it must prove that it was not responsible for the occurrence of a specific incident or did everything to prevent it (or it was impossible to do so).

The Warsaw Convention not only defined the bases for determining the liability of the air carrier, but also determined the specific scope and extent of this liability. According to the Warsaw Convention, the

[1] Ronald I C Bartsch, International Aviation Law: A Practical Guide (second edition), 2018 p.18;
[2] Shawcross, Beaumont, International Air Law, 1957, p 30-31;
[3] David Geperidze, International Air Law, 2021, p. 39;
[4] David Geperidze, *International Air Law,* 2021, p. 483;

airline's liability for each passenger (in case of injury or death) was set at 125,000 francs (about 8,300 US dollars in today's terms), and 250 francs (about 20 US dollars) for each kilogram of baggage and cargo. And for each passenger's hand luggage, a liability limit of 5 thousand francs (about 400 US dollars) was established.

Liability under Montreal Convention

Despite a number of innovative approaches and the goal of protecting passenger's rights, the Warsaw Convention was not flawless, became less effective and needed modernization.[1] One of the main issues was liability limits which were too low for modern airline industry. Because of that, there were attempts to change convention – for that purposes several additional protocols or conventions were adopted, some of them did not enforce, others – were supported only smart part of countries, so these changes were ineffective and still was needed the new convention which would be more related to moder reality. As a result, in 1999 Montreal Convention was adopted, which regulated certain subjects differently and corrected some of the issues that were in Warsaw Convention.

One of the main changes Montreal Convention has made, was adopting Special Drawing Rights (SDR)[2] which was more stable currency compare to Franch Francs used in Warsaw convention. Also, by the Montreal Convention the limits of liability for air carrier were increased significantly. We should also mention that, Montreal Convention brought different grounds of excluding liability based on the damage that was experienced by the customer (for instance these grounds were different in case of physical injury and delay…). One of the innovative changes that was made in Montreal Convention, was the adopting of two-level liability in case of death or physical injury of the passenger. According to the article 17 of the convention, within the 100 000 SDR (first level of liability) airline is strictly liable, meaning that it can not exclude or limit it's liability. Only exception, which excludes the liability of air carrier within 100 000 SDR is when the victim himself is to blame for the damage (death or injury). In this case it is permissible to release the airline from liability. Second level of liability is above 100 000 SDR – meaning that airline will not need to compensate damage above 100 000 SDR if the airline proves that the damage was not caused by the negligence, omission or wrongful act of the carrier or it's service personnel/agent or if it proves that this damage was caused by the negligence, inaction or illegal act of a third party.

Additionally, Montreal Convention increased jurisdiction of the courts that could review the case and last but not least, Montreal Convention was authentic on 6 languages, compare to Warsaw convention which had only one authentic language – Franch. Because of that change, it became much easier to use the convention in domestic courts.

Analysis of certain cases related to liability

Both the Warsaw Convention and the Montreal Convention explain as precisely as possible all the issues related to the imposition of liability, but nevertheless, it is impossible for the convention to exhaust and define all cases. In this regard, judicial interpretations are important, because each individual case specifies how certain article of the convention, or any part of the article, should be understood. Below will be discussed several interesting cases related to the use of Montreal and Warsaw conventions.

In conventions, there is article about responsibility that states that air carrier is responsible for the damage which occurred during air carriage. Thus, one of the important issues related to the understanding of aforementioned conventions, is the meaning of air carriage itself, more precisely what exactly can be

[1] Ron Bartsch, International Aviation Law - A Practical Guide, 2018, p. 202

[2] SPECIAL DRAWING RIGHTS (SDR), International Monetary Fund https://www.imf.org/en/About/Factsheets/Sheets/2023/special-drawing-rights-sdr [17.07.2023];

counted as an air carriage. For example, if the cargo is damaged in the warehouse, does air carrier still have liability over it or not? During the case *Victoria Sales Corporation v. Emery Air freight Inc.*[1] cargo was damaged while it was in the warehouse outside of the airport, but under the control of the air carrier. About this case, US court decided that terms “air carriage” or “transportation by the air” should not be used strictly and word by word. Court addressed the article of 18.2 Warsaw convention and stated that liability of the air carrier should be extended in time and space, while air carrier is in charge of the cargo.[2] It means that air carriage do not always literally means carriage by air, but can include situations when cargo is not in the air.

