# Air Accidents in Conflict Rules: Private International Law Perspective

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## Abstract

*With growth of liberalization and globalization, the air accidents have started occurring so frequently which in turn led to complex application of law, jurisdiction and compensation related issues. It differs based on the countries regulations and rules. The most important concern of the state is about the rights of the victim of such air accidents. In this paper, the author explains the air accidents, insurance issues, problems in private international law and interpretation of current controversies.*

*Basically, the two important controversies regarding air accidents revolve around two aspects namely jurisdictional aspects and liability aspects. The air transportation is preferred mode of travel which creates various unforeseen circumstances. And there is a clear requirement in uniformity and predictability of the law governing these air accidents. The two conventions which talks about these regimes are The Warsaw Convention, 1929 being the bedrock & the Montreal Convention, 1999. The author refers to various judicial pronouncements across the globe which deals with the applicability of law and determining the governing law aspects and lastly concludes by providing certain suggestions.*

***Keywords:*** *Conflict of Laws, International Treaties, Jurisdiction, Governing Law, Contract, Tort, Private International Law, Air Accidents, Insurance and Domestic law.*

## I. INTRODUCTION

International Aviation is all about the distances between the countries and how it is solved for passengers to travel with ease across the globe. But when the air accidents occur there is always a vital contradiction as to which law is the governing law for damages and liability of the carrier too. The most difficult adjudication for courts throughout the years has been regarding the compensation claims. The court finds difficulty in applying the old principles and rules to the most modern growing mode of transport. There is a lot of complexity and non uniformity within the domestic laws.[1]

The litigation is very uncertain because both domestic laws and international law determines the liability and both the courts are involved in the issue. The two most recent examples are the Lion Air Accident and Ethiopian Air Accidents raised a lot of questions regarding the safety of passenger and rights of victims. The main issues in these crashes was which entity can be held liable in such incidents and till what extent the international law particularly private international law plays a role. The accountability aspect is discussed briefly through these disasters.

The Warsaw convention was then replaced by Montreal Convention in the year 1999. This amendment included is consolidations of all the previous issues resolved together by providing one single text which will now govern the air accidents. Both these convention coexist across the world. The main objective is to determine the governing law and liabilities clearly. In certain scenarios where there is conflict between domestic laws the court has to first decide the choice of law applicable in the situation. The law then chosen will determine the damages and other procedural aspects with regard to the injury caused. If international law is applicable then there are various uniform international conventions and rules which determine the same. The Warsaw convention explains and establishes the principle regarding the carrier liability and goods and delay matters. This convention is ratified and is reliable in nature across the world.[2]

[1] Wherry, *Aeronautics and the Problem of Tort Liability,* 10 AIR LAW REV. 537(1939).
[2] Diederiks- Versechoor, *An Introduction to Air Law* 101 (KLUWER LAW INTERNATIONAL, 8TH EDITION, 2006).

Now when the liability of carrier is within the understanding of companies they have started making arrangements themselves by insuring the carrier against any possible losses occurred.

In this paper it is analyzed about the liability aspect from private International Law point of view. In the 1929 convention it penalizes the liability of carrier and determines the right of passengers and cargo consignors. This convention promoted to avoid ***conflict of laws*** by process of harmonization and to protect the entire industry from the ***contractual liabilities***. Basically the convention aims to limit the air carrier's liability.

Because the air carriages travel from one contracting state to other state the law that is applicable on these carriers is the Warsaw Rules. Almost all the countries now have started ratifying the convention. The convention needs a lot of documentations and also the liability is placed on the carrier in the form of burden of proof. The onus lies on the international carriages, their agents and members to prove that they took enough reasonable care before any such incident.[3]

The major drawback was that the countries didn't implement the amendments which led to complication in determining the extent of liability of international carriages. Later in 1999 the Montreal Convention (The Convention for the Unification of Certain Rules for International Carriage by Air) replaced the Warsaw Convention model.[4]

The main achievement was the uniformity and predictability regulations with regard to the air accidents. The Montreal Convention eradicated the monetary cap which limited the air carriage's liability. The rule which was still prevailing in the new convention was the contributory negligence on part of the air passengers.

## II. OVERVIEW

[3] Paul Torremans & James J. Fawcett, *Cheshire, North & Fawcett: Private International Law* 124 (Oxford University Press, 15th Edition, 2017).
[4] Peter H. Sandt, "Air Carriers' Limitation of Liability and Air Passengers' Accident Compensation Under The Warsaw Convention", 28 *J. Air L. & Com.* 260 (1962).

