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Title: Carrier's liability in air transport with particular reference to Iran

Issue Date: 2012-11-22

CHAPTER 1

GENERAL INTRODUCTION

1.1 Introduction (Uniformity)

As the use of aircraft as a mode of general transportation began at the beginning of the 20th century, the liability of air carriers and the issue of compensation for injury to passengers and damage to goods became two important issues encountered by European States. The concept of carrier's liability, which assumes a prominent position in legal and national systems, was extended to the air carrier. Prior to the ascendancy of the international aspect of air transport, these States applied their civil law and private law (conflict of laws)¹ to legal relations between passengers and airlines.² Only a few States, which were the biggest as well, developed their own domestic air law.³

International flights, however, have introduced political, social, economic and legal complications to European States since they face a large number of people and aircraft from various nationalities within their territory. Due to the huge increase in international flights and the presence of foreign elements in the civil law of international air transport (which does not occur to the same extent in any other branch of human activity), a large number of cases

¹ Private international law is frequently used in Europe to describe what the Anglo-American system usually refers to as conflict of laws, i.e. a response to a problem of which several possible laws apply to a transaction or event having more than one geographic element. For instance, the place of registration of an aircraft, the nationality, residence, or domicile of passengers; and the origin and destination of voyage; are among the issues that international air transportation is presented with. See A.F. Lowenfeld, *Aviation Law* (1981), 2-6.

² International air carrier's liability which falls within private international law has its own peculiarities. Through the presence of foreign elements in civil law relationships, it is connected to the territorial civil law of that country. It is simultaneously related to the interpretation of international conventions for the unification of some related rules, which intend to complete territorial law rules. At the domestic level, courts therefore face two legal rules when dealing with the issue of compensation in air carrier's liability: 1) Conflict of laws, in that the courts of any country, when a case is referred to them, will seek the governing law in that conflict; and 2) the rules explained in related international Conventions, which unify some of the civil law rules. See R.C. Horner and D.R. Legers, *Second International Conference on Private Aeronautical Law Minutes* (1975), 19.

³ Examples include the Air Navigation Law of 1924 in France; the Air Traffic Act of 1922 in Germany; and the Air Navigation Act 1920 and the Air Navigation (Investigation of Accidents) Regulations of 1922 in England - see D. Goedhuis, *National Air Legislation and the Warsaw Convention* (1937), 64-66.

related to foreign citizens went to court.⁴ Therefore court awards for air carrier's liability and damages for passengers differed from one State to another. They were severely placed under the impact of national legal systems. Thus a need for uniformity of rules / laws was felt in Europe.

1.1.1 Possibilities

The establishment of unified international rules enables air carriers in European States to face the economic challenges confronting them in a more robust fashion. Similarly, by knowing their rights against air carriers and receiving assurances that their rights would be supported in different States, passengers and shippers would be encouraged to use this new mode of transport, hence helping it to develop further.⁵ European States had three options open to them initially:

1. Unification, by unifying the rules that govern conflict of laws and the regulations related to specific jurisdictions;
2. Unifying the meaning of legal terms. This could be carried out by developing an international agreement about legal regulations which States could then absorb into their domestic legal system, thereby leading to uniformity at domestic and international levels; or
3. Unifying the rules that are applicable to international relations along lines that were similar to the Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (CIM) and the International Conditions of Sale (CIV).

⁴ M. Milde, *The Problems of Liabilities in International Carriage by Air: A Study in Private International Law* (1963), 14.

⁵ R. Hill, *The Law and Politics of Air Liability (Compensating Victims of Aviation Terrorism)* (1991), 11.

However, owing to the differences in the legal systems and regulations of individual States, only the third option was considered feasible and eventually chosen.⁶

Even so, a more practical way in overcoming difficulties in private international law is by establishing international agreements with regard to substantive rules, applicable to the international relationships.⁷ Since air carrier's liability is clearly an issue of private international law, at the beginning of the twentieth century European States tended to settle this issue by developing international rules in harmony with the then prevailing trends among the States. Through this, they therefore attempted to develop international agreements for unifying their conflict of laws.⁸

This task was accomplished in the 1920s⁹ when the States concerned developed rules that satisfy the legal systems that they were representative of and adopted the Second International Conference on Private Aeronautical Law in 1929, i.e. the Warsaw Convention.¹⁰ States thereby recognized the economic, political and technical privileges of the unification of some rules governing the liability of air carriers at the international level for the development of the air transport industry. This Convention recognized the conditions of the early twentieth century and the common economic interests of customers and operators; and it determined the limit of liability on the one hand, and harmonized the civil law and common law rules on the other hand.¹¹

⁶ See Milde, *supra* note 4, at 18.

