CHAPTER VIII

LIABILITY FOR CARGO: ADVISOR OF DAMAGES

INTRODUCTION

It is axiomatic that liability flows from the contract, and for carriage of cargo by air, the contractual document is the air way bill (the erstwhile air consignment note under the Warsaw Convention, 1929). The nature, contents, and the format of the air way bill have already been discussed but it still needs to be elucidated that the parties are not at liberty to formulate any conditions of carriage by air. These are governed by the Warsaw Convention and its amending instruments. Nevertheless, within the framework of the Warsaw regime and without violating any of its provision, the conditions of contract may be varied to suit specific requirements or additional complementary provisions included in the contract to cater for circumstantial contingencies.

The Schedule of Liability

It is a legal truism that liability arises out of a breach of duty. The duty of the carrier is to provide
and ensure safe transit of cargo to the destination and subsequent delivery to the authorised consignee. Therefore in the contracts for carriage by air "the carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to ... any goods, if the occurrence which caused the damage so sustained took place during the carriage by air...". The carrier will also be "liable for damage occasioned by delay in the carriage by air of ... goods" and consequently delayed delivery to the consignee at the destination.

The carrier is _prima facie_ liable for the damages caused. Thus, this creates a presumption of liability against the carrier which, nevertheless remains rebuttable subject to sufficient proof to the contrary. But the other party\(^2\) that has sustained loss or damage...

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1. The Warsaw Convention, 1929, article 18(1). This obligation is cast upon the carriers at common law by reason of their exercising a public profession for reward. Therefore the carrier is "bound to answer for the goods at all events." Refer _AA Laddit v. Guiger Coote Airways Ltd._ AIR 1947 PC 15. Also see the _Carriage Act, 1951_, section 9.

2. The other party is the one which formalised the contract for carriage. But the owner of cargo has a right to sue for damages caused even if he is not a party to the contract; whereas an agent, even if he be the other party, cannot on his own, _suo motu_, initiate an action for damages unless he himself has an interest in the goods. In the case of a seller, however, once the goods are delivered to the carrier for transmission to the buyer, the property in goods passes to the buyer and the latter then becomes entitled to take action against the carrier.
must lodge a complaint in a proper form and within the period specified; and if so necessary institute a suit to claim damages within the period of limitation provided. The liability of the carrier under various contingencies has been laid down by the Convention. But the carrier may set up permissible defences and obtain protection of the limitation of liability. Conversely, under certain circumstances, e.g. wilful misconduct or technical delinquencies in the documents etc., the carrier may be exposed to unlimited liability.

The period of Carriage

Under the Convention, the carrier is liable for damage caused during the carriage by air. It therefore becomes important to define the period or the limits of carriage within which the responsibility vests with the carrier. According to the Convention, "the carriage by air ... comprises the period during which ... goods are under the charge of the carrier, whether in an aerodrome or on board an aircraft or, in the case of a landing outside an aerodrome, in any place whatsoever." Further, "the period of carriage by air does not extend to any carriage by land, sea, river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of

3. The Warsaw Convention, 1929, article 8(2)
an event which took place during the carriage by air. 4 This aspect came up for consideration in the case of 
Sararam Perumal v. Air India Ltd. 5 In this case, a gold parcel booked from Karachi to Bombay was stolen at the airport while under the custody of the carrier. It was argued that the carriage comprised the period during which the goods are in the custody of the carrier and the remaining clauses describing the stages of carriage were merely by way of illustration and not comprehensive of the attendant situations. But it was observed by Shah, J. that "the liability of the defendant did not ... arise under rule 18, 6 because the goods cannot be regarded as lost during carriage by air." 7

THE LIABILITY OF THE CARRIER

The General Principles

Generally, the measure of compensation recoverable for the loss or total destruction under principles of contract law is, prima facie, the value of the goods.

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4. Ibid, article 16(9)
6. The Indian Carriage by Air Act, 1934 (Act 20 of 1934)
7. See Also Westminster Bank Ltd. v. Imperial Airways Ltd. (1936) 2 All E.R. 890. In this case also a gold consignment was stolen from Croydon airport after having been entrusted to the carrier for transportation.
at the time and place at which they ought to have been delivered, provided, identical goods were procurable from the destination market. In cases where there is no such market or that identical goods are not available, then the damages must be estimated by taking into consideration the price at which these goods could have been purchased in another market and adding to that value the cost of transportation plus a reasonable element of profits. Alternatively, the value can be computed by ascertaining the price at which the goods could have been sold in the market at the time and place of delivery.

