

Air Travel Compensation Procedure

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Abstract: *The article is aimed at analyzing the legal means of protecting the interests of air transportation service recipients. The main emphasis will be placed on the analysis of the Warsaw Convention and the Montreal Convention provisions reflecting the freedom-of-contract doctrine since the air travel compensation procedure is not regulated by the national Russian legislation. As a result of the analysis, the conclusion was made that individuals, for example, in the case of harm causation, have the right to choose according to the law of which country the compensation should be paid to them. Separately, it was established that the various degrees of liability of air carriers, prescribed in the rules of airlines, not only failed to contribute to fair compensation for harm to the life and health of a passenger but, on the contrary, made for unjust enrichment on both sides. In this regard, the authors came to the conclusion that it is necessary to bring the procedure of compensation for harm caused during air transportation to uniform standards of the transportation rules for all international airlines. In this regard, the authors substantiate the need to introduce the elements of self-regulation of transportation activities and mandatory insurance of carrier liabilities. Besides, proposals were made to fill the gaps in the current air transport legislation, for example, regarding the regulation of a long-term agreement on the organization of systematic air transportation, aircraft charter contracts, and contracts for the performance of aviation work which is important for the country's economy.*

Index Terms: *air carrier, baggage, cargo, insurance, international air transportation, Montreal Convention of 1999, passengers.*

I. INTRODUCTION

A. Introduction of the Problem

Currently, due to an increase in the international air transportation industry and the international integration of the Russian economy, a need has arisen for reforming Russian legislation.

Today, all over the world, and in the Russian Federation, in particular, legislation is being improved to regulate the state and activities of organizations involved in air transportation, since the effectiveness of their activities related to the development of entrepreneurship is recognized. Due to the variety of approaches to regulating this type of entrepreneurial activity, the legislation is devoid of integrity, which is manifested, in particular, in extending the rights, duties, and responsibilities of the parties of air transportation

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agreements. In particular, there are a number of legal difficulties in the interaction between air carriers and consumers of their services related to the states with different legal systems.

B. Importance of the Problem

Problematic issues of organization (air carrier) liabilities were raised in fundamental works by Sukhanov [1], Ostroumov [2], Shiminova [3], Maleev and Ovchinnikov [4], Batalov [5], Bordunov [6], Grechukha [7], Eliseev [8], Yerpyleva [9], etc.

Some issues of regulating the liability for harm caused to passengers are considered in publications by Rodiere [10], Senchilo [11], Kanashevsky [12], Morozov [13], Mosashvili [14], Remishevsky [15], Schurova [16], etc.

II. METHODS

A. General description

In the process of the study, the authors were guided by general scientific and private-law methods of cognition, in particular, technical and legal, comparative and legal, sociological and other research methods. The main methods used in this work were the systemic and structural methods that made it possible to establish the features of liability for harm caused to the life and health of a passenger, for loss, shortage, and damage to baggage in air transportation. The technical and legal method is used to analyze a set of legal rules governing the powers of air transportation organizations and the respective states. The sociological method substantiated the conclusions, proposals, and recommendations for improving legislation, establishing control both within air carrier organizations and from the side of member states of international agreements in air transportation.

B. Algorithm

The definition and study of problems and procedures of compensation for harm in air transportation were based on a branched algorithm.

During the study, the authors analyzed international standards in comparison with Russian legislation, as well as the attitude of the authors to the problematic issues of compensation for harm in air transportation in accordance with certain stages (Fig. 1).

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Studying the level of development of market relations, the level of cultural and social processes in various countries, the authors studied and identified the degree of responsibility and the extent of compensation for harm caused to recipients of air transportation services.

Having identified the most acute issues of compensation for air transportation, the authors made proposals to fill in the gaps in the current air transportation legislation, as well as determined the best options for compensation procedures in

the case of harm or damage caused to a recipient of the air transportation services by bringing a number of norms of the Air Code of the Russian Federation in compliance with the provisions of the Montreal Convention of 1999.