⁷ Private international law here has the following meaning: all laws made by countries are of course public laws (as contrasted with the rules of clubs or trade associations), in that they apply to all persons to whom they are directed, whether they like it or not. See Lowenfeld, *supra* note 1, at 7.

⁸ See Milde, *supra* note 4, at 18.

⁹ R. David and J.E.C. Brierley, *Major Legal System in the World Today, Introduction to the Comparative Study of Law* (1985), 10.

¹⁰ J. Ide, 'The History and Accomplishments of the International Technical Committee of Aerial Legal Experts', (1932) *Journal of Air Law* 27, at 28-31.

¹¹ With regard to the justification of the limitation of liability, some evidence have been presented by Dr. H Drion whereby an analogy had been drawn with maritime law with its global limitation of the ship owner's liability and the necessity of protecting a financially weak industry. Likewise, catastrophic risks should not be

Through developments in aircraft technology, air transport expanded rapidly to other States.¹²

As the Warsaw Convention successfully attracted attention to the issue of uniformity of carrier's liability, a majority of States adhered to it. This Convention is the most successful international instrument for international private air law.¹³

Enjoying firm legal foundations, with the threat that change would have compromised the whole system of international air carrier's liability lurking in the background, this Convention has remained intact for more than 80 years, except for the changes laid down in the amendments. These changes, made within the framework of the Warsaw system, were nevertheless deemed insufficient by passengers because of the low levels of compensation available. At the same time, these diverse international regulations compromised the uniformity which the pioneers had been seeking in air transport regulations. However, since they helped to inject more energy and vitality into the regulations and their gradual development, they were regarded as reasonable and constructive. Ultimately, member States approved a new international convention, the Montreal Convention of 1999, in order to assemble all international air transport instruments on air transport liability (based on the Warsaw system), and add recent requirements to them.¹⁴

borne by aviation alone. Notwithstanding the desirability that carriers or operators be able to insure their risks; there are also the possibilities that: potential claimants could take insurance out themselves; limitation of liability could serve as a counterpart to the aggravated system of liability imposed upon the carrier and operator; and the avoidance of litigation by facilitating quick settlements. See H. Drion, *Limitation of Liabilities in International Law* (1954).

¹² The total statistics of international and domestic passenger and freight traffic of scheduled services of airlines of ICAO contracting states for the period between 1950 to 2001 show that in 1950, only 31 million passengers had used this mode of transport in comparison with 1,623 million passengers who flew in 2002. Likewise, only 730 million ton-kilometers freight had been carried by these airlines in 1950 compared with the 110,700 million ton-kilometers freight carried in 2001. See A.D. Groenewege, *Compendium of International Civil Aviation* (2003), 1281-1282.

¹³ The Convention entered into force after the deposit of the fifth ratification in February 1933. Up to 2011, 152 States ratified it. See <http://www.icao.int/icao/en/leb/wc-hp.pdf>.

¹⁴ P. Dempsey and M. Milde, *International Air Carrier Liability: The Montreal Convention of 1999* (2005), 17.

1.1.2 Challenges

If international regulations are not in accordance with the economic, political and social conditions of their members, they will gradually lose their effectiveness since the States concerned will tend to apply their domestic laws to fit particular situations in spite of their international commitments. International conventions for air carrier's liability are not insulated from this phenomenon.

1.1.2.1 Economic Conflicts

The new conditions issued after the Second World War challenged the unity and coordination resulting from the Warsaw Convention for the unification of air carrier's liability. One of the serious obstacles to unification was the wide gap between the interests of developed countries and developing countries. Global unification is achieved through pressure from stronger States who were concerned that their standard and cost of living would determine the level of compensation for injury, death or loss of goods. Therefore, States whose citizens enjoy higher life standards, and earn more income, have higher limits of compensation compared to economically weaker countries.¹⁵ It is clear that in the former, customer interests take priority over the interests of airlines. But in developing countries, it is the interest of airlines which take precedence over the interest of customers and the States pay subsidies to airlines to help them survive.¹⁶

In the US, for example, lawyers having special interest in the accident expense system backed the removal of liability limit, stating that airlines could overcome any attendant financial problems by using the insurance system and by distributing the extra expenses through the

¹⁵ A.F. Lowenfeld and A.I. Mendelson, 'The United States and the Warsaw Convention', (1967) 80 *Harvard Law Review* 515, at 555- 565.