**A. Overview of preliminary questions in conflict process**

There are various legal instruments which are been signed and ratified by the countries with regard to air crash accidents. *The Warsaw Convention, 1929* has been ratified by 152 states in Toto. *Article 17* of this convention talks about the legal liability of carrier for damages, injuries caused to the passengers. He is liable only when such harm is caused on board or during the journey. *Article 18* of the convention further elaborates only liability of the carriage if it took place during the carrier being in air. That is liable for not only injury to passengers but also if any destruction of luggage or goods on the aircraft.[5]

**1. Classification - Determine the proper law**

There were various advancements in the aviation law which created problems. One such issue was discussed by the drafters of the ***Guadalajara Protocol of 1961*** being where carriers subcontract with other airlines. In such scenarios the subcontractors are liable till the extent as provided in Article 22 of the convention and ***Hague Protocol of 1955*** which was only to passengers onboard of the carriers only. The concept of strict liability is interpreted and also the onus is on airline to defense and the passengers are not required to prove any negligence on part of the airlines too.[6]

**2. Jurisdiction matter**

The Montreal Convention not only allow the victim to claim jurisdiction in domicile of carrier, but also where business is carried on, where the contract was made, the destination and also where the victim is domicile of therefore widening the scope of jurisdiction. And also allow the passenger to choose their most convenient forum and also the one which is legally beneficial. And the convention is not applicable if the state operates an aircraft for non-commercial purposes and is operating for state duties and military basis.

**B. Overview of applicable choice of law**

[5] Michael Bogdan, "Conflict of Laws in Air Crash Cases: Remarks from a European's Perspective" 54 *J. Air L. & Com.* 303 (1988).
[6] Willis L.M. Reese, "The Law Governing Airplane Accidents" 39 *Wash. & Lee L. Rev*iew 1303(1982).

The major question is with regard to the choice of law. *Article 20(1)* of the convention states that liability of the carrier can be avoided if the carriage proves that there was reasonable measures taken by the aircraft and their members. And also if they prove that the accident was impossible to be prevented. In *Article 22* the airlines can avoid the liability with regard to destroyed goods if there was negligence occasioned by pilot error. In other words, the concept of contributory negligence by third party is interpreted and applied to escape the liability wholly or in part.[7]

The above mentioned articles provides burden of proof on the aircraft side. If they don't discharge the burden then there is a monetary cap under Article 22(1) which limits the liability to sum of 12,000 USD.

But in *The Hague Protocol of 1955* the amount was increased to USD 24,000. And if destructed goods then USD 25 per kilogram is allowed. Article 28 provides that the damage claims should be based on the plaintiff. Court's jurisdiction is there when the carrier is an ordinary resident having his business in that particular region only. And also where the air carrier will reach also have jurisdiction generally. Article 29 provides that damages are given for a period of two years.[8]

**C. Overview of Legal Conventions that Govern Air Crash Liability**

The Montreal convention of 1999 came into effect on 4 November 2003. This convention increased the amount of compensation for the victims either death or injury to USD 170,000 and also have to prove that there was no negligence on part of carrier authorities. Later under Montreal convention the airline compensates the owner of the luggage at 27 USD per kg. And under this convention only there is a provision which escapes the liability if they can prove a wrongful act or omission on the part of the victims.[9]

[7] James A. R. Nafziger, "Choice of Law in Air Disaster Cases: Complex Litigation Rules and the Common Law" 54 *LA. L. REV.* 1001 (1994).
[8] Richard C. Coyle, "Choice of Law in International Aviation Accidents" 16 *FORUM* 658 (1980).
[9] George Panagopoulos, "Substance and Procedure in Private International Law"1 *J. PRIV. INT'l L*. 69 (2005).

### 1. Conditions Required for Application International Conventions

*Firstly* the flight should be an international one traveling between different countries. *Secondly* the convention must have been ratified in the both the countries ( Departure and Arriving) If one country ratified Warsaw and other has ratified Warsaw and Montreal then the Warsaw Rules will only apply but this limits the rights of passengers.