Similarly, the measure of liability for damage to the goods is the resulting depreciation in the value of goods or the differential between the actual sale price and the reduced price at which the goods can be sold consequent to the damages caused. However, where additional or exceptional loss is alleged, due to certain circumstances peculiar to the consignor which are generally disregarded, the plaintiff must prove the reasonableness of such circumstances and that such information and probable consequences for its breach

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5. In Monte Video Gas and Dry Dock Co. Ltd. v. Clan Line Steamers Ltd. (1921) 37 TLR 866, the plaintiff was successful in recovering exemplary damages resulting from special circumstances peculiar to himself.
were in the contemplation of both parties at the time of the formalization of the contract.

Under the Warsaw Convention

Notwithstanding the manner of computing damages under the contract law, the Warsaw Convention, 1929 establishes its own regime of liability which is superimposed as lex specialis over the general municipal laws. Under the regime, "in the carriage ... of goods, the liability of the carrier is limited to a sum of 250 francs per kilogram." It is important to note that this provision constitutes a ceiling limit of awardable damages, by way of presumptive liability, and does not become a non-rebuttable or absolute liability. Within this limit the courts can decree damages based on individual merits or circumstances of each case or in other words in arbitrio judicis.

However a provision exists, where, if a consignor does not wish to be bound by this liability regime, considering the expensive nature or importance of his goods he can declare his value for the consignment.

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9. The Warsaw Convention, 1929, article 22(2). The currency mentioned is the French poinecare franc bearing a value of 65-1/2 milligrams gold of millesimal fineness 900 which can be converted into any national currency in round figures. Refer ibid, article 22(4).
Therefore, if a consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value and has paid a supplementary sum, should the carrier so demand, then the latter will be liable for damages up to a sum not exceeding the declared value unless he proves that that sum is greater than the actual value of the goods to the consignor at delivery. It will be seen that this provision may require payment of additional charge and if so paid, then only the declaration creates a presumption of liability in excess of the ceiling limit, and at the same time the consignor is estopped from unlimited liability.

The salient features of this provision are, first, the requirement to pay "a supplementary sum" over and above the normal freight charges by way of a surcharge for additional care and caution as well as the concomitant responsibility required to be undertaken in view of the valuable and attractive nature or the peculiar importance of the cargo. This payment con deemed to be a sort of insurance cover for the additional risk and enhanced liability of the carrier. Therefore, if such a declaration is made and additional payment

10. Ibid, article 32(3).
as levied has been effected, then the carrier is liable for the notified value. Also, if a declaration of value is made but no supplementary sum is levied or charged by the carrier, then notwithstanding the non-charge or non-payment of additional sum, the declared value remains valid and equivalent liability remains enforceable.  

Secondly, the carrier, of course, is entitled to rebut the declared value, if he provesthat this sum is greater than the actual value to the consignor at delivery, albeit the burden of proof for such rebuttal lies on the carrier to establish beyond doubt that the declared value was incorrect, inflated or unreasonable. It is, however, important to note that the declaration made by the consignor must be deliberate and specific and be so intended and mutually understood as part of the contract between the parties. It should not be a mere casual statement as to the value of the goods or a statement made in some other connection or for other purposes, e.g., customs octroi etc. Although no specific format or a specimen of declaration has been prescribed under the convention,

11. Also see Secretary of State of India v. Subhunath Poddar, (1892) 19 Cal 533.

12. refer Westminster Bank Ltd. v. Imperial Airways Ltd. (1936) 2 All 389.
yet it is expected to be clear and explicit in the intent and purpose.

Thirdly, if a valid declaration has been made, then the consignor is estopped from asserting that the value has been inadvertently under-declared and that his actual value was greater than the declared value and thus set up a plea for enhanced or unlimited liability. This estoppel appears equitable and logical under such contractual conditions.

Lastly, the paramount consideration for soliciting declaration of value appears to be that the carrier should not unwittingly or surreptitiously be made to a liability higher than the limits laid down. Hence, it is imperative that the consignor or his agent make a specific and appropriate declaration of value to enable the carrier to appreciate the nature of the risks involved and compute the leviable supplementary sums so chargeable. It has, however, been considered sufficient for purposes of declaration of value, if the description used for the cargo and other information supplied to the carrier was enough and adequate to enable him to compute additional charges.\textsuperscript{13} Further even when a supplementary charge is not made by the

\textsuperscript{13} Refer \textit{Bradbury v. Sutton}, (1872) 19 WR 800
carrier his enhanced liability still stands, once a valid declaration is made.

