

## Civil Liability for the Airlines Regarding Flight Delay or Cancellation

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### Abstract

Warsaw 1929 Convention and 1955 Hague Protocol made transport operators responsible regarding flight delays or cancellation. Responsibility of cargo airlines towards passengers and goods senders is contractual and based on the assumed fault. In the event of the presence of action triple terms (violation through flight delay or cancellation) and the existence of loss and causation relationship between the loss and the action, cargo air lines are required to compensate for damage to the passengers and goods senders, unless they prove that they themselves or their agents have taken all necessary measures to avoid the damage or the adoption of such measures has not been possible (Force Majeure) or prove that the loss has been the fault of the individuals themselves. Material damage and lack of benefits in obtainable profits have the capability of being compensated. But most courts of the member states of the Warsaw Convention oppose judgment for compensation for moral damages with the purpose of the Convention. However, some of them consider moral damage eligible through developing the meaning of lesion corporelle (Bodily injury) or through resorting to the place of the court. The maximum of compensation payable to passengers is 250 Francs and in terms of carrying personal registered items and is limited to a sum of 250 Francs per Kgs. Including any condition regarding provision of decreasing the responsibility of flight airlines is void but the revoke is not transportation contract, however, it is right to have an agreement to intensify their responsibility, regardless of the fact that the Convention itself also considers some factors enhancing the responsibility of companies.

**Keywords:** Responsibility, airlines, flight delay, flight cancellation, moral damage, lack of profit, discounts and aggravated responsibility

### Introduction

Airplane as a fastest transportation vehicle is the first choice of rich people to be carried by; they as a natural consequence want to reach to the destination in the shortest possible time along with their luggage. Despite this, everyone whose preference is flight for transportation knows that delay in flights is inevitable in Iranian airlines. If the reports from press agencies be investigated this doubt will be removed, in a report broadcasted in Asre Iran analytic and news site it reads; this morning flight of Ardebil to Mashhad performed with 6 hours delay. Interesting news is that pilot's being oversleep causes 2.5 hours delay in Tehran to hamburger flight. Another report reads the flight of last Kermani pilgrims caravan is done with 4 days delay and without their luggage and some pilgrims luggage is not delivered after two weeks. In nearly two years that I selected airplane for my transportation from Ardebil to Tehran, haven't seen a flight of no delay. In all the cases oral apologies of crew or pilot was the only cure for the passengers. It ought to mention that when delay becomes more than 2 hours, a cake and 300cc juice is added to the oral apologies.

In this paper we are going to answer to this question that, are airline agencies liable to compensate the loss from delays or cancellation? What their escape path from liability? Is it possible to agree about their aggravated liability? No need to say that if someone damages other one he is liable to compensate it and the principle is that no damage should remain inexpressible even moral or lack of profit damages. Loss coming from flight delay should not be exception. However delay or cancellation of flight may be of external issue and it wasn't of airlines liability or the loss comes from the losers fault, in these cases the agencies have no fault. In this study we are going to start with air lines entity and liability principles and then go on with their liability principle about loss, action and relation of loss and action and eligible loss. Third chapter which is the last chapter shows the limitations of the agencies liabilities and how they should compensate the loss and is it possible to discount or aggravate their liability?

## **Literature Review**

### ***Liability entity of airline agencies for delay and cancellation of flight***

Before discussing the issue we need to determine the entity of their liability. Because according to assuming their liability contractual or non-contractual both liability resources and conditions of being liable even though their condition have no differences. Contractual liability is a commitment resulting from violating the provisions of a contract for an individual, on the contrary when two people have no contract and one of them damages the other intentionally or unintentionally, the liability is called non-contractual.(Katoozian,1990,p16) both liabilities come from breaking the covenant but in contractual liability, broken covenants which the liable person accepts, will create liability for him and in non contractual liability, violation from the commitment which is determined by law will create liability(Mazo and Marthi cited from Katoozian,1990,p 47). Airline agencies face two kind of liability in transporting passenger and goods. It is obvious that airline agencies have no liability before making any contract with passengers or goods owners, what make them liable , is the contract held between them and passengers or goods owners. Third provision of Lahe protocol 28 sep.1955 after declaring the necessity of issuing ticket for the passengers in provision one, in second provision reminds that the ticket issued for the passenger is a document showing the contract of transportation and adds that in case of ticket getting lost or being not by the passenger have no influence in this contract.