### 2. Air Accidents

The Montreal convention of 1999 came into effect on 4 November 2003. [10]In the case of ***Chubb & Son v Asiana Airlines***, the Korea had ratified the Hague Protocol of 1955 and US had ratified Warsaw. The court stated that following the two different versions of same treat is not permissible. Therefore, there should be identical treaties in both the countries to apply.[11]

The only drawback in Warsaw convention was that the definition of passengers who can make carrier liable for air accidents does not include the family of the pilots and crew staff. Further, the liability of Carrier towards passenger only lies when the airline issues a valid ticket. It must include date, time address and name of the carrier.

### 3. Insurance Matters

Under The Montreal Convention there is a duty on imposed on the carriers to take insurance of the carrier in their own country were the carrier and business resides. The insurance policy should be of that extent that it covers the liability under the legal provisions effectively. Hence there is a part of assurance given to the victims this way. And also the country where in the carrier operates has the obligation to receive evidences with regard to the insurance covers of the flying aircraft from their home ground to ensure protections of the citizens.[12] The Montreal Convention also imposes liability where in a carrier contracted another carrier to transport and accident occurred even

[10] 214 F.3d 301.
[11] John E. Stephen, "The Adequate Award in International Aviation Accidents"1966 *Ins. L.J.* 711 (1966).
[12] Kimberlee S. Cagle, "The Role of Choice of Law in Determining Damages for International Aviation Accidents", 51 *J. AIR L. & COM*. 953 (1986)

though the carriers are not party to contract. Basically the objective of the convention was to protect the passengers.

## III. Solving Conflict Of Laws And Application Of International Treaties

When any dispute comes into picture the first thing the courts are confronted with the conflict of laws aspect. Because most of the passengers victims in these air accidents are from different countries with different nationalities it is beyond doubt that there is always conflict with regard to the law which has to be applicable to solve the dispute.

To settle this dispute the courts had time and again looked into the conflict rules of private international law where in the most favourable legal norm and treaties should be applied to safeguard the rights of passengers in the air crash. But the problem lies to determine who is responsible for the accident and also all countries have not ratified the international treaties to the same extent. Hence there is requirement of judicial interpretation in this matter effectively.

Also each country has different compensation system and that to under different laws and regulations for different airlines. Both domestic laws and agreements of different states airlines are also there. Furthermore due to the passengers dying in same accidents receives different amount of compensation under different international treaties or domestic laws. Hence there is requirement to unify the different provisions and laws.

In other words there is a requirement to unify different provisions of international conventions and Private International law to determine coordination at international level and feasible compensation regulations to the air crash victims uniformly.

In the case of ***Brown v. Astrin Enterprises & NAFTA***[13], the court clearly stated regarding the liability of carrier. When there is not specific statute which determines the liability of the carrier

[13] 989 F. Supp. 1399, 1406. (N. D. Alabama, 1997)

then the owners of the carrier cannot be held liable to that extent. The court states that the owners are innocent if they lends loans or leases the aircraft to any other party then also not liable for the negligence of party t unless expressly stated in the legislations.

## IV. Liability And Defenses Available In Air Accidents And Insurance Issues

Both the Warsaw Convention and Montreal Convention do not talk about the liability of manufacturers of the air carrier expressly. This was raised during the Lion Air and Ethiopian Air accident which happened because of the software malfunctioning happened in Mcas control system. In this case the Boeing being the manufacturer was to be held liable as a third party under these conventions. Further if there are many manufacturers involved then the liability is jointly or severally in nature respectively. [14]

### A. Liability of Carrier

The liability of carrier can be further explained by the following classification and judicial interpretations:

#### 1. For The Physical Damage (Injury Or Bodily Harm)

In the case of ***Lear v. New York Helicopter***[15] the U.S Supreme Court held and widened the definition of the carrier given under Article 17 of the convention that it not only includes parent holding company but also the maintenance company and the operator of the heliport. Because all of them are from same corporate system and operate in same entity hence mixing it up with the concept of Article 30 on successive carriers.

There is a *contractual relationship* till that extent. But the legal basis of the liability aspect is on fault principle and the onus of proof is on the carrier to prove otherwise.

[14] *Supra* note 09.
[15] New York Sup. Court, 1990, 23 Avi 17, 887.

In the case of ***Air France v. Saks***[16] the U.S court stated that liability of carrier only when it is an unforeseen event and the passenger is nowhere within the expected protocol. By looking into various judicial pronouncements and under Article 17 of Warsaw convention held that it is an incident which is caused by an accident and internal negligence of the passengers.