¹⁶ ICAO DCW Doc. No.20(1999).

tickets they sell.¹⁷ But for developing countries, it is not possible to distribute the expenses through the tickets, and relevant States have had to invest money in the industry to support the operation of air transport as part of national policy. Due to their comparatively lower rate of economic growth, they are therefore in favour of low rates of compensation in order to help their national airlines.¹⁸

So, although the draftsmen of the Warsaw Convention had initially determined liability in a way which balanced the interests of carriers with those of customers, some States, in practice, went contrary to it.

As a result, after two decades of success in unifying limits of liability, the Warsaw Convention gradually headed towards a breakdown. In later decades, protocols or agreements were amended to move up the limits of liability, while States increasingly preferred to apply their own domestic rather than international regulations.¹⁹

1.1.2.2 Different Legal Systems

Since States follow different legal systems, the main goal of international private law conferences had been to bring together the legal principles of States and overlook the differences in order to achieve uniformity. As Sir Alfred Dennis, representative of Great Britain in the second private international law conference states: ‘As regards the British

¹⁷ As stated by W Guldemann, the factual basis of liability problem developed mainly after the Second World War when: ‘i) air transport become a mature industry, (ii) air transport become a big business at the forefront, (iii) the insurance industry grew as well...(iv) the differences in the standards of living of different countries... and the differences in their legal systems become more important, (v) the liability limits established in 1929 become clearly insufficient for passengers in most of the industrialized countries, and insufficiency was aggravated by the impact of the progressive inflation...(vi) in the industrialized countries, the development of the claim mentality in the public become more general, more progressive and more aggressive...(vii) the system of system civil aviation - airlines, aircraft, airports, air traffic services- and their operation become progressively more complex and more interdependent, (viii) the same holds good for the legal relations between the parties involved in serious accidents’. W. Guldemann, *Air Transport in International Law –Possibilities and Limits in International Unification* (1982), 164.

¹⁸ Ibid.

¹⁹ See Dempsey and Milde, *supra* note 14, at 14.

government, the sole reason which it has for entering into this convention is the desire to achieve uniformity.²⁰

However, uniformity of international regulations is subject to the following threats:

1. The Warsaw Convention includes only some regulations for the substantive rules, providing no solutions for numerous other issues. For example, in the case of the death of a passenger or the interpretation of damage, the question of who the deceased's representatives are, arises. Which person can claim on his behalf? Does the exemption clause have no effect on the representatives' claim as it is a separate one or his own? The answers to these questions will differ in the different States and would depend on national laws²¹ and their interpretation of concepts such as the definition of accident.²²
2. Since the legal systems of contracting parties are different, a clause in a contract would be considered valid in some States, whereas in other States it would be considered void. In some States where the passenger will have an option to sue in contract or in tort, the exemption of liability could be considered valid as far as contractual liability is concerned, but void regarding liability for tort.²³
3. The legal rules of private law are dynamic and not static, changing according to the economic, social and political conditions of States. Air carrier's liability is no exception. Due to the abovementioned conditions as well as technological advancements, the rules regulating this area had undergone changes at domestic level. An example would be the liability system in France which is based on fault. Although the burden of proof had previously been on claimants, due to the aforementioned conditions and since it had been too onerous for

²⁰ See David and Brierley, *supra* note 9, at 21.

²¹ P.P.C. Haanappel, 'The Right to Sue in Death Cases under the Warsaw Convention', (1981) *Air and Space Law* 66, at 69-70.

²² See Dempsey and Milde, *supra* note 14, at 61.

²³ See Goedhuis, *supra* note 3, at 3.

claimants to prove fault in industrial cases, and defendants had the upper hand, the burden of proof was shifted to defendants to prove that they had not committed a fault. Another interesting example would be Germany. Although the basis of tort there is based on fault, in some special statutes such as the Road Traffic Act, liability is based on risk or strict liability.²⁴

4. The Warsaw Convention was primarily written with the two main legal systems, common law and civil law, in mind. Since the transport industry was then operating and growing mostly in developed countries, it was justifiable to tackle the issue of liability according to their legal systems. However, the period after the Second World War witnessed the emergence of new States, some of whose legal systems differ from the two prevailing systems. These legal systems include independent regulations.