Fifth provision of Warsaw convention which is untouched in Lahe protocol was one of the first ones about the bill of lading and of course provision 11 before third and fourth provisions of Lahe protocol, reform the third and fourth provision of convention and assumes the Ticket and personal accessories receipt as a document of existing contract between sides, existing of air bill of lading denotes the existence of contract for passenger and goods transportation unless the contrary is proved. About the passengers boarding freely, it is believed that due to not being any contract between them and the transportation curator, the curator liability about them is non-contractual and even legal procedure of France recognizes the loss compensate to these people under the general rules of civil liability and assumes it out of the 1967 law enclosure which consists the compensation about the people just on the earth not in the air (cited from Badini, p 69).

### ***Basis of airline agencies liability about delay and cancellation of flight***

Provision19 of Warsaw convention assumes the transportation curator liable for the delay in air transportation of passenger, goods or accessories and in material 1 of provision 20 goes on; if the curator proves that he and his crew have done their best in providing conditions for not occurring any loss, or taking such preventive decisions was not available for them- they are not liable. Provision 20 shows that nothing more than fault assumption is not intended by the convention writers, because don't make the curator to prove his not being guilty do determine the reason of the loss but it is enough that he proves the preventive actions has been done before like mild and moderate prevention as a good fathers one in a family.

The mentioned provision wrote that curators of transportation can get rid of the accusation on themselves, if they prove that they have done all the preventive action in order to prevent the loss. According to this provision from the theoretical point of view, the transportation curator commitment is to avoid of occurring any loss. But in legal procedure short interpretation of this provision has been done so that transport curator for escaping from liability, should prove the occurrence of external factor only. (Hashemizadeh,p168) and as a result of tendency of legal procedure to liability assumption theory the curator can get rid of the liability with proving the not being any causality relation between his deed and the loss.

### ***Liability principles of airline agencies about delay or cancellation of flight***

Apart from being a transport contract, gathering of necessary conditions are required to rebuke the airline agencies for delay or cancellation of flight and get the loss of the passengers and goods owners from them, these conditions are; 1. action 2. loss 3. causality relation between loss and action. In case of absence of any of the conditions liability is not assumed.

#### ***Action***

Liability of compensation will be created in any case in which by an action, others are damaged. In contractual liability the commitment should be committed. Violating the commitment may be temporary or complete. If temporary, it should be treated as not performing the espouse condition completely. Loss for delay in committing commitment is true when there is room to commit next commitment. So violation of commitment by airline agencies may be temporary as it is said flight delay or be complete as it is said flight cancellation which both are discussed separately;

***Flight delay:*** Provision 19 of Warsaw convention and also Montreal convention without explaining the term delay, assume the transport curator as liable for the loss. Delay occurs when the passenger, goods or accessories reach to the destination not in time. According to inevitable dangers of aviation, the opinion of all the lawyers and courts is that delay here means unusual delay; a delay resulted from the transport curator fault in doing demanded actions and being confident of departure and landing of the airplane on time (Jabbari, 2012, p98). According to appeal court of Paris, when the contractual relation between the curator and the passenger cannot be tolerable, delay is equal to violating the contract commitment. For example, according to the contract, the flight should be done in 21 December but the curator postponed it to 25 December, in this case the court assumes the curator as a side violating the contract (cited from Fakhari, mohammadzade, p221).

If the determined time in ticket or bill of lading has a especial traits which not performing the flight on time be crucial, the curator should compensate the loss for not committing the contract and not delay in committing the contract. In Swiss air vs. Engeli case a group of architects in order to participate in a competition for reconstructing the Izmir city in Turkey signs a contract with Swiss air for carrying the machete to Turkey, the machete didn't bring to Turkey on time and the group couldn't take part in the competition, they were complaining from the delay of Swiss air that damaged their face and reputation. Swiss air lawyer in defense of his client said that the company had done its best but due to one problem occurred, the flight couldn't reach on time, and the court considered the lawyer defense inadequate and condemn the Swiss air to pay 250 thousand Swiss Franks (cited from Fattola pour shirazi, 2007, p82.83). This delay is abnormal and unusual so the airline curators are liable. The most important issues causing delay are as follows; fault in not reserving seat for a person provided ticket before, reserving a seat for two people, delay in departure, flight suspension, giving incorrect flight time to the passengers, not stopping where the passenger was supposed to get off, increasing the stoppage locations not putting personal accessories of passengers in the airplane and putting personal accessories of the passengers in an airplane carrying passengers (Fattola pour shirazi, p86).