**Under the Hague Protocol**

The Hague Protocol elucidates the liability provisions of the Warsaw Convention to make them more broad-based and more strict, but at the same time retain adequate defences to the carrier. Thus there has been a process of rationalisation of liability regime. The salient liability provisions additionally introduced under the Protocol are discussed in succeeding paragraphs.

First, the Protocol enlarges the scope of the carrier's liability by providing for an award of pleader's costs and other expenses for the suit over and above the limits of liability for cargo stipulated under the Convention. It states that "the limits prescribed in this article shall not prevent the court from awarding in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff." 14

This clause, thus introduces an uncertainty regarding the gross liability of the carrier maintainable in any specific case. This element is also variable as such costs are bound to differ widely in different

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countries. Nevertheless, a need for such a provision had been acutely felt and was considered legitimate under certain restricted circumstances.

However, "The foregoing provision shall not apply if the amount of damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later". 15 This means that if the carrier had in writing offered a compensation for loss of or damage to the cargo to the plaintiff within the stipulated period or before a suit was instituted and that the net damages awarded by the court do not exceed the offer, then the plaintiff is not entitled to an additional award to cover the court expenses and other litigation costs. Because in such an event, the need for a suit would be suspect and the action would be deemed patently vexatious. On the contrary, however, it appears doubtful if, in cases of vexatious litigation, the defendant can plead to the court to reduce the damages awarded to the extent of his legal costs incurred for his defense; or that the defendant would be able to recover his costs of defense in a separate suit if

15. Ibid.
so instituted. This is a moot issue, but logical, if malfeasance and adverse intentions of the plaintiff can be proved.

Secondly, under the Convention, the liability of the carrier for loss or damage is in relation to the weight of the consignment and can be invoked for the deficiency in weight of the total consignment or separate packages. Normally the amount of liability shall be determined in accordance with the weight parameter. But there could be cases of integral or composite consignments in which each package cannot be considered separately for liability because the contents of the rest of the consignment lose their value in absence of the lost or damaged package or packages. Therefore, the Hague Protocol provides that "in the case of loss, damage or delay of part of registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damages or delay of a part of the registered baggage or cargo or of an object contained therein, affects the value of other packages covered by the same baggage check or air way bill, the total weight of such package or packages
shall also be taken into consideration in determining the limit of liability.\textsuperscript{16}

Therefore, in cases where certain part of the cargo is lost or damaged and as a consequence of the portion lost or damaged, the use or utility of the remaining is adversely affected or that the balance consignment is rendered useless or its value is detracted, then this aspect shall be material and will be given due consideration while awarding damages and even the full limit of liability may be recoverable despite the fact that a part of the consignment has been duly transported by air and promptly delivered. It is, however, pertinent to read this clause in relation to article 7 of the Convention which concedes a right to the carrier to require the consignor to make out separate consignment notes when there is more than one package. Therefore such situations of receipt of part consignment against an air way bill are likely to be rare and isolated instances only.

Thirdly, the protocol makes the liability stricter by deleting article 20(2) of the Convention which exonerated the carrier for damages" occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation when in all other respects

\textsuperscript{16. Ibid, article XI; or article 22(2)(b) of the amended Convention.}
he and his agents have taken necessary measures to avoid the damage. This defence plea has therefore been denied to the carrier under the Protocol. But it is equally relevant to appreciate that aviation since the days of Convention has become much less hazardous and a safer operation considering the improvements in the aircraft and its avionics as well as the modernised infrastructure of ground facilities and the reliability of meteorological forecasts.

Fourthly, the protocol introduces a new provision, 17 which accords a stricter interpretation to the term "wilful misconduct" to make it precisely equivalent and an accurate translation of the word "dolé" used in the French text of the Convention. Accordingly, wilful misconduct now becomes "an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result". Besides, the limit of liability is also extended to the servants and agents of the carrier acting within the scope of their employment when sued individually and severally.

Lastly, the carrier has been provided with a defence plea in cases where the loss or damage to the cargo could have resulted from the inherent defect, quality or vice of the cargo.\textsuperscript{18} This appears to be an important and legitimate plea in the carriage of perishable commodities. This clause could also become patently relevant in cases of carriage of domestic pets and animals.