C. Flow chart

Table I. Brief of the pedagogical model

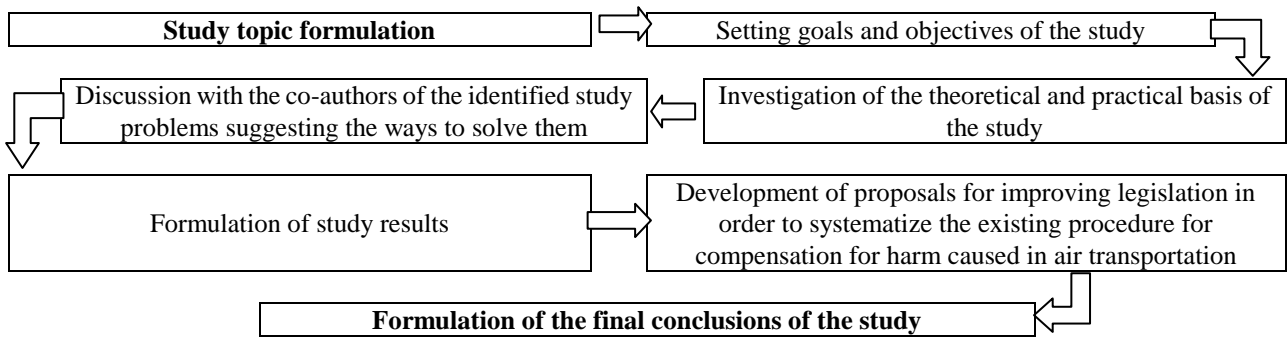


Fig. 1. Phases of the study

III. RESULTS

It has been revealed that the degree of responsibility and the extent of compensation for harm caused to recipients of air transportation services may differ in different states depending on factors such as the level of development of market relations, the level of cultural and social processes, etc.

It is believed that the norms of the Air Code of the Russian Federation require clarification regarding the liability of carriers with regard to passengers and their insurance during international transportation, bringing it in line with the rules of the European Union, in particular with the rules of the Montreal Convention of 1999 (the Convention for the Unification of Certain Rules for International Carriage by Air).

It has been determined that it is required to fill the gap in the current air transportation legislation regarding the regulation of a long-term agreement on organizing systematic air transportation, an aircraft charter agreement, and an agreement on performing aviation work which is important for the country's economy.

It has been established that there is no unambiguous solution to the issue of compensation in the event of harm or damage caused to the recipient of air transportation services on the basis of the law acting at the place of residence or preferential stay of an individual, the place of harm causation or the law of the state in which the aircraft is registered.

In order to improve the legislation, it is proposed to bring the norms of the air transportation legislation, in particular, the Air Code of the Russian Federation, in line with the provisions of the Montreal Convention of 1999, which will ensure full protection of the interests and rights of recipients of international air transportation services in connection with

increasing integration into the global economy, unification of international law and its increasing priority over the domestic law.

IV. DISCUSSION

Today, the norms of the current Russian air transportation legislation in the field of regulation of air transportation agreements, the carrier liability and its insurance are outdated and do not correspond to modern international trends in the development of unification of substantive private law, in connection with which the rights of consumers and other users of air transportation services are infringed and do not meet the legitimate interests of carriers.

For the carrier to incur liability, appropriate grounds are required. The person requiring compensation (the plaintiff) must prove, first, the fact of obligation violation by his/her counterparty, second, the existence and amount of damage (losses) incurred by him/her, the compensation for which is simultaneously a universal measure of civil liability, and third, the causal relationship between the legal offense and damages. However, the carrier (the defendant) has the right to prove the absence of its fault in causing losses insofar as its presence is the fourth condition for the occurrence of the carrier's liability, and also refer to the limitations of this liability. In practice, the conditions of liability of an air carrier are closely and inextricably interrelated, intertwined with each other. Moreover, the onset of one of them often determines the presence of the other one, and its presence or absence is not a basis for the onset of liability or relief therefrom.

However, according to Senchilo, the subject of liability should not be confused with the subject of damage compensation.

This distinction is associated with the use of terminology in carrier liability insurance. In this regard, it is incorrect to identify the obligation of the insurer to pay insurance indemnity with its liability [11].

If it is necessary to apply the Russian law (due to the gaps in the conventions or the references to domestic legislation contained therein), an individual should first of all be guided by the provisions of Ch. 40 of the Civil Code of the Russian Federation, which regulates the carrier's liability from the transportation agreement, and Clause 1 of Art. 116 of the Air Code of the Russian Federation, indicating the contractual nature of the carrier's liability. According to Clause 1 of Art. 116 of the Air Code of the Russian Federation entitled "General Principles of Liabilities," the carrier is liable to the air passenger and the cargo owner in the manner established by the contract for the carriage of passengers by air and the contract for the carriage of goods by air.