***Flight cancellation:*** Warsaw convention has no reckoning to the flight cancellation and in provision 19 there has been spoken about flight delay; this silence cannot be interpreted as airline agencies not being liable about flight cancellation and possibility of cancelling the transportation contract. Transportation contract is a necessary espouse and it cannot be cancelled unless one of the sides have this right according to the contract. Airline agency commitment for transporting passenger and goods, even though according to first paragraph of provision 20 of Warsaw convention is theoretically on the basis of taking care of them in order to prevent the possible loss, but with assumption of liability for curator, this commitment has lost his main role and has approached to commitment to the result. So for requesting the loss it is enough the passenger and goods owner according to general principles of liability sign a contract and prove that predicted result has not reached to. In addition, when Warsaw convention in provision 19 has recognized the right of requesting compensation for the passenger and goods owners, accordingly this right is preserved for them when the flight is cancelled.

#### ***Loss***

In order to commit to be liable about the obligee, it is necessary due to the violation and breaking covenant, the obligee face some loss or the liability is cancelled because of not existing any subject. (Shahidi, 2003, p 67) provision 19 of Warsaw convention about the delay in transporting passenger and goods reads that; transportation curator is the liable

person about the loss of delay in transporting passenger, goods and accessories. So in provision 19 of convention this issue is repeated for defragmenting the aviation transportation (montreal28 may of 1999) regulations.

The loss is the damage which is moral or material. If material again it is either loss resulting from partial or whole waste of the property or loss of being deprived of benefits of the contract which is called as loss of lack of profit. (Shahidi, the same, p69-70) now question is that whether it is possible to request compensation for the three kinds of loss in delay or cancellation of the flight? We are going to answer these questions in next three paragraphs;

**Material Loss:** Material loss is what can be changed to the money. Its origin is of two kinds;

- Financial loss
- Loss of lives and health

Material loss is wasting or being incomplete which can be changed to money by the expert opinion. (Sepahvand, p145) is the loss to the profits and property rights.(Rahpeak,2010, p 48). Loss to the lives and health; if physical injuries lead to the illness, death or defects cause to financial loss (Sepahvand, the same). Loss to the lives and health in international flights according to the 17<sup>th</sup> provision of convention (and not 19) and with regarding the requisite condition is demandable and in internal flights according to the regulations of determining the liability limitation of airline agencies approved in 2012.5.11 is demandable according to the Islamic punishment rules. Loss resulting from wasting, defect or fault of the cargo which delay or cancellation is its reason, hotel residential costs, if the ticket cost is fluent and provision of up to date ticket be more than usual one are assumed as material loss which should be compensated. Returning the ticket value if the flight is cancelled is an obligatory issue.

**Moral loss:** Moral loss means the loss to the validity or career, social and family fame of the obligee due to the committer fault (Shahidi, 2003, p71). Even though the provision 19 of convention has used the term loss as absolute term and knows the transport curator as liable for delay in passenger and goods and accessories transportation, accordingly moral loss can be demandable based on convention, however this provision in company with provision 17 can be interpreted. Because one cannot be claiming that the writers of the convention didn't intend moral loss but they wanted to compensate it on the next two provisions so they emphasized both moral and material loss. We can command to the demand of the moral losses according to 19<sup>th</sup> provision of the convention if we accept its compensation by 17<sup>th</sup> provision too.