**Under Montreal Protocol**

Under the Montreal Protocol No. 4, the presumed liability of the carrier in respect of carriage of cargo under the Warsaw system has been changed to a regime of strict liability broadly based on the legal doctrine of *res jusa loquitur*. Therefore, no evidence need be adduced so long as the occurrence which caused the loss or damage took place during the carriage by air. However, as per this protocol, the carrier is not liable if he proves that the destruction, loss or damage to the cargo resulted solely from one or more of the following reasons:—

(a) Inherent defect, quality or vice of the cargo.

(b) Defective packing performed by a person other than the carrier or his agents.

(c) An act of war or armed conflict.

\textsuperscript{18} Ibid, article 22; refer article 23(2) of the amended Convention.
(d) An act of public authority carried out in connection with the entry, exit or transit of the cargo.
(e) Contributory negligence or other wrongful act or omission of the claimant.

DEFENSE CLAUSES FOR THE CARRIER

The Warsaw system governing international carriage by air has over the years evolved from a qualified and rebuttable liability of the carrier under the Convention to the presumptive liability under the Hague Protocol to the strict liability under the Montreal Protocol. There has thus been a process of gradual evolution to modify the conditions governing liability to be stricter. This trend has been prompted, inter alia, by the development in the aviation technology resulting in greater safety of the aircraft and advanced ground facilities making flying more safe and convenient. Further, the economics of air transport industry has also rendered it capable of shouldering such stricter liability and be able to bear the burden of enhanced compensation as stipulated under the revised Warsaw system. However, whatever be the
nature of the contract and however strict may be
the contractual conditions, it is well nigh impossible
to enforce absolutely absolute liability. Hence
there are always certain clauses in the contract which
invest the transaction with practicality and treat
the other party as human and give due regard to
basic human limitations in the discharge of contractual
obligations. Therefore all contracts invariably
bear certain conditions, which if proved successfully
can wholly or partially exonerate the deficient
party for the nondischarge or partial execution of
the contract. Similar conditions do exist and are
dispersed over the Convention and other instruments
of the Warsaw system. It is proposed to discuss these
defence pleas available to the carrier in a consolidated
manner in the succeeding paragraphs.

The Plea of Force Majeure

This is a common and general clause in all contracts,
which implies that if it is not possible to execute the
contract due to forces beyond human control and
contemplation, or in other words where failure is
attributable directly or indirectly to an act of God,
the liability is to be viewed realistically under the
circumstances and condoned if so justified. This type
of defence is available to all common carriers whether
operating on rails, roads, river or sea. The air carriers too share it by sheer analogy of similar operational hazards and inherent limitations of human capabilities.

The generic clause of force majeure sums up all situations which are abnormal or contingencies entirely unforeseen or caused by an act of god or nature like tempests, storms, earthquakes, severe snowfall and so on. These eventualities are not seen made and are beyond his control to rectify. Hence an operator even when not negligent and diligently engaged in lawful activities to fulfill the contract yet may find it impossible to take such measures to avoid a loss or damage and thus fail for reasons beyond his control.¹⁹ In such cases both the parties share and bear their respective losses. Annals of case law are replete with decisions where the parties have been protected from inequitous liability under such contingencies.²⁰

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¹⁹. This plea can be readily derived from article 20(1) of the Warsaw Convention, 1929, though not explicitly provided thereunder. However, this plea is clearly defined in the Montreal Protocol (Rs. 4) 1975. Refer per Lord Wright in AN Luddit v. GC "Irwava Ltd., AIR 1947 FC 15.

²⁰. Refer Nichols v. Harland, (1875-76) LL 10 Ex 293. This was a case of similar plea due to exceptionally severe snowfall, thunderstorms, gale and tempest. Also refer River Steam Navigation Co. Ltd. v. Milanchand Tirnal, AIR 1955 Assam 11; PK Malalasamy Nadar v.K. Chennuswamy Madalier and others, AIR 1962 Madras 44.
The Plea of Acts of Enemy

This is another common plea available to all carriers, and air carriers can find specific protection for this under article 20(1) of the Convention. The Montreal Protocol No.4, 1975 also protects the carrier for any losses or damages due to "an act of war or armed conflict."

