INDIAN AVIATION LIABILITY REGIME THROUGH THE PRISM OF INTERNATIONAL AVIATION LIABILITY LAW

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ABSTRACT

The growing aviation sector of India holds key for economic development at par with developed countries. The recent scheme of Regional Connectivity Scheme (RCS) – *'ude desh ka aam nagrik (UDAN)'* by the government of India with the objective of making air travel affordable and accessible to people, has tremendously benefited the aviation industry. According to Director General of Civil Aviation (DGCA) data during January-November, 2017 number of travelers has reached to 105.9 million at the pace of 17.27 per cent. Simultaneously, the number of disputes between service provider and travelers has also become more frequent and obvious.

India, being member and signatories of all major international aviation instruments, has attempted to bring domestic legislations accordingly. However, the legal regime for liability issues are scattered one. The Carriage by Air Act, 1972 has been amended in accordance with the Montreal Convention, 1999 but yet it is not consumer friendly.

In this connection, the paper seeks to analyze the existing framework dealing with the liability regime in aviation sector in India. It seeks to critically evaluate the provisions in the light of international Conventions. The paper also attempts to comparatively analyze the US and EU framework on the same.

Keywords: India, Liability, Compensation, Convention, International Law

INTRODUCTION

The twentieth century has been a boon in terms of technological advancement in distinct field. The aviation sector, since in its shape of cutting edge, as a means of transport has evolved tremendously across the globe. The aviation sector, likewise, as a means of transport, contributes enormously to economy by invigorating connectivity. However, this gleaming sector has faced a blatant setback following the 11 September 2001 terrorist attacks. Aviation industry which was enduring losses, toiled incessantly to survive in the market. Concurrently, the concerns of travelers also need to take into account in terms of liability arising in the event of death, injury or delay of flight. Steadily, the industry managed to ride out the storm. The International Air Transport Association(IATA) data show that the dark ages of the aviation industry are over and now it is tilted towards golden age.

India, realizing this potential, recently has launched a scheme of Regional Connectivity Scheme (RCS) – *'ude desh ka aam nagrik (UDAN)'* with the objective of making air travel affordable and accessible to all people. The 12th Five Year Plan aims "to propel India among the top five civil aviation markets in the world by providing access to safe, secure and affordable air services to everyone…"[1] According to IATA's released 20 year-air passenger Forecast, India with the 278 million passengers will be the third largest aviation market thereby replacing the United Kingdom in 2026 and by 2035 it will cross the mark of 442 million.[2]

With this increased operation of aviation sector as a mode of transportation, incidents of mishaps, accidents and other complications are bound to increase. As we have seen in the recent past. Accordingly, it is necessary to have an effective, efficient and consumers' friendly liability mechanism to fix the responsibility expeditiously.

The world community has been agile in charting and regulating the air navigation foreseeing the future projection of its use.[3] The first international Convention[4] regulating the air navigation was signed in Paris on 19 October, 1919. In 1929, another Convention came into

[1] Report of Working Group on Civil Aviation for formulation of Twelfth Five Year Plan (2012-17), http://civilaviation.gov.in/sites/default/files/moca_001320.pdf
[2] Realizing India's Aviation Potential, Press Release No. 63 (Oct. 21, 2016), http://www.iata.org/pressroom/pr/Pages/2016-10-21-01.aspx
[3] The Postal History of ICAO, https://www.icao.int/secretariat/PostalHistory/1919_the_paris_convention.htm
[4] Convention Relating to the Regulation of Aerial Navigation (popularly known as "Paris Convention, 1919"). To which India ratified on 1st June 1922.

being for the regulation of liability mechanism in the international aviation carriage.[5] The Convention arrayed a framework for a unified system of liability claim, assessment of damages in case of death, injury, and delay of passengers and delay or damage to luggage. With the passage of time, varying need, and demands from several quarters have brought forth an exceedingly composite and scattered legal mechanism for liability claims. Many additional provisions have sprouted at the international level, which ultimately led to enactment of the Montreal Convention (hereinafter referred to as MC) 1999. However, the MC was intended to replace those complex mechanism but still it is far away in timer to achieve.