Ambiguity in 17<sup>th</sup> provision of the convention about moral loss caused to different legal procedures in different countries. Courts tries to reach to the equivalent of French term meaning bodily injured in English and for this they have reached to different results (Talian, 2011, p76). In some opinion there should be clear distinction between injury and physical damage, they think physical damage is a general term consisting all the damages to the person against the loss to the property and moral and spiritual damages be of that kind too (Fakhari and Mohamadzade,p279). Husrel case was the most important case for demanding moral loss. In this case one of the federal courts in New York concluded that the French word lesion corporelle is not binding. So the court intentioned to the will and goals of the signing countries and concluded that they were not about to ban certain kind of loss compensation, so compensation should be paid for moral losses too (cited from Talian, same, p77).

Some courts and national court of America believe that one of the goals of convention was to make similar the international transportation regulations and prevent from regulation controversies in the courts. If we accept demanding compensation for merely moral losses, it is impractical cause in some member countries demanding compensation for moral loss is not legitimated yet (Talian, same, p84). Supreme Court of America also declared that if we demand compensation for moral losses, second goal of the convention which is limiting the liability of curator of air transportation won't be provided. The court voted that present opinion of the countries have no significance now and cannot reveal the meaning of term lesion corporelle . But what is important is that what the countries opinion was in 1929. With this deduction the court voted that if a passenger face moral loss cannot demand compensation. This decision then followed by other countries too (Talian, same, p84-85).

Superiority of the courts which voted to being impractical demanding moral loss to the others raise the question that if regulations of the country where the court is held in consider the moral loss compensation demanding, is the court able to vote for the loser side according to their own regulations?

Is this action in contrast with Warsaw convention? There is two opinions about it in courts;

Courts of some countries referring to the paragraph 2 of provision 24 of Warsaw convention permit the claimer to complaint according to the country regulations in which the court is held. So if the regulations of the country assumed the moral loss retrievable, the claimer can present his request for example France, in cases when the event is out of the frame of provision 17 of convention, appeal court has accepted that general contractual liability principles of that country in provision 1147 of civil laws of that country is applicable (Fakhari and Mohamadzade, p215).

On the contrary, countries like England consider referring to the paragraph 1 of provision 24 about moral loss as improper; according to the British House of Lords this provision should be interpreted accompanied by provision 23 of convention. From British courts view from one hand transport curator according to provision 23 of convention waive from his freedom in limiting his liability and from other hand, passenger or any other person as a other side of the contract according to the 24 provision of the convention limits his complaint and thus cannot complaint out of this frame.. Because in other case convention of Warsaw basis is weakening and regulations for liability of curator and claimer is leaded to parallel and opposite to the system regulations (Fakhari and Mohamadzade, p216).

The writer of this paper never faced with a case in which a person complaint for demanding his loss compensation for delay or cancellation of a flight except one case in which in one of the Tehran courts due to the complaint of a prosecutor was issued against one of the airline agencies. The prosecutor with his wife and child of 1.5 years old were waiting for return flight to Tehran, which after many hours the flight become cancelled. And after two tiring days they manage to provide a return train ticket. In return he complains for demanding legal and material loss compensation and after three sessions, branch 206 of general legal court of Tehran votes for prosecutor .the court deduction in this event is that the judge of the case considers the silence or ambiguity in the provisions 17 and 19 of Warsaw convention as a reason for accepting to compensate the moral loss and with maneuvering on the other regulations in Iran voted to compensation of moral loss.

### ***Lack of Profit***

In Iran law despite the reckoning of civil liability law approved in 1339 in provisions 5 and 6 to the examples of lack of profit like loss resulting from weakening of working stamina or lack of the stamina and provision 9 of criminal procedure also introduces the profits resulting from committing crime as a part of retrievable loss, in amendment 2 of provision 515 of civil law procedure consider the loss resulting from lack of profit as irretrievable. The existing contrast between these two procedures lead to different opinions to solve it; most lawyers consider amendment 2 of provision 515 indicating to the possible lack of profits and provision 9 indicating crucial lack of profit and thus, the loss is demandable (Rahpeyk, p 36). Some said that in amendment 2 of provision 515 the goal is loss of loss of lack of profit and lack of profit itself is demandable (Zeraat, 2007, p1022), and some believe that despite the shortcomings we should accept that lack of profit is not demandable (Shahidi, 2004, p258).

