

India and the Montreal Convention-A New Perspective

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Introduction-

The Indian aviation industry is one of the fastest growing aviation industries in the world. Since liberalization, aviation industry in India has undergone a rapid transformation. Earlier, air travel was a privilege, only a few could afford, but today air travel has become much cheaper and is within the reach of a much larger number of people. This is because the airline industry has now been dominated by privately owned full service airlines and the low cost carriers. With this development in air travel, there came up the issue of aviation liability. There is an international legal regime governing the liability of air carriers for injury or death of passengers, for destruction or loss of or damage to baggage and cargo and losses caused by delay in International carriage of passengers, baggage and cargo. The first aviation insurance policy was written by Lloyd's of London in 1911 and subsequently stopped in 1912 after a bad weather.

The legal regime of air carrier liability was also considered under the Warsaw Convention 1929, the first recognition of airline industry, as we know today. By 1933 it came to be realized that the liability regime requires to be served by a specialist industry sector. The International Union of Marine Insurance then set up an Aviation Committee and by 1934 eight European Insurance Companies and pools were formally established and finally the International Union of Aviation Insurance was born. The aviation liability regime is set out in International instruments like the Warsaw Convention 1929¹, the Warsaw Convention as amended by Hague Protocol 1955², the Guadalajara Convention

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¹ Convention for the unification of certain rules relating to International carriage by Air signed at Warsaw on 12th October 1929.

² The protocol modifying the Warsaw Convention signed at The Hague on 28th September 1955.

1961³, the so called Montreal Agreement of 1966⁴, the Guatemala City Protocol 1971⁵ and the Montreal Convention 1999⁶.

Aviation Conventions and compensation levels in India

For a long time India confined itself to ratify only to instruments – the Warsaw Convention 1929⁷, which was signed in 1947, and the 1929 convention as amended by The Hague in 1973⁸. Based on these instruments, the liability regime in the country was given effect to by the Carriage of Air Act 1972. With the passage of time while many countries made amendments to the provisions of the two archaic instruments, India continued with the very old two instruments with respect to identify the liability of the carrier. Finally, on 1st May 2009 India became the 91st country to have ratified the Montreal Convention 1999⁹ (MC99), which is a vast improvement in its predecessors and enable realistic compensation.

Before under the Warsaw Convention 1929 the carriers were liable up to 125,000 Poincare gold francs (approx 8,300 USD at that time) and under the Hague amendments it raised the cap to 250,000 Poincare gold francs (approx. 16,600 USD at that time). It was under Montreal additional Protocol No 2 1975 where the expression of 250,000 gold francs was changed including other amounts under these Conventions into Special Drawing Rights (SDR).

Today consumer and consumer protection is the prime concern. The MC99 focus towards this protection. Flying by air is no longer deemed to be a dangerous activity; it is now a part of modern life. The old limitations were therefore replaced by a two- tier compensation system where the carrier is strictly liable up to the first 100,000 SDR. Above that level, liability attaches for unlimited damages with a reversed burden of

³ **Convention Supplementary to the Warsaw Convention, for the unification of certain rules relating to international carriage by air performed by a person other than a contracting carrier signed at Guadalajara on 18th September 1961.**

⁴ **Montreal Inter-carrier Agreement 1966**

⁵ **Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, As Amended By The Protocol Done At The Hague on 28 September 1955, Signed at Guatemala City, on 8 March 1971**

⁶ **Convention for unification of certain rules for international carriage by Air signed at Montreal on 28th May 1999.**

⁷ **Id pg 1**

⁸ **Id pg 1**

⁹ **Came into effect on 30th June 2009**

proof. The 100,000 SDR was revised up to 113,100 SDR s (approx 79 lakh rupees) on December 30, 2009, which is in accordance with MC 99, Article 24.

The provisions of Montreal Convention 1999 has been incorporated into the Carriage by Air (Amendment) Act 2009

Provisions of MC99

- 1. The Two-Tier System-** The two- tier system is the unique feature of the Montreal Convention, which is definitely an improvement over the Warsaw regime of air carrier liability. The two-tier system means that the carrier is strictly liable for the first 113,100 SDR s¹⁰ of damage and cannot exclude or limit this liability except to the extent the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the passenger¹¹. For damages in excess of 113,000 SDR s, the carrier is not liable if the carrier proves that the damage was not caused by the negligence or other wrongful act or omission by the carrier or that the damage was solely due to the negligence or other wrongful act or omission of a third party¹².
- 2. Indian Law and MC99-** The Indian carriage of goods by Air (Amendment) Act 2009 is in consonance with MC 99. The MC 99 is unclear about calculation of damages though it has unified certain rules relating to international carriage by air. Question of damages, conflict of laws and other procedures will be governed by the law of the court seized of the case. In case of Indian Court, it would apply Indian Law.