The international aviation law in general and liability law in particular is a unique blend, or as put by someone 'unusual hybrid' of both public international law as well as private international law. The Warsaw Convention and several other instruments set out the primary rule for settling the dispute, though adjudication and interpretation on that liability mechanism is done by the domestic judicial bodies. India, being active participant in these international events, has molded up domestic mechanism along the lines of international standards. Having said that, India has replaced the Carriage by Air Act 1934 with the Carriage by Air Act 1972 and has amended the latter several times.

Considering the complexities involved in the governance of the sector viz: public international law; private international law; and country specific laws and regulations make study and governance of this sector very complicated. Therefore, the paper examines the aviation liability mechanism at the international space and afterwards it drills into the Indian scenario.

INTERNATIONAL AVIATION LIABILITY MECHANISM IN NUTSHELL

The aviation liability mechanism since the advancement of the sector has been debated and discussed immensely. Presently, it is being governed through two major instruments: one Warsaw Convention, 1929 and its additional instruments, i.e., collectively called as Warsaw System and second Montreal Convention 1999. The development of these instruments has been discussed as follows:

[5] Convention for the Unification of Certain Rules Relating to International Carriage by Air, 1929 ("The Warsaw Convention").

The Warsaw Convention 1929

The Convention regulates the liability mechanism applicable in the event of transportation of 'persons, luggage or goods' by air carrier.[6] The Convention has emerged as the most litigating instrument of private international law. Several Protocols to the Convention and supplementing instruments to it have developed over the years. Those are in together called as the 'Warsaw System'.[7] The Convention was intended to operate the relationship of consumer and service provider in the event of any accident, damage, injury or death. It also contains liability provision in case of delay.[8] However, during the initial stages of the development of aviation sector, the Convention was pro-service provider rather than consumer friendly. The Convention fixes the liability at 125,000 *'poincare' gold francs* (approximately $8300 at the time of 1933) in case of injuries to passengers, 250 gold francs per kilogram ($17 at the time of 1933) in case of damage to cargo[9] and 5,000 francs for the hand luggage of a traveller. However, carrier was entitled to take the defense that it had taken "all necessary measures" to thwart any wretched incident from befalling. The Convention provided four kinds of jurisdiction where any claim could be instituted. Plaintiff could an action for damages in one of the High Contracting Parties where the carrier "ordinarily resident [reside], or has 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".[10]

This pro-service provider provisions and inadequate amount of compensation was questioned by the United States lawyers and alleged that the Warsaw has created 'moral hazard'. Subsequently new Protocol was added to the existing mechanism.

The Hague Protocol 1955

The International Civil Aviation Organisation (ICAO) Legal Committee drafted a new Protocol after considering the ever-growing discontentment of the United States. The Protocol unequivocally doubled the liability amount to 250,000 francs ($16,600).[11] Yet, the United

[6] *Id.* art. 1.
[7] *Supra* note 3.
[8] *Supra* note 5, art. 19.
[9] BRIAN F. HAVEL & GABRIEL S. SANCHEZ, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL AVIATION LAW, Cambridge University Press (2014).
[10] *Supra* note 5, art. 28.
[11] *Supra* note 9.

States did not ratify the Protocol. Though, The Hague Protocol attempted to address the issue, nevertheless remained carrier friendly which led to another round of discussion.

Guadalajara Supplementary Convention 1961

The Supplementary Convention titled 'Convention to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by Person other than the Contracting Carrier, 1961 included the modern modalities of transport when a person was not a party to the agreement for carriage[12] and interpretative stability to Article 1(3) of the Warsaw Convention.[13]

The Montreal Protocol 1975

The Protocol brought up significant change to the existing Warsaw System wherein, calculation of damages was switched from 'gold clause' to Special Drawing Rights (SDRs).[14] Still, the United States continued with the US/IATA Montreal Agreement, 1966. This was an agreement between the American Aeronautics Board (AAB) and the Airlines operating in the United States. Air carriers acceded to extend the pecuniary limit in case of death, wound or injury up to US$ 58,000 excluding legal costs and US$ 75,000 including legal costs.

