**PAPER**

**TITLE** – “**AIRLINE LIABILITY AND INSURANCE**”

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Airline Liability and Insurance

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Aviation Industry in India is one of the fastest growing aviation industries in the world. With the liberalization of the Indian aviation sector, aviation industry in India has undergone a rapid transformation. From being primarily a government-owned industry, the Indian aviation industry is now dominated by privately owned full service airlines and low cost carriers. Private airlines account for around 75%share of the domestic aviation market. Earlier air travel was a privilege only a few could afford, but today air travel has become much cheaper and can be afforded by a large number of people.

The rights and liabilities of air carriers are governed by the Carriage by Air Act, 1972 [as amended in 2009] (‘the Act’). The Act extends to the whole of India. Consequently, the Act is applicable to Indian citizens involved in domestic carriage by air and in international carriage by air, irrespective of the nationality of the aircraft performing the carriage.

In brief, therefore, the Act[[1]](#footnote-1) sets out a limit up to which a carrier is absolutely liable[[2]](#footnote-2) for damage/death/ bodily injury sustained in course of air travel on board a carrier and in the course of any operations of embarking/disembarking in context to a passenger.

The Act also established a ‘per kilogram’ limit of liability for personal baggage (checked-in and hand) and air freight cargo to which a carrier is absolutely liable.

Section 5 of the Act establishes the liability of a carrier in respect of the death of a passenger in the course of the carriage by air subject to the Rules contained in First Schedule[[3]](#footnote-3) ; Second Schedule[[4]](#footnote-4); and Third Schedule[[5]](#footnote-5), as the case may be. Section 5 does not oust the jurisdiction of any other law/rule in force in India, including the Fatal Accidents Act, 1855. As such the Act is not in derogation of any other law in force in India.

To put it differently, from the point of view of a claimant, the Act establishes the liability of a carrier, expressed in liquidated damages which are paid out as compensation, if a passenger engaged in international and domestic carriage by air is involved in an air crash/accident.

The recent Mangalore crash of an Air India flight from Dubai brought to the forefront the yet untested liability of the air carriers and the compensation due to passengers under the Montreal Convention of 1999 (“Montreal Convention”) which was ratified by India only last year.[[6]](#footnote-6)

Until recently, India was a signatory to the antiquated Warsaw Convention of 1929 (“Warsaw Convention”) as amended by the Hague Protocol of 1955 (“Hague Protocol”) which secured significantly low limits of liability on the carrier in case of death or injury to the passengers or upon delay, lost or damaged baggage. By virtue of the Carriage by Air (Amendment) Act, 2009 revising the Carriage by Air Act, 1972 (the “Act”), India has ratified the Montreal Convention securing higher levels of compensation and obviating discrimination for Indian passengers. This bulletin provides a glimpse into the prior and current international carrier liability in case of passenger death and bodily injury.

*1.0 Status prior to accession of Montreal Convention*

**1.1 Liability**

The Warsaw Convention and Hague Protocol regime provided a maximum liability of air carriers for bodily injury or death of passengers of 250,000 francs[[7]](#footnote-7) (approximately $46,666[[8]](#footnote-8)). This was not only a significantly low compensation but the regime also did not make provision for any advance payment by the carrier leaving claimants to go against the carriers to seek compensation. This is evident from the October 2009 ruling[[9]](#footnote-9) in respect of a crash of a domestic flight of Indian Airlines in 1988 wherein the Gujarat High Court determined an amount of Rs. 7.53 lakhs (approximately $16,700) as compensation based on the income of the victim in 1988 viz., Rs. 1 lakhs (approximately $2,200), likely residual life, potential expenses during residual life etc. and awarded a 9% interest from the date of filing the appeal. The other interesting aspect of the judgment is the heavy reliance on verdicts of motor vehicle claims.

**1.2 Jurisdiction**

The victim or their families were entitled to take action against foreign carriers in the territory of one of the signatories of the Warsaw Convention which could be either where –(i) the carrier maintains its principal residence, (ii) the carrier has its primary location of business, (iii) the contract is made, or (iv) the flight intended to have its final destination. The Warsaw Convention effectively left it to the claimants, who were not residents of the above states, to pursue a claim against such carriers in a jurisdiction other than their own which was not always feasible for claimants.