However, with regard to the liability of the carrier for harm caused to the life and health of the passenger, Art. 800 of Ch. 40 of the Civil Code of the Russian Federation and Art. 117 of the Air Code of the Russian Federation refer to the rules of Ch. 59 of the Civil Code of the Russian Federation on obligations in tort, the subjects of which are not in a contractual relationship with each other. Despite the existence of an agreement between the passenger and the carrier, the latter's liability, in contrast to its liability for the failure to preserve cargo or baggage under the Russian legislation, by virtue of the indicated reference of Art. 800 of the Civil Code of the Russian Federation, becomes of a noncontractual (in tort) nature and therefore is stricter and unlimited. At the same time, if, for example, the transportation agreement provides for an even higher liability of the carrier, then the provisions of this agreement will be applied and not the rules of Ch. 59 of the Civil Code of the Russian Federation. This is expressly provided for in the same Article 800 of the Civil Code of the Russian Federation. In this way, the Russian law, without prejudging the nature of the carrier's liability for the passenger's life and health, sets the priority of their safety interests over those of the carrier, the observance of which is ensured by the institution of compulsory liability insurance of transport organizations.

Sukhanov confirms this thesis and says that although the harm caused to the life or health of a passenger in a traffic accident is subject to settlement under the noncontractual obligations by virtue of the requirements of the law, the liability arises as a result of the nonfulfillment of contractual obligations (Art. 1084 of the Civil Code of the Russian Federation) [1]. Shiminova states that under the transportation agreement, the carrier's most important duty is to ensure the safety of the passenger, but in the case of violation of this contractual obligation – harm caused to the passenger's health and his/her death – the contractual harm compensation relationship is regulated by the rules providing for the noncontractual harm compensation [3]. Maleev and Ovchinnikov state that the carrier as an aircraft operator may also incur noncontractual liability for harm, however, not to passengers and cargo owners but to third parties in the event

of air accidents, air crashes, as a result of engine noise, sonic boom, etc. Such liability is in tort and is regulated not only by the relevant norms of the applicable national law. There is also a process of unification of legal regulation in this area. There is a special Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome Convention of 1952), and its Protocol of 1978. These documents did not receive such widespread recognition as the Warsaw Convention; however, a significant number of states participate in them, including Russia [4].

The new conventions were developed mainly by the countries not participating in the Rome Convention, and especially by the United States. They provide for the possibility of full compensation for damage to victims, including as a result of acts of terrorism, by creating a fund of estimated passenger fees, and the absolute and in most cases unlimited liability of aircraft owners.

Rodiere, in connection with this matter, states that the French law assumes that the carrier's liability for the life and health of a passenger is strictly contractual. There, the right of the deceased's relative to demand compensation for the damage caused was once even questioned, since the relative was not a party to the passenger carriage agreement. Therefore, the contract for the carriage of a passenger began to be regarded as a contract in favor of a third party. According to this scheme, the carrier under the contract has an obligation to relatives and dependents to deliver the passenger to the destination, alive and healthy. The obligation to indemnify dependents and relatives arises from a breach of the contractual "obligation to achieve a result" (obligation de resultat) [10].

According to the General Rules for the Air Carriage of Passengers, Baggage, Cargo and the Requirements for Serving Passengers, Shippers, Consignees, approved by the Order No. 82 of the Ministry of Transport of the Russian Federation dated June 28, 2007, the carrier organizes, provides and performs the transportation of passengers, baggage, cargo and has the right to transfer duties completely or partially under the contract of air transportation to another carrier, being responsible for its actions (inactions) to the passenger, consignor, consignee and the implementation of the contracts of passengers and cargo air transportation (Clause 6 Sec. I of the General Transportation Rules). In the modern practice of cooperation between airlines, the situation of carrier replacement is very common. In particular, it arises on the basis of agreements between airlines on the transportation under the code of another airline (on the mutual use of their codes, the exchange of codes). If for some reason it is not possible to carry out transportation, the airlines are often forced to transfer the load to the flights of their partners and other (actual) carriers [17].

However, in all these cases, the question arises on the liability regime of the actual carrier, since its relations with the passenger or the sender are not bound by a contract (transportation agreement), the presence of which is a condition for applying the provisions of both the Warsaw and the Montreal Conventions.

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In this regard, the international practice of traffic regulation has developed the institution of the so-called actual carrier. The most important condition for the use of this institution is that the actual carrier has an agreement with the carrier under an agreement different from the transportation agreement, in particular under a charter, code exchange, or any other commercial agreement between carriers, under which each of them undertakes to accept passengers or cargo of each other with shipping documents, in which the latter is designated as a carrier.