A large part of these new States had been Islamic States, mostly situated in the Middle East and North Africa and some in South East Asia. There is an increasing trend in Islamic States to apply Islamic law.²⁵ On the other hand international air transport operations are fast growing in these States.²⁶ Based on these two facts, it is necessary to study the principles of liability in Islamic law and Islamic States in order to clarify their similarities and differences with the international system to help achieve the uniformity of international rules in the

²⁴ See Chr 2.2, *infra*.

²⁵ In many Islamic countries, Islam has been declared as an official religion and it is the main source of law. The Parliaments in these countries have to be sure that the conventions are in line with Islamic rules. For instance, see Article 4 of the Constitution of the I.R. Iran, Article 3(2) of the Constitution of Syria, Article 2 of the Constitution of Algeria, Article 3 of the Constitution of Afghanistan, Article 7 of the Constitution of Iraq, Article 3 of the Constitution of Yemen, Article 6 of the Constitution of Morocco. Article 1 of the Constitution of Tunisia, Article 2 of the Constitution of Libya, See M. Jabbari and E. Shoarian, *Legal Aspects and Advantages for Iran to Ratify the 1999 Montreal Convention with Emphasis on Islamic law*, Air Transport, Air & Space Law and Regulation Workshop and Conference, April 12-16, 2009, Abu Dhabi (UAE). <http://www.mcgill.ca/iasl/press/abudhabi2009/>.

²⁶ The strongest international passenger demand growth is forecast for the Middle East where an Average Annual Growth Rate (AAGR) of 6.8% will be driven by Gross domestic product (GDP) expansion along with significant new routes and capacity. Within the region, UAE (8.4%) will show the strongest growth. Total international passenger numbers are forecast to be around 105 million in 2011, an increase of 30 million over 2006 levels. See <http://www.iata.org/pressroom/>.

future.²⁷ The majority of Islamic States in the Middle East and a number in Africa and South East Asia (e.g. Indonesia) had been under the influence of both civil law and Islamic law. The legal system of Iran, for example, has been influenced by these two legal systems with one taking precedence over the other at different times.²⁸ The Iranian legal system is therefore a mixture of the two and their respective degrees of influence differ from one area of law to another. For instance, whilst liability for death or bodily injury follows the *Shariah*, obligation and trade law are under the influence of civil law. This difference between the *Shariah* and civil law or common law is crystallized when the provisions of the Warsaw, and later Montreal, Conventions and those of Islamic law were simultaneously applied to domestic flights in Iran. In places where rules of the two systems are in conflict, the rules of the Islamic system prevail.²⁹

Hence, it seems that one of the factors impeding the global uniformity of international rules governing air carrier's liability was the tendency to overlook the principles of liability in Islamic States that follow the *Shariah*. Ignoring other legal systems would cause inconsistency in air carrier's liability at the international level in the future.

It is submitted that the basis of legal liability and compensation in Islamic law are partly different from the principles of civil law and common law. So, Islamic law differs from the international system of liability governing the international conventions and in particular, international instruments of air carrier's liability.

Although most States adhere to the international system of air carrier's liability, it is possible for Islamic States to gradually withdraw from the international system by referring to

²⁷ See David and Brierley, *supra* note 9, at 10.

²⁸ The Code Napoleon had a great influence on the legal systems of Middle East countries. French law, in comparison to other European legal systems (Common law and German law) had been more influential. However, the depth and width of this influence varied from country to country. See R.B. Schlesinger, H.W. Baade and P.E. Herzog, *Comparative Law: Cases-Text- Materials* (1988), 324.

²⁹ *Ibid.*, at 325.

compensation on the basis of the *Diyah*. The *Diyah* is discussed in Islamic texts and Islamic law under criminal law rather than tort law. This means that compensation in air carrier's liability for death is deemed to be a criminal law matter. It will be discussed how this criminal law issue has also been extended to tort law. This topic will be discussed within the scope of the Islamic legal system in Iran.³⁰

This would be particularly relevant where there is a wide gap between the *Diyah* and liability limits under this system, thus causing a huge difference in the compensation levels for domestic and international flights. Therefore in order to unify liability rules at the international level, it is necessary to pay due attention to the Islamic legal system for which the most important concept is the *Diyah*.