This discontent continued and sphered to other jurisdiction including Japan and European Union. In fact, the Italian Constitutional Court termed the Warsaw Convention as unconstitutional as it discriminates air traveller and surface traveller and its liability limit constitutes an offense to human life and dignity.[15]

In November 1992, Japanese air carriers floated a new 'Conditions of International Carriage by Air'. This initiative planted a two-tier system: carriers waive the defence for damages up to 100,000 SDRs (strict liability); carriers can escape the liability by proving an absence of fault in case of claims exceeding 100,000 SDRs.[16] This new initiative got "internationalised" by the IATA – Intercarrier Agreement on Passenger Liability of 1995. This was an umbrella agreement wherein the participating carriers agreed to waive their defences to

[12] *Supra* note 3.
[13] *Supra* note 9.
[14] Article VII of the Protocol read with Article 22 of the Warsaw Convention 1929.
[15] Coccia vs Turkish Airlines 1985 as cited in Supra 9.
[16] P.P.C HAANAPPEL, THE LAW AND POLICY OF AIR SPACE AND OUTER SPACE: A COMPRATIVE APPROACH, KLUWER LAW 72 (2003).

personal injury and death claims up to 100,000 SDRs. The nature of claim herein was colored with strict liability. However, where the claims exceeded 100,000 SDRs, the presumption of liability was rebuttable by the carriers. There are two inter-carrier agreements to implement the 1995 Agreement, viz. one to implement world-wide except the USA, the Measures to Implement Agreement, and another for the US carriers, the Air Transport Association of America (ATA) Provisions Implementing the IATA Intercarrier Agreement to be Included in Conditions of Carriage and Tariffs (IPA).[17]

Though, the IATA 1995 initiative brought up a 'policy equilibrium' in the liability mechanism, the 'disunification' of the Warsaw System remained in place. It failed to resolve the issue of multiplicity of instruments which made it difficult to decide which 'system' should apply in a particular case. The interpretation of the instruments also remained inconsistent. Hence, the Warsaw System to a certain extent failed to achieve the uniformity and predictability in the case of aviation liability which led to arrival of the Montreal Convention 1999.

Montreal Convention 1999

The Convention[18] brought a colossal change in the liability approach. The Convention was more consumers' friendly in many ways. It adopted 'strict liability' scheme in case of proven damage up to 100,000 SDRs and unlimited liability with limited defences.[19] It also provided 'Escalator Clause' which empowers the ICAO to review the SDRs limit in every five years. Article 23 also enlist mechanism for converting SDRs into local currency. The Convention also provides for dispensation of advance compensation without delay in case of accidents resulting in death or injury to passengers.[20] A vital clause was adjoined regarding the place of filing an action was that the passengers can initiate claim at his/her principal and permanent residence.[21] However, provision for compensation in case of mental injury could not be included into the Convention. In conclusion, the Montreal Convention was intended to replace the existing Warsaw System[22] but in practicality, it could not.

[17] *Id,* at 73.
[18] Convention for the Unification of Certain Rules for International Carriage by Air 1999. Opened for Signature at Montreal on 28 May 1999 (ICAO Doc No 4698).
[19] *Id.* art. 21.
[20] *Id*. art. 28.
[21] *Id*. art. 33(3)(b).
[22] *Id.* art. 55.

INDIAN AVIATION LIABILITY MECHANISM

India is a member of the Warsaw Convention 1929[23], The Hague Protocol 1955[24] and Montreal Convention 1999[25] concerning aviation liability regime. Accordingly, India has amended its laws now and again. Presently, the Carriage by Air Act 1972 which replaced the Carriage by Act 1934 is in force. The 1972 Act has been amended in 2009 to incorporate provisions of Montreal Convention. In 2016, the Act has been again amended to increase the new compensation limit to make it at par with the Montreal Convention 1999.

The Carriage by Air Act 1972 embraces the three Schedule: First Schedule contains the provisions of the Warsaw Convention 1929[26]; Second Schedule is imbued with the provisions of Hague Protocol 1955[27] in addition to Warsaw Convention; and the Third Schedule incorporates provisions of the Montreal Convention 1999.[28] Hence, the 1972 Act is having three sets of liability recourse in the event of aviation claims thereby making it a bit complicated.