One more interesting case is what happens if one country has ratified convention but not its additional protocol, and second country has ratified additional protocol but not the main convention. During the case *Chubb v. Asiana Airlines*[3] in 1995 US court decided that USA (which had ratified Warsaw Convention) and South Korea (which had ratified only Hague protocol but not main Warsaw Convention) were not in treaty relationship because they had ratified different treaties. While in 1986 in similar case South Korean Supreme Court concluded that countries were in the treaty relationship under the Hague protocol. This examples clearly shows, that during the use of conventions, domestic courts of different countries can have various approaches, that in the end prevents the formation of the united practice.

We should also discuss how the word “accident” mentioned in both of the conventions, is actually used in practice. The most acceptable and used definition of this term was used during the case *Air France v Saks*[4]. According the court air carrier is liable, when if the injury is caused by an “unexpected or unusual event or happening that is external to the passenger”. Meaning that, when the damage is occurred as a result of passenger’s internal reaction to the normal and expected usage of aircraft, this damage would not count as caused by “accident”.

Embarking and disembarking are important parts of the air carriage law. Unfortunately, Montreal and Warsaw conventions do not define when the embarking started or when the process of disembarking ended, so domestic courts need to determine it by themselves. In case *Walsh v KLM N.V.*[5] passenger got injury near the departure gate. In order to determine whether process of embarking was started or not, US court used three-step test: 1. control of the air company over the passenger; 2. Actions of the passenger; 3. Location of the passenger. Based on those grounds, court decided that the passenger was in the process of embarking, because he was near the group of other passengers, and air company had control over them. Speaking about disembarking, we can say that descending from the aircraft is one of the most commonly understood meaning of disembarkation.[6]

Last but not least, we should also mention the cases of mental injuries in international air carriage law. If we take a look at article 17 of Montreal or Warsaw conventions, there is specifically stressed that this

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[1] Victoria Sales Corp. v. Emery Air Freight, Inc. 1990.
https://casetext.com/case/victoria-sales-corp-v-emery-air-freight-inc
[26.07.2023];

[2] Ruwantissa Abeyratne, *Law and Regulation of Air Cargo,* 2018 გვ. 210;

[3] Chubb v. Asiana Airlines, 2000
https://www.justice.gov/osg/brief/chubb-and-son-inc-v-asiana-airlines-invitation
[26.07.2023];

[4] Air France v Saks (1985) 470 US 392
https://supreme.justia.com/cases/federal/us/470/392/
[30.07.2023];

[5] Walsh v KLM N.V. (SDNY Sept. 12, 2011)
https://law.justia.com/cases/federal/district-courts/new-york/nysdce/7:2009cv01803/341015/25/
[15.07.2023];

[6] Ron Bartsch, International Aviation Law - A Practical Guide, 2018, p. 205;

article only covers physical injuries – wording in those articles is “wounding” and “bodily injured”. But there are exceptions, when conventions can cover mental injuries as well. For example, in case *Ospina v TWA*[1] passenger died because of the explosion under his seat. It was determined by the courts that prior death, passenger suffered and got extremely severe physical pain. According to court, this suffering was the direct result of the explosion and physical injury, thus it was covered by the convention. Opposite to that, in case *Eastern Airlines Inc v Floyd* [2] during the flight all three engines of the aircraft failed and passengers were told that they had to land into the sea. In the end, crew managed to restart one of the engines and everything finished without casualties. But several passengers issued a claim against airlines to get compensation for the mental injury that they received because of the stress. Court decided that Warsaw Convention did not cover separately mental injury and that airline was not liable. So according to practice, mental injury in air carriage law is ground of responsibility only when it is resulted from physical injury.