With respect to the transportation carried out by the actual carrier, the obligations (liability) of both carriers are joint. In the case of transportation by an actual carrier, a claim for compensation for harm (loss) may be voluntarily set forth by the victim to the contractual, actual carrier or to both of them. If a lawsuit is set forth only against one of the carriers, the latter has the right to bring the other carrier to the case before the court, in which the lawsuit is set forth. The procedures for such involvement and its consequences are determined by the law of this court (Art. 45 of the Montreal Convention, Art. VII of the Guadalajara Convention).

The actions or inactions of the actual carrier and its employees and agents acting in the framework of their duties in relation to the carriage performed by the actual carrier are considered the actions or inactions of the carrier under the contract and vice versa (Art. 41).

The period of liability for damage to the cargo, in accordance with the provisions of Clause 3 of Art. 18 of the Warsaw Convention and Clause 4 of Art. 18 of the Montreal Convention, does not include any land transportation, sea transportation or inland water transportation carried out outside the airport. There are two exceptions to this rule, which, however, do not apply to multimodal transportations, where the sender specifically agrees on transportation by various means of transport. First, transportation by other means of transport may be carried out pursuant to an air transportation agreement for the purpose of loading, issuing or reloading. In this case, any damage, to the contrary, is considered to be caused during air transportation, and carriers, other than air carriers, should be considered as agents or employees of the latter. Second, according to the innovation of Clause 4 of Art. 18 of the Montreal Convention, the carrier, without the consent of the sender, can completely or partially replace the transportation, which, by the agreement between the parties, was supposed to be carried out by air. Such transportation by another mode of transport is considered to be transportation carried out during the period of air transportation, and, therefore, the rules of the Convention will apply to it, and therefore to the corresponding carrier of another type of transport. It is believed that this is a situation of carrier replacement. The liability regime of the replacing carrier will be determined by the status of the actual carrier, which is regulated by Chapter V of the said Convention.

Quite often, situations arise when claims by victims of air transportation are set forth not only against transport companies but also against other legal entities that have a connection with the damage caused. In practice, for example, lawsuits against air traffic control authorities, airports, and the like are common. Unlike the Warsaw Convention, the

Montreal Convention provides an opportunity for anyone who is sued to refer to the terms of the Convention and thereby greatly removes the issue of competition of claims for countries participating in it. At the same time, the Montreal Convention (Art. 37) specifically states that the Convention “does not prejudice the question of whether the person liable for harm in accordance with its provisions has the right of recourse against any other person.” Thus, the carrier who has indemnified for damages to the victims of the transportation is entitled, subject to the relevant domestic law, to submit claims to any persons involved in this. The conventions contain a provision according to which, in the event of the death of a person liable, a claim for damages is set forth against his/her successors (Art. 27 of the Warsaw Convention) or to persons legally representing his/her property (Art. 32 of the Montreal Convention). Such a claim may be set forth only subject to the conditions of the relevant convention. A literal interpretation of the text of these articles leads to the conclusion that they apply only to cases where the person responsible for the harm is an individual. However, this gap is easily eliminated by the applicable domestic law governing the reorganization of a legal entity in various forms (e.g. Art. 57 of the Civil Code of the Russian Federation) when rights and obligations are transferred to other organizations on the basis of a deed of transfer or a separation balance sheet. In addition, there is a special provision in the Russian legislation (Art. 1093 of the Civil Code) relating to compensation for harm in the event of termination of a legal entity recognized in an established manner as responsible for harm caused to life or health. So, in the event of its reorganization, the obligation to pay the relevant payments belongs to its successor. Claims for damages should also be presented to this legal entity. In the event of the liquidation of such a legal entity, the relevant payments should be capitalized for their payment to the victim. The limits of liability of the carrier established by the Warsaw Convention in relation to harm to the life and health of a passenger, the failure to preserve cargo and baggage also apply to delays in their transportation. Therefore, when delaying the carriage of passengers, the limit of liability calculated for causing harm to their life and health should be applied, which puts the carrier in an extremely difficult position. The Montreal Convention limits the carrier's liability for delays in the carriage of a passenger by a special monetary limit, and it is high enough to provide reasonable compensation for losses incurred in this case. This distinguishes the new Convention from Russian law and the Warsaw Convention. Thus, the conducted analysis makes it possible to state the following: giving priority to the interests of transportation safety, preserving the life and health of citizens, international conventions and domestic legislation systems, including the Russian one, do not actually regulate the time of air transportation and give carriers the freedom to determine it for themselves, the right to change the schedule, route, skip the boarding destination, replace the type of aircraft, cancel, interrupt, reschedule, delay any flights, if this is required by the circumstances.