The claim of 113,000 SDR is not available to all passengers. It is only a limit not a lump sum payable under any circumstances. The claimant has to prove the extent of the actual damage suffered. It also depends upon the age factor of the deceased.

¹⁰ Montreal Convention 1999, Article 21(1)

¹¹ Id Article 20

¹² Id Article 21(1)

3. Invoking MC 99- the Indian carriage by Air Act 1972 covers the provisions of Warsaw Convention 1929 and Warsaw Convention as amended by the Hague Protocol 1955. The Warsaw Convention 1929 has been ratified by 152 state parties, and the Warsaw Convention as amended by The Hague has been amended by 137 state parties. Though the Montreal convention 1999 supersedes all the previous conventions relating to carrier liability and applies to international carriage of persons, baggage or cargo performed by aircraft for reward the Warsaw system will keep playing an important role in international carrier liability for years to come.

The application of MC99 has been determined under its provisions as follows-
“International carriage means any carriage in which place of departure and place of destination are situated in-

- a) Within the territories of two state Parties
- b) Within the territory of single State Party if there is an agreed stopping place within the territory of another state, even if that state is not a party to the convention.”¹³

Thus if an Indian passenger is traveling to a country which is not a party to the MC 99, say for example Ghana, he can enjoy the benefits of MC99 if he travels India-Ghana- India but he cannot get the benefits if he travels Ghana- India- Ghana. In the latter case Warsaw Convention as amended by Hague will be applied since India and Ghana are both parties to that convention, in the former case MC99 can be invoked. ¹⁴

It may be noted that MC99 does not allow for claims for damages for mental anguish and inconvenience caused or suffered by the claimant.

4. Question of Jurisdiction- In case of air accidents the MC99 provides for five jurisdiction options to bring an action for damages. It provides that an action for damages must be brought where the carrier is domiciled, or where the carrier has

¹³ Article 1(1)

¹⁴ Stephen Eriksson, ‘Aviation claims in India- some thoughts regarding the new Montreal Convention’, current developments in Air and Space Law, pg197

its principal place of business, or where the ticket has been brought through the carrier's place of business, or at the place of final destination or even where the passenger at the time of the accident has his or her principal and permanent residence and where the carrier operates either its own aircraft or through code sharing.¹⁵

Issue of Mangalore Air Crash

An overview of recent Mangalore Air Crash throws light on (issue of liability, compensation and the jurisdiction in claiming damages) all the above provisions.

An Air India Express flight from Dubai to Mangalore crashed while landing on 22nd of May 2010, killing 158 of 166 people on board including crew. Investigation reports revealed that it was due to the Captain's failure to discontinue an unstabilized approach despite three calls from the First Officer and a number of warnings from the EGPWS.¹⁶

The Air India Express operated a Boeing 737-800 Quick Turn Around (QTA) flight on sector Mangalore-Dubai-Mangalore. Capt Z Glusica and First Officer HS Ahluwalia, along with 4-cabin crew operated the flight. The outbound flight was uneventful. The accident was caused by a chain of multiple errors that took place right from the top of descent. The captain had slept for a considerable period of time during the cruise phase. On waking up, there was a distinct possibility of his transiting into sleep inertia. The crew had failed to plan the decent profile so as to arrive at correct altitude for positioning into ILS approach. The aircraft was high on approach and touched down on the runway, much farther than normal. The aircraft over short the runway including the strip of 60 metres and continued into the Runway End Safety Area (RESA) of 90 metres. Soon after which, the right wing impacted the localizer antenna structure located further at 85 meters from the end of the RESA. Thereafter, the aircraft hit the boundary fence and fell into a gorge.

The injuries to the occupants were mainly due to the aircraft impacting the gorge and subsequent fire. Most of the passenger had received fatal injuries. A large number of

¹⁵ Article 33 of MC99

¹⁶ Enhanced Ground Proximity Warning System

fatalities were due to burns. Of the eight survivors, seven passengers had received serious injuries and one had received minor injury. An action claiming compensation was brought in India applying the fifth jurisdiction i.e., the principal and permanent residence of the passengers and the domicile of Air India Express.