1.2 Aims of the Thesis

The main question posed in this thesis is as follows. Do differences between the *Shariah* regulations and those of the Warsaw-Montreal Conventions obstruct the implementation and application of uniform international regulations? Or, can the *Shariah*, like common law and civil law systems, compromise some of its regulations so as to enable a harmonious and fruitful coexistence with the international system?

The main purpose of the current study is therefore to explore the hypothesis that although Islamic law has its independent principles of liability, Islamic States can adopt international air carrier's liability in international flights and allow the two systems to coexist in domestic flights, irrespective of the fact that such States have not been active in the drafting of most of these regulations. In so doing, the work focuses mainly on the legal system of Iran.

³⁰ See Chr 3.3, *infra*.

The thesis has two further sub-hypotheses. One, that since the principles of liability and terms related to air carrier's liability in international instruments are prescribed in a way that each State can apply them according to its own specific system, the principles of liability in the Warsaw-Montreal regime are in fact dynamic and flexible. States with different legal systems can therefore easily implement those concepts and principles. Secondly, that although Islamic law has its own special principles regarding carrier's liability, since it is a dynamic legal system, States that have based their legal system on the *Shariah* (such as Iran) can join the international system of air carrier's liability and ratify related instruments without facing undue obstacles.

1.3 Methodological Framework of the Research

The combination of various legal aspects including private international air law and legal systems in this work provides the basis for a study which utilizes three different methodologies: analytical, descriptive and comparative. However, the overall research is predominantly based on a critical legal analysis of the *Shariah*.

The thesis consists of five chapters. Chapter 2 will discuss the prevailing legal systems that are the common law and civil law that have affected the Warsaw system. A close study of the principles underlying legal liability in these two systems would lead to an appreciation of their similarities and differences. This would in turn be very useful in gaining a better understanding of air carrier's liability in private international law especially since international commentators desired to use the rules of liability of the two systems in the new Convention to make it more comprehensive so as to achieve more uniformity.³¹ Further, an analysis of these two systems provides an important insight into the reasons for the collapse

³¹ See *Ide*, *supra* note 10, at 29.

of the Warsaw System. It also helps make clear that in order to achieve uniformity within the framework of the Warsaw Convention, States follow these systems. England from among the common law States and France from the civil law States adopted principles such as liability limitation, invalid contractual conditions, or the presumption of fault for death or bodily injuries which had no precedence in either of their pertinent legal systems.

Chapter 3 will investigate the legal liability under the *Shariah* and Iranian law. The *Shariah* provides sufficient principles that make it a self-contained and independent system. The most important subject will be the *Diyah* as a legal principle and compensation for death or bodily injury. Familiarity with these principles is essential for comparing the principles of liability in the *Shariah* with air carrier's liability in international instruments in Chapter 4.

Chapter 3 also deals with air transport regulation in Iran. To comprehend the air carrier's liability system in Iran, one should understand the State's legal system and its legislators. An appreciation of its air transport system can also offer a clearer view of the overt and covert rules governing air carrier's liability and the way they are implemented in this State.

Chapter 4 deals with the general principles of liability that govern air carrier's liability in international instruments. There, the author analyses these principles and compares them with the *Shariah* principles. In Chapter 4 it will be argued and demonstrated that the principles of air carrier's liability in international treaties are neither static nor completely dependent on the common law and civil law systems. It is a dynamic system that continuously evolves. Therefore, States with diverse legal systems including common law, civil law and Islamic law, can adapt themselves to the principles of the international system. Chapter 4 explains that there are issues in the international system of air carrier's liability that are designed flexibly, so that States with different legal systems may investigate legal cases according to the principles of their respective legal systems.

Chapter 4 also deals with air carrier's liability for death or bodily injury in domestic flights, which operate under the influence of the *Shariah* and the Warsaw system.

Chapter 5 provides a general conclusion. It addresses the question of whether Islamic States, whose independent liability principles for death or bodily injury differ from that of the common law and civil law, are in a position to adopt the international system of air carrier's liability? Drawing on the discussion in previous Chapters, this Chapter concludes by highlighting that the *Shariah* is indeed consistent and able to co-exist with the liability principles of the Warsaw-Montreal regime.