The provision under the protocol is broader in scope and can cover the conditions of national insurgency, civil wars and other riotous situations which are not caused by a war. In olden times this plea was more relevant to the maritime transportation where ships at sea could be pirated and hence, under the English common law, inability caused due to actions by kings' enemies was exempted. Air carriers also legitimately deserve this protection and in greater measure, because by virtue of their international operations, they are exposed to greater risks of this nature. A few illustrations where airliners hazard such risky situations will prove the point.21

In the past, such acts have occurred and transport aircraft have been shot at under apparently innocent

21. A well known example of such hazards can be hijacking of aircraft by subversive and anti-national elements. The shooting down of K.A.L. airliner by the Soviet fighter aircraft on their territory on 31 August 1983 brings this aspect into sharp relief.
circumstances. A few examples are given below:

(a) On 6 August 1946 a US plane on a regular flight from Vienna to Udine encountered bad weather and while attempting to find its bearings was fired upon by Yugoslav fighters and forced to crashland.

(b) On 19 August 1946 an unarmed US transport aircraft was shot down by Yugoslavia, killing its pilot and the crew.

(c) A big commercial airliner, which apparently had lost its way due to failure of its instruments in bad weather was shot down over Bulgarian territory in July 1955.

(d) In October 1963 a small private aircraft while flying over Czechoslovak territory was shot down.

The Plea of Acts of Public Authority

Under the various Conventions each state has a right to regulate exports from the country, imports from other countries and transiting of cargo through its airports for the purpose of customs and other requirements of entry, transit and exit clearance as well as for
prevention of spread of disease.\textsuperscript{22} Therefore acts of a public authority in connection with the compliance of above regulations may cause a loss of or damage to the cargo. The carrier is protected from any liability caused due to such an act which was beyond his control and for which he cannot bear any direct responsibility.\textsuperscript{23}

\textbf{Flea of Abundentia Cautela}

If the carrier and his servants take all requisite action and exercise abundant caution in executing the carriage by air and still are unable to avoid damage to the cargo, then their liability is exempted. "The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."\textsuperscript{24} This implies exercise of reasonable care and prudent foresight with acceptable standards of operational skill and expertise. If despite all this, damage occurs to the cargo then it is

\begin{itemize}
\item \textsuperscript{22} Refer the Paris Convention, 1919. This has been superseded by the Chicago Convention, 1944. Refer articles 13 & 14 of the latter.
\item \textsuperscript{23} Refer the Montreal Protocol No. 4, 1975
\item \textsuperscript{24} The Warsaw Convention, 1929, article 20(1)
\end{itemize}
deemed to be humanly impossible to execute the contract without such loss and nobody can force the other party to achieve an "impossibility", even if the contract so stipulates. The doctrine of lex non cogit ad impossibile also supports this contention and viewpoint. Hence the liability for such loss, under humanly unavoidable or inevitable circumstances is exempted.

The Idea of Contributory Negligence

At times, damage to the cargo may be as a result of the contributory negligence of the consignor. Therefore, "if the carrier proves that the damage was caused by or contributed to by the negligence of the injured person, the court may, in accordance with the provisions of its own laws exonerate the carrier wholly or partly from his liability." In such cases, generally both parties are in pari delicto, and may partially bear their respective losses.

In other words, if the carrier can establish that had the other party to the contract been more careful and vigilant, or less negligent and careless, the damage

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25. Ibid, article 27. The term "injured person" used in this article should be liberally interpreted to include not only a wounded passenger but any person whose interests are injured or has suffered a compensable damage.
could be avoided or mitigated, then the court may exonerate the carrier or reduce his liability.\textsuperscript{26}

But the connotation of negligence and expected standards of care, skill and expertise may vary from country to country and "the court may, in accordance with the provisions of its own law" accord different interpretation and thus belied the intended uniformity of liability. The concept of negligence was examined in the case of Smith v. Pennsylvania Central Airlines Corporation,\textsuperscript{27} and it was stated to mean "the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do."\textsuperscript{28} This however is a common sense interpretation whereas negligence is a matter of fact that needs to be fully proved in each case as a defense plea under the Warsaw regime of strict liability.