As we mentioned before, Montreal and Warsaw conventions do not cover everything or describe some terms more detailly, so time by time courts need fill it by making their own definitions. Abovementioned cases were just small examples how certain rules can be understood in practice by the domestic courts.

Conclusions and recommendations

To sum up we can say that air carriage law is a part of international air law, concerning norms regulating air carriage by airline companies. In that regulation there are two main conventions: Warsaw Convention and Montreal Convention. Warsaw Convention was step-forward during the time of its adopting, but lately became ineffective. Warsaw Convention is still used in some of the countries nowadays, but mainly in modern aviation industry Montreal Convention is used. It is the most recent and the newest convention on that field, but has some flaws and there is a bit of a room for improvement. For example, as already have been discussed, Montreal Convention does not describe the definition of embarking/disembarking, does not include the definition of the term “accident”, meaning that domestic courts need to determine the meaning of these terms during the dispute. And the decision or definition of the court of one particular country is not absolute, it does not mean that domestic courts of other countries will share this description, and they have possibility to make totally different decision in similar cases. This in total prevents the norms of convention to be understood similarly in any state party, resulting that the uniform practice can’t be established.

Based on aforementioned information, there are several recommendations that will help the development of the international air carriage law. First of all, for developing the field, would be better if more and more countries ratify the Montreal Convention. As said before, maybe it is not “perfect”, but it is yet the most advanced convention in the field, so to have maximum uniformity, it is needed more and more countries to participate. Nowadays convention is ratified by 138 states and European Union.[3]

For developing the field would also be better if in the convention certain terms and details were more explained. Such as aforementioned term accident or embarking/disembarking. It would promote united understanding and practice.

Mental injury nowadays is also as important as physical injury, and it would be step-forward if Montreal

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[1] In Re Inflight Explosion on Trans World Airlines, 778 F. Supp. 625 (E.D.N.Y. 1991) https://law.justia.com/cases/federal/district-courts/FSupp/778/625/1605649/ [15.07.2023];

[2] Eastern Airlines Inc v Floyd (1991) 499 US 530 https://supreme.justia.com/cases/federal/us/499/530/ [15.07.2023];

[3] CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR DONE AT MONTREAL ON 28 MAY 1999 https://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf [15.07.2023];

Convention covered it. As stated before, the wording of convention specifies only on physical injury, but in practice it is possible to extend the scope of the application and interpret the convention more relevant to current reality.

Last but not least, one of the main recommendations is that independent judicial body should be created, that will settle disputes between air companies and customers based on Montreal Convention. Creating the specified courts or tribunals is not an innovation for modern international law. For example, there is the United Nations Convention on the Law of the Sea, which established the International Tribunal for the Law of the Sea;[1] Also, the International Center for Settlement of Investment Disputes (ICSID) was established by the World Bank.[2] So if such kind of court is created in air carriage law, it will make similar decisions on similar cases meaning the promotion of certain practice on topics that is not fully covered by the convention. Also, this judicial body will have more trust among claimants, as it will be independent from governmental bodies. Lastly, there will be less ambiguity as to which court a claimant should apply to - in particular the claimants will know that they can apply to this court in all cases.

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3. David Gederidze, *International Air Law*, 2021;
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6. The World Bank, https://data.worldbank.org/indicator/IS.AIR.PSGR
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8. SPECIAL DRAWING RIGHTS (SDR), International Monetary Fund https://www.imf.org/en/About/Factsheets/Sheets/2023/special-drawing-rights-sdr;
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12. Air France v Saks (1985) 470 US 392 https://supreme.justia.com/cases/federal/us/470/392/
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17. International Tribunal for the Law of the Sea - https://www.itlos.org/en/main/the-tribunal/the-tribunal/
18. ICSID CONVENTION, REGULATIONS AND RULES https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdfk.org/sites/default/files/ICSID%20Convention%20English.pdf

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[1] International Tribunal for the Law of the Sea - https://www.itlos.org/en/main/the-tribunal/the-tribunal/ [15.07.2023];

[2] ICSID CONVENTION, REGULATIONS AND RULES https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf [15.07.2023]