*2.0 Status subsequent to accession of Convention*

The Montreal Convention, formally the Convention for the Unification of Certain Rules for International Carriage, is a treaty adopted in 1999 and amended provisions of the Warsaw Convention and Hague Protocol concerning compensation for the victims of air disasters. It unified the rules on international carriage by air and modernized limitation of liability for international air transport.

**2.1 Two-Tier Liability**

It introduced a two-tier liability system: (i) a first tier of strict liability for damages of up to 100,000 SDR[[10]](#footnote-10) (approximately $155,000) and; (ii) a second tier of liability based on the presumed fault of the carrier in which case there is unlimited liability. It is pertinent to note that while the Montreal Convention provides for a first-tier 100,000 SDR as a strict liability, this amount does not reflect the minimum liability of the carrier. In other words, the Convention has left the determination of the level of damage to the local law. As such, if the courts in India rule that the damage sustained by each victim in the Air India crash is up to 100,000 SDR, the carrier cannot escape liability on the ground that it is not responsible for the accident.

Furthermore, the compensation package in respect of the second tier of liability is assessed in accordance with the provisions of the Act which incorporates the Montreal Convention. Globally, under this Convention, the amount of compensation is worked out in each case separately on “proof of loss basis” and determined and dependent upon the parameters of loss suffered by each passenger or claimant namely, the age of the deceased, educational status, employment with salary, earning capacity, dependants, general economic status etc. In the event, the claimants challenge such compensation amount, and where damages of more than 100,000 SDR are sought, the airline would have the burden of proof that the incident was not on account of its negligence and may thereby avoid liability by proving that the accident which caused the injury or death was attributable to the negligence of a third party.

**2.2 Jurisdictional Flexibility**

In addition to the options provided under the Warsaw Convention and Hague Protocol, the Montreal Convention added a “fifth” jurisdiction namely the principal and permanent residence of the passenger provided the carrier operates in such jurisdiction and such territory is a signatory to the Convention. This would ensure that Indian residents can claim in the Indian courts against any airline as long as such journey is ratified by the Convention. Given that the determination of damages under the Convention is a matter of the local law, the jurisdiction where a claimant brings an action becomes significant as the assessment of damages may vary from one jurisdiction to another.

*Impact on compensation in the recent Mangalore crash*

In the recent crash, since the carrier NACIL was operating an international carriage from Dubai to Mangalore, the provisions of Montreal Convention were triggered and NACIL had to pay the compensation based on the two-tier system with strict liability at the outset. The claimants could potentially bring action in the UAE courts (depending upon where the contract is made), or India (principal place of business of carrier) or any third state provided permanent residence of such claimant is a party to the Convention.

We note[[11]](#footnote-11) that the insurers of NACIL have offered a flat interim compensation to the next of kin of the 128 deceased passengers viz., Rs. 10 lakhs (approximately $22,000) to each adult deceased passenger; Rs. 5 lakhs (approximately $11,000) to each passenger below the age of 12; with Rs. 2 lakhs (approximately $4,400) disbursed to each injured passenger.

Given the low compensation, it is likely that the next of kin of some of the deceased passengers and the injured passengers would seek a higher final compensation which would be at least close to 100,000 SDR or $155,000. It appears that NACIL is attempting to determine any further compensation on the basis of “proof of loss” implying that a child and an adult placed low in the economic strata would qualify for less compensation than an adult who is healthy and was from a good economic status[[12]](#footnote-12), since such amount would be much lesser than 100,000 SDR and this would reduce NACIL’s liability. Assuming the claimants file the claim in India, it will be interesting to see whether the courts assess the strict liability on the basis of the “proof of loss” basis or be more liberal in granting compensation. The final compensation determined would set the base line for compensation in future liability cases.

Most aviation liability insurance policies specify that the aircraft will be covered as long as certain named pilots are flying the plane and these pilots meet all F.A.A. requirements. These conditions are usually contained in what is called the "Pilot Warranty" provision.