The Plea of Limitation

The Warsaw Convention also lays down a period of limitation for initiating suits, on the expiry of which

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27. (1948) 1 QBD Av B 184.
28. Ibid.
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this right lapses and actions instituted thereafter do not remain sustainable. "The right to damages shall be extinguished if an action is not brought within two years reckoned from the date of arrival at the destination or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped".\textsuperscript{29} Further "the method of calculating the period of limitation shall be determined by the law of the court seized of the cases".\textsuperscript{30} Though the concept of limitation is fairly uniformly understood in almost all legal systems, yet individual courts may bring in slight variation in the method of calculation and accept a little flexibility with regard to the cut-off date from which the period of limitation is computed. However, it is seen that the courts have generally applied the rule of limitation rather rigorously and have dismissed cases, even involving wilful misconduct, on the mere plea of limitation.\textsuperscript{31}

The Plea in Bar

The defence of plea in bar is admissible to the defendant when the complainant makes a wrong choice of

\textsuperscript{29} The Warsaw Convention, 1929, article 29(1)

\textsuperscript{30} Ibid

\textsuperscript{31} Vanderer v. SABENA and Panam. (1949) US Av R 25
Also refer Shutter v. RIR. (1955) US C AvR 250.
the court to bring an action for damages in respect of the contract for carriage by air. This is because under the Convention, the jurisdiction for such cases has been expressly stipulated and alternatives clearly defined. Therefore any erroneous exercise of option to select the court by the plaintiff provides the defendant a right to raise this plea and seek dismissal of case. It is mandatory that "an action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties either before the court having jurisdiction where the carrier is ordinarily resident, or has its principal place of business or has an establishment by which the contract has been made or before the court having jurisdiction at the place of destination." 32 These alternatives of jurisdiction are explicitly defined and adequately provided, however, the "question of procedure shall be governed by the law of the court seized of the case." 33 This provides flexibility and empowers the municipal courts to apply lex fori in deciding points of procedure.

The Plea of Negligent Pilotage

Under the Convention, if the carrier can prove

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32. The Warsaw Convention, 1929, article 28(1)
33. Ibid, article 28(2)
that he and his agents have taken all possible action, and that the damage resulted from an *actus reus* due to negligent pilotage or other incidents of flying, then his liability is compromised. "In the carriage of goods and luggage the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage."\(^3\)\(^4\) This clause appears to have been introduced on an analogy from the maritime laws where a carrier is exempted from liability incurred for reasons of errors in pilotage and navigation.\(^3\)\(^5\)

This provision has been deleted by the Hague Protocol, 1955\(^3\)\(^6\) and rightly so for several reasons. Firstly, the consignor who tenders cargo, under this provision risks an unknown and uncertain imponderable because he has no knowledge of the skills of the carrier's

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\(^3\)\(^4\). *The Warsaw Convention, 1929*, article 20(2).

\(^3\)\(^5\). Refer *Carriage of Goods by Sea Act, 1925* article IV, rule 2.

\(^3\)\(^6\). Article X. This deletes article 20(2) of the *Convention in toto*. 
Crews nor has he any hand in selecting personnel for pilotage and navigation. Therefore, it appears unreasonable and inequitous that the consignor be deprived of his rights for reasons on which he has no control and the carrier be provided a defence for incidents over which he has control and authority.

Secondly, this plea is not relevant nor tenable for claims in respect of injury to or death of a passenger. This clause therefore appears discriminatory. Thirdly, in view of the improvements in flight safety and increased profitability of the air transport industry, there has been a trend to gradually move towards stricter liability and this amendment of the Convention purported to make the carrier’s liability more strict and less defensible.

The Plea of Inherent Defect or Vice of Cargo

The common carriers who undertake transportation by sea, rail, road or river enjoy a protection against liability, should the loss of or damage to the cargo occur purely and solely due to its quality or condition. This plea of defence was not available to the air carriers under the Convention and they were exposed to
unjust and inequitable liability for no fault or negligence on their part. Therefore to eliminate this anomaly an appropriate clause has been introduced by the Hague Protocol which permits the carrier to nullify his liability, should the loss or damage result "from the inherent defect, quality or vice of the cargo carried." 36

Inherent vice is the quality of perishability of the goods which does not remain suspended during the carriage, or their susceptibility to decay or deterioration as a natural phenomenon, e.g. in the case of fruits, flowers, vegetables etc. The inherent infirmity could also be the quality of volatility or evaporation of liquids or tendency to effervescence or cause corrosiveness or acidity. 37 The courts have, however, enlarged the connotation of this clause while dealing with cases arising for other common carriers and have included improper and faulty packing particularly for fragile articles or leakages due to ill fitting bungs on the casks. 38 There are also cases of damage caused by endemic defect in the goods with no folly or negligence of the carrier whatsoever. 39

36. The Hague Protocol, 1952, article XII inserting article 25(2) in the Convention.
37. Refer Flower v. Great Western Railway, [1872] LR 7 CP 655.
The Plea of Good delivery

If delivery of cargo is made to a person so entitled and a clean receipt is obtained by the carrier then no liability persists thereafter. Such receipt ... without complaint is prima facie evidence that the same have been delivered in good condition and in accordance with the documents of carriage." However, "in the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage", but not later than the period for complaints specified below 40:

(a) In the cases of receipt, within three days from the date of receipt of the luggage and seven days from the date of the receipt of the cargo.
(b) In the cases of delay, at the latest within fourteen days from the date on which the luggage or goods have been placed at the disposal of the carrier.