**2. For The Emotional Damage**

In case of ***Eastern Airlines v Floyd,***[17] the court held that allowing any kind of emotional and psychological liability to the carrier is indeterminate in nature and cannot be recovered at any cost.

Further reiterated by U.S. Supreme Court in the case of ***Jack v Trans World Airlines***[18] where in the damage can be only recovered in special circumstances like when the relatives of passenger witness the accident i.e., have knowledge regarding it. Hence the law is very clear with respect to these aspects and the only preliminary requirement is that the country must have ratified the conventions.

**B. Carrier Defenses To Negate Airplane Crash Liability**

In the case of *Wallace v Korean Air*,[19] the court held that under Article 17 accident refers to risk in the air travel and which is related to the operation of the flights. The carrier is required to take necessary measures to reduce such crashes. Not only the carrier but also the maintenance entity and the part providers are held liable.

As in the *Ethiopian Air accident* there was a malfunction in sensor which led to the crash. In such scenarios the airline can be exonerated of liability if there is clear connection established between the malfunctioned software and accident. Such type of evolution and liability of manufacturers is expected accordingly. Same goes with the liability when the pilot makes an error. Where the lack of knowledge of how to disable the faulty software on the airline is the reason behind the accident then the provided training should be questioned.

[16] 470 U.S. 392 (1985).
[17] 499 U.S. 530 (1991)
[18] (854 F. Supp. 654 (N.D. Cal. 1994))
[19] 214 F.3d 293; MANU/FESC/0288/2000

Hence these are certain defenses that can be raised during the liability of the air accidents is in question. The classification of the liability might determine the ease and will not be against the conflict rules under the Private International Law.[20]

## V. CASE REVIEW

### A. Baotou Air Crash And Its Jurisdiction

#### 1. Facts

This air accident was in territory of china on November 2, 2004 which was stated as a domestic infringement and the jurisdiction was in Chinese courts. In 2009 the application which was filed by victims in Beijing Second Intermediate People's Court was accepted. The malfunctioned engine was manufactured by USA General Electric Company and an American lawyer has filed a lawsuit which led to the question of jurisdiction and then about the liability.

#### 2. Cause of action

The *jurisdiction* is determined on the basis of international treaties and domestic legislations. China had ratified both Warsaw and Montreal. And the domestic law of china states that when there is any conflict between international treaties and domestic law then the international conventions will prevail.[21]

#### 3. Legal issues

Later on the jurisdiction was transferred to American Courts and *law applicable* also changed. According to Conflicts of Laws of USA, the proper governing law is American Law. There was a conversion of Jurisdiction and also a case of air infringement was then converted into product

[20] Peter H. Sand, "Air Carriers' Limitation of Liability and Air Passengers' Accident Compensation under the Warsaw Convention", 28 *J. Air L. & Com.* 260 (1962).
[21]Wang, Y., "Law Evasion on the Compensation for the Foreign Aviation Damages from Baotou Air Crash"7 *Legal System and Society* 65-66 (2010).

liability case i.e., foreign infringement. In present case the Court of California expanded their jurisdiction and made it flexible in nature.

**(i) Long Arm Jurisdiction**

Hence Chinese Courts have to adopt the principle of *long-arm* (extending) jurisdiction of the United States. The court should look that even if there is any minimum contact then the court can precede it. This is one of the fastest modes to accept the case in the countries jurisdiction and solve the dispute and receive Substantial justice to whole humanity. In present case the Court of California expanded their jurisdiction and made it flexible in nature.[22]

**(ii) Forum non Conveniens**

And also the doctrine of Forum non conveniens as specified in the civil procedure whereby the court has discretionary power over the case. as in the present case the airlines was china Eastern Airlines, the accident happened in china and are the material evidences are in china then the most convenient forum is the Chinese courts which was ultimately agreed by US courts too.[23] Basically this may resolve the jurisdiction issues and promotes international cooperation respectively.

**B. Asiana Air Crash and its Jurisdiction for Mental Damage**

**1. Facts**

In this case, 3 of the Chinese students are killed and other 28 were injured. The harm caused to victims and goods are different in degree. The victims can claim against the Asiana Airline. The court held that the Chinese passengers who bought their return ticket have the right to claim in U.S Courts too.

**2. Cause of action**

[22] *Supra* Note 17.
[23]Wang, Y.H., "View the Effect of American long Arm Jurisdiction from Baotou Air Crash Case" 4 *Journal of Jixi University* 48-49(2009).