These rules are based on the principles of ensuring flight safety, on such postulates of the Air Law as Art. 58 of the Air Code of the Russian Federation, according to which, in order to save the lives of people, only the aircraft's captain has the right to make final decisions on take-off, flight, and landing. They in no way diminish the carrier's liability for the delay if it occurred due to the fault of the carrier.

The Montreal Convention has created a flexible procedure for reviewing the carrier's liability limits set for cargo and baggage, depending on the level of inflation. Together with the system of declaring an interest in delivery, it creates additional guarantees for air transport clients to be adequately compensated for the damage caused during their transportation and ensures the stability of the unified legal regime for international air transportation.

A feature of the implementation of air transportation is that its object (whether it is a passenger, cargo or baggage) almost entirely falls into the sphere controlled by the carrier – the owner of the corresponding aircraft. The life and health of the passenger, the safety of cargo, baggage, and the timeliness of their delivery to the destination point become dependent on the carrier, its actions or inactions.

In the light of control theory, the vague, according to some authors, wording of both Conventions regarding the period of the carrier's liability for the life and health of a passenger in practice makes it possible for the court in each case, taking into account all circumstances of the case, to correctly assess the existence of a causal relationship between the carrier's actions and the harm caused.

Another component of causation stipulated by international conventions is the occurrence of an accident, which should be the basis for the carrier to incur liability for the death or personal injury of a passenger.

For the carrier to be held liable for the failure to preserve cargo and baggage, an accident is not required. The carrier is responsible for any case, event that caused loss and occurred after the acceptance of cargo or baggage for air transportation and before delivery to the consignee.

The development of international air transport, the strengthening of its reliability, the introduction of new technologies have shifted the priorities in regulating transportation relations, and above all, the responsibility of the air carrier towards providing stronger guarantees of the full compensation for harm to its clients injured in aviation accidents. This led to the emergence of a new legal regime for international air transportation established by the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention of 1999), which is already practically universal in nature. The new regime is significantly different from the old system of legal regulation of international communications, which is still used by the Russian international airlines, and from the conditions for air transportation existing within Russia.

The norms of the current Russian legislation on the air transportation agreement, on the liability of the carrier and its insurance are outdated and do not correspond to modern international trends in the development of unification of substantive private law, infringe the rights of consumers and other recipients of air transportation services, do not meet the legitimate interests of carriers. The relevant provisions of the

Air Code of the Russian Federation are very fragmented, contradict the compensatory nature of civil liability institutions, require clarification regarding the carrier's liability to the passenger and its insurance during international transport, and harmonization with European Union rules.

Thus, with all the social significance of the amendments to the Air Code of the Russian Federation adopted in recent years, the need for a comprehensive review of the system of legal regulation of air transportation in compliance with the basic principles of international private and civil law using their inherent regulatory methods has become imminent.

V. DISCUSSION

Summing up, it can be concluded that the general rules of transportation in Russia in many respects depart from the international standards of the International Air Transport Association (IATA). Meanwhile, due to the activities of IATA, the unification and universality of the legal regime of international air transportation to a large extent become complete. This contributes to the development of cooperation between air carriers in carrying out air transport operations, provides a uniform operating procedure for the air transport industry of the world economy, and thereby creates considerable convenience and additional opportunities for passengers and participants in foreign trade.

IATA's activities in summarizing the experience of applying international agreements in the field of air transportation have become a stimulator of the progressive development of international legal regulation of air transportation, taking into account the interests of both airlines and their clients.

The use of foreign experience in legal regulation is important for improving Russian legislation in the field of air transportation but requires caution. The need to harmonize domestic legislation with the rules of the European Union is obvious:

- on the air carrier liability insurance;
- on the immediate advance payments in the event of an accident that caused the death or harm to the health of passengers to persons entitled to compensation;
- on the fixed compensation payments in the case of refusal of transportation due to lack of seats for a passenger who has a ticket with a confirmed reservation.

The EU rules in this regard facilitate simplification of procedures for compensation for damage caused in these cases, minimize claims and ensure that consumer rights are respected under conditions acceptable to the carrier.

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