"Every complaint must be made in writing upon the document of carriage or by separate notice in writing despatched within the times aforesaid " and while calculating the time, it is important to remember that " the expression days ... means current days, not

40. The Warsaw Convention, 1929, article 26(2)
working days. Therefore, if a complaint is not made in writing upon the document of carriage or is not communicated as a notice in writing, then "no action shall lie against the carrier." This would also imply that a delayed report, for whatever reasons, would not be able to invoke or resuscitate the carrier's liability however serious or genuine the damage may be.

However, liability is not extinguished by a delay in complaint where the carrier is guilty of deceit or fraud in concealing the damage in respect of which a complaint ought to have been made. It is obvious that in such a case a complaint can be lodged only when the fraud is revealed and therefore no strict time limit for this can be mandated except repeating a truism that for such a complaint the principle of reasonableness shall be applied and cases considered on individual merit and in the light of particular circumstances attendant on them.

It is pertinent to point out that a clean receipt is, at best, only a prima facie evidence of goods

Footnotes:
41. Ibid, article 35.
delivery and loses its validity if a proper complaint is made or action instituted by the entitled person for any damage, short-receipt or loss detected subsequently. Even if the consignee finds or suspects any damage to the consignment from its external physical appearance or finds short delivery in weight, he cannot insist upon taking an open delivery nor is the carrier bound to oblige the entitled person by granting him such delivery or inspection of goods. Therefore the consignee's only option is to accept delivery against a receipt of discharge and then lodge a complaint with the carrier in writing but with due promptness.

It is equally important to highlight that the Convention stipulates that the notice of complaint must be "despatched" within the statutory periods provided. This would imply that the notice may or may not reach the carrier within this prescribed period so long as proof of its despatch within the time limit can be established.

43. Refer Manohar Lal Gokal Prasad v. Governor General of India, AIR 1952, All 702.

44. In the case of Jiwakhun v. Union of India, (1970) 3 P.L.J. (Note) 17, the authorised period was interpreted to mean that the notice must be sent within that period. To interpret otherwise would imply curtailment of full use of the authorised period. Cf. A.B. Gandhi, Law of Carriage by Air in (Bombay, Milan Publishers, India, (1973) p.126.
Under the Hague Protocol, 1955, this statutory period for filing a complaint with the carrier has been enhanced as follows:

(a) For baggage, within seven days of the date of receipt.
(b) For cargo, within fourteen days of the date of receipt.
(c) In the case of delay, within 21 days from the date on which the baggage or cargo have been placed at the disposal of the carrier. 45

The Plea of Extra Ordinary Circumstances

The Convention does not apply to carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business. 46 But under the Hague Protocol, this plea has been narrowed in its effect and its applicability restricted to the provisions relating to documentation i.e. articles 3 to 9 of the Convention. 47 Obviously, therefore, the

45. Refer article XV. The days here mean current days and not working days.
46. The Warsaw Convention, 1929, article 34.
rest of the provisions of the Convention are fully applicable and the carrier is entitled to invoke the clause pertaining to the exclusion or the limitation of liability even for carriage under extra-ordinary circumstances and as such does not remain liable to unlimited damages.

The Plea of Non-declaration of Value

International carriage by air is governed by the Warsaw Convention and liability for loss or damage to cargo is limited to certain stipulated sums, irrespective of the value of the cargo. However, the consignor has a right to declare his value of goods or special interest in the consignment for delivery at destination. When this value or interest is duly notified by the consignor then he transcends the limitation of liability under the Convention. Therefore, if the consignor has not declared his expensive nature and the high value of the cargo at the time of delivery and later prefers a higher claim on the basis of the contents of the consignment there the carrier can set up the plea of non-declaration of the value to estop the consignor from claiming excess damages and thus limit his liability.
The interests of the carrier are adequately protected under the Warsaw Convention and the most important protection guaranteed under this is the global ceiling on the liability under certain stipulated contingencies. This saves the carrier from the risk of unlimited liability in the event of death of a passenger or loss of important or valuable cargo. But the Convention also provides certain circumstances under which the carrier is not entitled to invoke the protection of the Convention for exclusion or limitation of his liability. But to expose the carrier to unlimited liability and to prove that he is disentitled to attract the provisions of the Convention which exonerate or circumscribe his liability, the onus probandi rests on the plaintiff. It is, therefore, the complainant who is expected to adduce adequate evidence to establish beyond doubt the required nature of circumstances, since no defendant can be obliged to make self-incriminating statements or produce