The insurance companies are very strict when it comes to the issue of whether or not the pilot warranty has been met. Accordingly, if a named pilot was not operating the aircraft when a mishap occurred or he or she was not current (no medical, biennial or other currency requirement), there is a very high possibility that the insurance company will not pay for the injury or damage, despite the fact that the particular pilot or currency had nothing to do with the accident. Furthermore, while there is a split amongst the states, the majority of state courts will uphold the coverage denial under the jurisdictional interpretation that if the pilot warranty provision was not met, it does not matter that this had nothing to do with the cause of the accident.

Therefore, in these states (California being one), it is imperative that only pilots authorized under the insurance policy who are properly certified (current) are operating your aircraft. If not, you could be left "holding the bag" as an aircraft owner/operator, with no liability coverage or legal defense coverage. That could get very expensive, in more ways than one, no matter what the cause.[[13]](#footnote-13)

**CONCLUSION**

No doubt, the Montreal Convention has been a long-awaited change providing airlines and the passengers a more reliable regulation as opposed to the Warsaw regime which provided extremely low limits of compensation. Furthermore, with a large number of countries where Indian carriers have services, being signatories to the Montreal Convention, the accession has brought reasonable parity in the compensation available to Indian passengers. However, since liability under Montreal Convention would vary largely depending upon the jurisdiction where the claim is made, it is yet to be seen whether the Convention also facilitates swift recovery of proven damages without the need for lengthy litigation by the method of strict-liability for Indian residents.

1. The Carriage by Air Act, 1972: The Act contains 9 substantive sections; three Schedules; and one Annexure. [↑](#footnote-ref-1)
2. Absolute Liability: a concept in law which means that a carrier is liable, irrespective of whether or not it was at fault in the damage sustained by a passenger on board. Also known as ‘no fault’ liability, it a legal concept in civil law jurisprudence. [↑](#footnote-ref-2)
3. The Carriage by Air Act, 1972: First Schedule harmonizes provisions of the Warsaw Convention 1929 on liability of an air carrier engaged in international civil aviation. [↑](#footnote-ref-3)
4. The Carriage by Air Act, 1972: Second Schedule harmonizes provisions of the Hague Protocol, 1955 which amended certain provisions of the Warsaw Convention 1929 on liability of an air carrier engaged in international civil aviation. [↑](#footnote-ref-4)
5. The Carriage by Air Act, 1972: Third Schedule harmonizes provisions of the Montreal Convention, 1999 which has replaced the Warsaw System related to liability of an air carrier engaged in international civil aviation. The International Civil Aviation Organization (‘ICAO’) has reviewed and updated carrier liability to 113,000 SDR effective 2009. [↑](#footnote-ref-5)
6. w.e.f. June 30, 2009 [↑](#footnote-ref-6)
7. Rule 22(5) of Schedule II of the Act provides that “The sums mentioned in francs in this rule shall be deemed to refer to a currency unit consisting of sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment”. [↑](#footnote-ref-7)
8. $1 = Rs. 45 [↑](#footnote-ref-8)
9. Airport Authority of India v. Ushaben Shirishbhai Shah & 6 Ors. (2010) 1GLR 321 [↑](#footnote-ref-9)
10. Special Drawing Rights as defined by IMF and 1 SDR = $1.5 [↑](#footnote-ref-10)
11. Statement by Mr. Praful Patel, Minister of State for Civil Aviation in the Upper House of the Parliament (Rajya Sabha) as released by Press Information Bureau on August 3, 2010 <http://pib.nic.in/release/release.asp?relid=64012> [↑](#footnote-ref-11)
12. Smitha Nair, Mangalore crash: Victims’ income to decide payout (September 17, 2010), http://ibnlive.in.com/news/mangalore-crash-victims-income-to-decide-payout/131202-3.html, and retrieved on September 23, 2010. [↑](#footnote-ref-12)
13. Richard T. Miller, Specialist in Aviation Law, *“Pilot Warranty and Aviation Liability Sometimes Cause Doesn't Matter”* [↑](#footnote-ref-13)