It seems that possible profits are demandable and lack of profit as possible profits should be considered out of inclusion of amendment 2 of provision 515. And this interpretation regardless of its legal basis and by accepting the delay loss and retrieving the decrease of money value in provision 515 of civil procedure is a suitable interpretation and can be the principle of action (Rahpeyk, p36). In laws of member countries of Warsaw convention there is no discussion about the lack of profit. In the case of Robert Hudin v. Panair Brazil the passenger claimed to have been ordained to perform rituals in front of the King of Portugal which he couldn't reach to the ritual in time due to the long time delay of flight and lost some profits, the court considered the airline agency guilty and made them to pay the loss (cited from Fatolapourshirazi, 2007, p91).

Third discussion; causality relation between delay or cancellation and the loss

In order to demand compensation from flight curator due to delay or cancellation, occurrence of them is not enough, there should be a causality relation between the delay or cancellation and the loss. It means that delay or cancellation cause a loss to passenger.

In previous pages we mentioned that the curator liability is contractual and in this kind of liability there is an assumption of causality relation between the breaking covenant and occurring loss and he can be out of liability that can prove his innocence.

Warsaw convention after recognizing the transport curator as liable for the loss of delay or cancellation of flight in provision 19, in provision 20 and 21 shows the ways he can escape from liability.

Provision 20 of convention reads; if curator prove that he and his crew have provided all the requisite conditions to prevent the loss or doing such actions were impossible for he and his crew, he won't be liable.

Provision 21 reads; if the curator proves that loss is the result of the loser deed, the court can free the curator from liability.

Cases by which curator can be freed from liability are as follows;

- A) Providing all the requisite conditions
- B) Force majeure
- C) The role of loser in occurring the loss

#### ***A. Providing all the requisite conditions;***

If the curator provide all the conditions he is not liable anymore. If we act according to the paragraph 1 of provision 20 of Warsaw convention, the curator would has a hard work to prove he is not liable. And if we are intending he would provide all the requisite conditions, we mean the conditions that are logical and applicable not illogical and impossible actions and conditions and so that no one faces loss (Azizi, p248). When Mont real convention was written to replace Warsaw convention in provision 19 declared clearly; if the curator proved that he and his crew and delegates have done all the common provisions to prevent loss he is not liable anymore.

In Robert Hudinv.Panair Brazil case mentioned before, the court announced that due to transport curator incapability to prove that he has done all the requisite actions and even couldn't prove that has done his best to prevent the loss, so he is liable for the compensation of the loser loss wholly (Azizi, p249).

#### ***B. force majeure;***

paragraph 1 of provision 22 of Warsaw convention mention to another point too which cause exemption of curator against the loss to the passengers and goods. If curator proved that providing suitable condition were not possible for him and his crew to prevent the loss he is not liable. This is what is called force majeure in countries law.

If an event assumed as force majeure and out of will, there should be conditions; first the event be inevitable like blowing severe wind or intense fog which make airplane unable to land or take off and as a result flight delay or cancellation occurs.

Second condition is the event being unpredictable. Like pilots and crews strike which lead to flight cancellation.

Third condition is external reasons, it means that curator prove that an external factor prevented their providing requisite conditions, so if the curator stimulate the pilots and crews to take advantages from the government he is liable for the loss and should compensate them all.

#### ***C. the role of the loser in occurring the loss***

Provision 21 of Warsaw convention declared that if the loss to the passenger or goods is the result of the loser himself, courts can exempt the curator partially or wholly from the liability.

It should be noted that merely committing fault from the passenger or sender of the goods area, won't exempt the curator from liability but there should be causality relation between the loser fault and loss. When we exempt the agent of the loss from the liability due to the role of the loser, it means that the loser himself is liable for that loss (Kazemi, p 118-119).