48. For such cases, refer Reinhard v. Imperial Airways Ltd. (1936) 2 All E.R. 690 and Hillsdon v. Imperial Airways Ltd. (1939) A.C. 332, (1939) 2Q A.R. 65.
such evidence. The circumstances under which the carrier forfeits such protection are discussed in succeeding paragraphs.

Wilful Misconduct

"The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as in accordance with the law of the court seized of the case, is considered to be equivalent to wilful misconduct" or "the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment." The connotation of wilful misconduct has been elucidated under the Hague Protocol, 1955 to mean damage that resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of a servant or agent, it is also proved that he was acting within the scope of his employment.

Therefore, in order to assert a claim for unlimited liability and deprive the carrier of his protection, the plaintiff has to prove malafide

49. Indian Evidence Act, 1872.
50. The Warsaw Convention, 1929, article 25(1) and (2).
intention on the part of the other party or reckless behaviour with conscious awareness of the prejudicial consequences or negligence in patent disregard of the safety or security of the cargo during execution of the activities legitimately related to the performance of the contractual carriage. Therefore, a mere accident or an error in judgement or a basic human failing is not adequate to divest the carrier of his protection. The complainant must prove, beyond doubt the existence of a serious yet avoidable failure or utter want of diligence or deliberate defiance of regulations or acts of culpable negligence. Presumably, an element of mens rea will have to be established in the act of commission or omission and this burden of proof appears to be rather heavy to be fully and satisfactorily discharged.

Technical delinquency in documents

Secondly, the carrier relinquishes his limitation of liability for reasons of technical delinquency in the documents of carriage. The fatal deficiency in the air way bill could pertain to lack of obligatory particulars or absence of details regarding stopping places to establish the international nature of carriage.52 Besides, the carrier also gets denuded of this protection, if he accepts cargo (as per the Convention) or loads

52. The Warsaw Convention, 1929, articles 8 and 9.
the cargo in the aircraft (as per the Hague Protocol) without proper and valid air way bill having been prepared and duly signed.

Failure to Serve Statutory Notice of Liability

Thirdly, there is a mandatory requirement to serve a notice to the consignor regarding the applicability of the Warsaw Convention or the Hague Protocol, as relevant, governing the liability for carriage under the air consignment note/ air way bill. A failure on the part of the carrier to duly promulgate or inform of this condition to the consignor compels him to forfeit his limitation of liability under the Warsaw regime and he becomes liable to unlimited liability. This is a statutory obligation under the Convention which has been emphatically reiterated under the Hague Protocol. 53 Hence this requirement is inviolable and cannot be compromised without peril. The abovementioned mandate can be discharged by printing of a statutory notice on the air consignment note or air way bill. To elucidate the compliance of this requirement, the dicta of Rama Chandra Iyer, J in the

case of Indian Airlines Corporation v. Jotha ji,54 as stated below becomes relevant.

"It is comparatively rare to find any common carrier to convey goods under such liability (absolute liability) as it is invariably the practice with common carriers to enter into a contract, defining and limiting their liability. That practice is so universal that in the normal course of things one would accept any consignor of goods to look into such conditions which are found in the consignment notes. To say that in every case the carrier should prove that he drew the attention of the consignor to the clause ... is extending the rule beyond its limits." 55

Experimental carriage

Fourthly the Convention does not grant its protection to international carriage by air performed by way of experimental trial by air navigation undertakings with the view to the establishment of a regular line of air navigation, nor does it apply to carriage performed in extra-ordinary circumstances outside the normal scope of an air carrier's business."56

54. AIR 1959 Mad. 285.

55. Ibid. p.286.

However, through the Hague Protocol, the carriage performed in extra-ordinary circumstances has been brought under the protective umbrella of the Convention except with regard to the relaxation relating to strict compliance of the requirements pertaining to the documents of carriage. 57