If the parties are willing to file a lawsuit in U.S. the compensation standards in the country have to looked into. Since the standard in U.S. are higher when compared to in China and South Korea the families prefer to bring it in US Court only. The court form s a jury which evaluates the amount of damage caused and compensation.

And moreover if the negligent act of the airlines is proved before the court then the limit of compensation that is specified in the conventions need not be followed. The court may rule the amount higher than mentioned therein.

**3. Legal Issues**

In this incident it is interpreted based on international conventions and domestic laws of US, South Korea and China and for the matters which are not provided in the conventions the local domestic law is applicable. For example with regard to air transport contract the contract law will apply and with regard to infringement of personal right it is the tort liability. Both Warsaw and Montreal conventions are to ensure the rights of the International consumers and about the competent court and also the compensation system. Though there is no specific compensation standard in Montreal but there are general provisions with regard to it.

## VI. JUDICIAL INTERPRETATION - INDIAN SCENARIO

In India the air carrier are governed by the International Conventions. India has ratified and signed the Warsaw in the year 1947 and enacted Indian Carriage Air act, 1972 based on Warsaw Convention. In 2009 the Montreal Convention was ratified. If it is an inland air carrier then English common law rules should be applied.[24] Generally parties through their contract determine their own law.

And there is not interference by judiciary unless against the public policy (violates Indian contract Act, 1872 provisions).[25]

[24] *Air Carrying Corporation v. Shidendra Nath Bhattacharya*, AIR 1964, Cal 396.
[25] *National Tobbaco Co. of India v. Indian Airlines Corporation,* AIR 1961 Cal, 383.

In the case of ***Airport Authority of India v. Ushaben Shirishbhai Shah***[26] the passenger died in Indian Airlines near Ahmadabad Airport in 1988. Composite Negligence on part of airport authorities and their employees proved in 70 -30 ratio effectively.

In the case of ***K. Bharathi Devi v. The General Insurance Corporation of India***[27], the AP High court had to determine whether there could be set off if the compensation is already been paid according to the air act. The court held that the provisions cannot be dispensed of and the general law on tort.

In case of ***Sangeeta Barring v. Air India Ltd,*** [28] the accident took place at Mumbai Airport. The passenger was Singapore born and got injured due to jerky movements. The compensation of 90 lakhs with bearing medical expense both in Indian and abroad was awarded because pilot used brakes more than permissible limits.

In case of ***National Aviation Company of India Ltd. V. S. Abdul Salam & others***[29] also known as Mangalore Air Crash which killed 158 Passengers and 10 were injured including the staff. It was an international flight from Dubai to Mangalore and the error was committed by the pilot. The compensation for 1 Lakh was awarded to each passenger.

The court observed various problems in air accident cases:

1. Firstly there accidents invokes various jurisdictions and applicable laws
2. Application of Strict Lex Loci Delicti Rule and Lex Loci would not allow any monetary recovery to the passengers.
3. No common jurisprudence on this aspect is ever discussed.
4. Complexity in choice of law because it varies from jurisdiction to jurisdiction.

[26] AIR 2009 Guj 264.
[27] AIR 1988 AP 36
[28] MANU/DE/0026/2003
[29] 2011 (4) KLJ 235

The new issue which arises is about the liability of government in these accidents. Generally both air traffic controller and pilot have a duty of additional care. The 1999 convention aims at modernized limitation of International Air liability.

Basically there are stages of liability in the first tier it is strict in nature where in the compensation is awarded till 100,000 SDRs. In the second tier it is based on fault principle where the carrier is liable unlimitedly.

## VII. CONCLUSION

The two most important international conventions related to air accidents and insurance matters are Montreal and Warsaw Convention. The Montreal convention was the most uniformed regime in this aspect. The only drawback was that there is no clear provision in the convention which provides compensation to the air victims for mental damage suffered during the crashes. In United States there were different legislations governing being federal in nature creating havoc.

Hence there was a dire need of uniform provisions to benefit the passengers and their families mentally. There are raising concerns with regard to long time claim procedures and low compensation during settlement.

Nowadays there is a lot of hue and cry with regard to protection of human right and dignity. The fuzz about these accidents reveals the need of a reasonable law in this aspect. For this reason, the author suggests after enlightenment of Baotou and Asiana accidents to have a perfect private international law on these issues because there is a lot of uncertainty and inconsistency in the rules of International tort liability of the nations.