#### **liability limitation of airline agencies about delay and cancellation of flight**

As said before in case of providing all the three conditions of contract, airline agencies are liable to compensate the loss of delay and cancellation of flight. Now, we should search the conventions and amendments in order to find answer to the question whether they have set a ceiling for compensation of the loss or not? Are airline agencies capable of decreasing or increasing their liability with insertion of some conditions? The answer comes in next discussions

### ***The Amount of Payable Compensation***

Warsaw convention, in order to support the aviation industry which was newly born and weak preparing the convention, in provision 22 about carrying passenger has limited the curator liability to 125000 Swiss franc for every passenger and 250 Swiss francs for every one kilogram of accessories and goods. About the thing that their carrying liability was with passenger himself, liability of the curator could not be over five thousands francs. By financial improvement of agencies the mentioned amount doubled according to the provision 11 of Lahe protocol and the same was preserved about the thing which liability is by passenger himself mentioned in provision 22. So regarding the mentioned points, if the flight is done with delay and as a result loss occurred to the passengers, airline agency is liable to pay up to 250000 francs and about the accessories registered and goods the agencies liability is 250 francs per one kilogram

### ***Liability Discount of Airline Agencies***

According to the provision 23 of the convention any condition relating to disclaimer of curator of transport is abandoned and void. But voidance of such condition does not result to cancelling all the contracts subordinate to the convention. Provision 32 of convention assumes any contract by which both sides try to agree when loss occurring and want to violate the Warsaw convention content is void and abandoned. However, such conditions as civil law says is a corrupt condition which its corruption do not infect the main contract. So, transport curators cannot insert conditions in order to discount their liability, even if agreement lead to discount of the liability it is void and abandoned.

### ***Aggravated Liability of Airline Agencies***

Warsaw convention and joint protocols to it and also Montreal convention have determined the rate and amount of curator's liability. None of the convention provisions ban curators of settling new contracts. Transport curators can apply any condition which doesn't violate the convention regulations. Against the discount of liability of curators which is banned in mentioned regulations, in passenger and goods transport, the amount of liability of curator can be increased by mutual agreement between the passenger and curator. About the passenger as said in provision 22, by contracting between the passenger and curator the liability domain can be increased. According to the paragraph 2 of the provision 22, both sides of the contract can agree about goods and accessories. If passenger or goods sender when delivering its goods or property announce the value of them, and that value registered in the bill of lading, the registered value will be replaced with amount determined in paragraph 2 of provision 22, providing that sender or passenger pay extra amount determined by curator. In case of loss to goods and delivered accessories, registered value is the criterion of paying compensation even if the real value be less or more than registered value.

### ***Conclusion***

The relation of airline agencies and passengers is a contractual relation. This issue will require their fault assumed as given and proving the covenant break (delay or cancellation of flight) by the loser exempt him of proving the companies fault. In case of existing all three conditions, action, existing the relation of causality between the action and loss, passenger or sender of the goods has right to demand compensation from the airline agency. There is no doubt in possibility of retrieving financial loss like ticket value, hotel residential value and etc. but about lack of profit and moral loss there is too much controversies. Some courts differentiate between injury and physical damages presented in Warsaw convention and know physical damage as a general term which consist all the damages to person and property and thus moral loss is also included. In contrast, some courts believe demandable being the moral loss is in contrast with convention which was going to support the newly created aviation industry. Again some courts don't consider moral loss retrievable according to Warsaw convention but referring to paragraph 2 of provision 24 of the convention let the claimer to demand compensation for moral loss according to the country in which the court is. Even though, some courts don't let to do so.

In Iran first opinion is followed and branch 206 of general legal court in its vote referred to civil liability law and principle 171 of constitution and condemned one of the agencies to retrieve the moral loss of a family whose flight was cancelled.

About lack of profit loss, even though the courts of member countries vote to compensation according to the convention, paragraph 2 of 515 provision of civil law caused many controversies however, retrieving lack of profit have its own fans.

If an airline agency prove that its staff have done their best in providing normal condition in order to prevent the loss, or providing such conditions were out of their ability, and also the loser himself be liable about the loss, relation between loss and airline agency is not settled and as a result agency is freed from retrieving loss.

According to provision 11 of Lahe protocol the ceiling amount payable to a passenger is 250000 and to registered goods and accessories is limited to 250 for per kilogram.

Insertion of any condition for discounting liability of airline agencies according to provision 23 is void but don't abandon the whole contract of transportation, aggravated liability on the contrary has no problem according to provision 22 of the convention. Sometimes increasing the liability of the agencies is obtained due to the agreement about the value of goods and accessories.

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