Compensation

The compensation was settled in two parts-

Firstly, as interim compensation: It is important to know that the interim compensation of Rs 10 lakh offered by the airline is their statutory duty to do so under section 28 of Schedule III¹⁷. This amount will be deducted from the final compensation.

Secondly, final settlement: Consortium of insurance companies may want to settle as soon as possible, individually with the families. They will offer compensation amounts depending on the basis of calculation of the quantum of damages claimed. The important factors that influence the offer which the airline/insurer will make are (i) age of the deceased passenger, (ii) educational status, (iii) employment, (iv) last salary drawn, (v) marital status, (vi) general economic status, (vii) number of dependents, (viii) the extent of dependency, among others.

The Prime Minister of India, Dr Manmohan Singh announced ₹2 lakh (US\$3,990) or €3,390) for the families of the dead and ₹50,000 (US\$1,000) for the injured to be allocated from the Prime Minister's National Relief Fund

The Civil Aviation Ministry announced Rs 10 lakh each, compensation for families of the dead. Karnataka government also announced a compensation of ₹2 lakh (US\$3,990) to the families of the dead.

The Airline announced interim compensation of ₹10 lakh (US\$19,950) for passengers above 12 years of age, ₹5 lakh (US\$9,980) for passengers below 12 years of age and ₹2 lakh (US\$3,990) for every injured passenger. This compensation is over and above the compensation announced by the Prime Minister. Additionally, Air India has said it would offer jobs to the survivors.

¹⁷ Carriage of Goods by Air Act 2009

The Kerala High Court issued notices to the Centre and Air India on a petition seeking compensation of Rs 75 lakh each to the victims under the Montreal convention, Air India was obliged to pay a minimum compensation of 100,000 SDRs (Special Drawing Rights) amounting to Rs 75 lakh. The version of the Court was that according to the Montreal Convention, the air carrier is strictly liable to pay the said amount without the proof of any fault.

Air India preferred appeal against this decision. The Division Bench of the Kerala High Court comprising Justice C.N. Ramachandran Nair and Justice P.S.Gopinathan, while setting aside the judgment of the single judge, observed that the third schedule to the Carriage by Air Act, 1972, do not provide any minimum compensation for the death or injury of a passenger. The carrier is liable to pay any actual damages proved by the claimants in the case of death or injury. The carrier can negotiate this sum through settlement or in a civil court of competent jurisdiction. The court further held that the actual damages payable had to be claimed and proved by the injured or the legal heirs of a person died in the air crash in a civil court if no settlement was possible.¹⁸

Conclusion-

Thus the above judgment though has been challenged before Hon'ble Supreme Court, it has raised a new debate regarding the amount of compensation under the Montreal convention. Recently a city-based organization, '812 Foundation',¹⁹ has filed criminal petitions in the Supreme Court as well as the second JMFC court in the city, seeking punishment for those who were responsible for the 2010 air crash tragedy. The organization has enclosed to its petition an investigation report prepared by it, to prove that the death of 158 people is a homicide arising out of the negligence of Airports Authority of India. In the petition, the organization has also held Air India responsible for not subjecting the ill-fated aircraft to mandatory annual checkup as required for its flight

¹⁸ Vishal Gehrana, "India and Montreal Convention-The New Limits of Liability", CASL news letter, vol4 pg 32

¹⁹ An organization set up by a Mumbai-based advocate, Yashwant Shenoy, city-based lawyer, Nayana Pai, and a member of a family affected by the above tragedy

capability. In fact, the organization has said, this aircraft was not put through the annual tests for the last four to five years. The petitioners have argued that the tragedy, which had occurred at Kenjar near the airport on May 22, 2010, was not an accident, but murders resulting out of the negligence of the entities concerned. The petition seeks stringent punishment to those responsible for the tragedy. The main aim of these petitions is to ensure that those who were responsible for this catastrophe are punished, rather than ensuring payment of compensation to the affected persons. The organization has filed private complaints under section 200 of Criminal Procedure Code. A total of ten organizations and individuals including Air India, Airports Authority of India, and Director General of Civil Aviation, have been mentioned as respondents in the case.²⁰ Thus this has given a new outlook to the Montreal Convention and there is a need to re look not only on the levels of compensation but also to punish those persons responsible for this tragedy. There is a need to include the provision of liability for negligence so as to punish the entities concerned.

“With the passage of time public memories may fade but those who lost their loved ones will always feel the tinge of pain and despair for the rest of their lives. It is a bigger tragedy that for some victims there are no close family members left to grieve.”

²⁰ www.daijiworld.com, at May 22nd 2013