The Act provides a two-tier system as outlined by the Montreal Convention. The first tier imposes strict liability on air carrier up to 100,000 SDR[29] and only defence available to the carrier was manifestation of contributory negligence on the part of the victim. Second tier provides some scope of relief to the carrier whereby it can take defence that the carrier had adhered to all due care and the damage was the outcome of third party intervention. In this regard airline has to show that it has taken "all [the] necessary measures".

JUDICAIL INTERPRETATION IN DIFFERENT JURISDICTIONS

One of the major shortcomings that is present in the liability system is that it lacks a body which could interpret the texts of the instruments at the international level. Since, the aviation links to domestic as well as international aspects of the transportation, this lacuna

[23] India signed the Convention on Oct. 12, 1929.
[24] India signed the Protocol on Sept. 28, 1955.
[25] India signed the Convention on May 28, 1999.
[26] The Carriage by Air Act 1972, sec. 3.
[27] *Id*. sec. 4
[28] *Id.* sec. 4A as inserted by the Carriage by Air (Amendment) Act 2009.
[29] Recently through 2016 amendment to the Carriage by Air Act 1972 limits of compensation has been raised up to: in case of death or bodily injury 113,100 SDR; in case of delay 4694 SDR; in case of destruction, loss, damage or delay with respect baggage for each person 1131 SDR; and in case of destruction, loss, damage or delay in respect of carriage of cargo 19 SDR per kilogram. Rate of 1 SDR was equal to 88.78 as on Aug. 7, 2015, http://www.prsindia.org/billtrack/the-carriage-by-air-amendment-bill-2015-3962/

affects grievously. The domestic courts do apply these essentially a global principle inconsistently and conveniently. European and American courts had been very active and liberal in interpreting the provisions. Since the aviation industry in these regions are comparatively old and developed in those territories, there are a good number of cases that has been decided in consumers' favour.

Delay/Denied Flights

Article 19 of the Warsaw Convention states that the service provider will be liable for damages caused due to delay of flight. However, 'delay' has not been defined in the Warsaw Convention. In general, and common understanding 'delay' could be understood as when a passenger is denied boarding on a flight even after having valid tickets and subsequently the passenger was carried by the airline after delay.

In one of the 1956 case *Ste General Airfret v. Ste TWATrans World Airlines*[30] the court uphold that the carrier had to deliver the goods immediately to shippers as the shippers chose air carrier primarily for swift delivery. By this interpretation of Article 19, the court exhibited a passenger friendly attitude. It is expected that the carrier shall ensure the delivery of the goods within a reasonable period of time considering all the circumstances of a particular case.[31]

The Warsaw Convention does not disclose about the determination of damages caused due to delay in delivery. The determination of damages therefore leftover upon the sweet will of the concerned domestic forums. However, the carrier could escape liability by showing the proof that the causation of the delay was due to the fault of the passenger only.

In March 1995, a US lower court in the case of *Azubuko v. Varig Airline*[32] upheld that a refusal by a carrier to a passenger despite having a valid ticket due to impression of the carrier's employee that a passenger was required to have a visa to his destination. The court held that the private contract between carrier and the passenger could be independently effectuated outside the Warsaw Convention. Henceforth, the denial of the flight by an employee of air carrier is compensable.

[30] 10 RFDA 324 (1956).
[31] 1 Lloyds Rep. 239 (1967).
[32] Lloyd's Aviation Law, Vol. 15, No. 9, 11 May, 1995.

In *Jamil v. Kuwait Airways Corporation*[33] the plaintiff filed a suit against the carrier under the Warsaw Convention. The flight was delayed for four days, which resulted in plaintiff losing out an opportunity of securing a project from the Pakistani government. The U.S court held that the failure in getting the document finalised by the passenger could not be considered resulted due to four days delay. The court further stated that the airline carrier could not reasonably have foreseen that the delay would result in such loss.

Likewise, the Montreal Convention 1999 states that the service provider shall be liable of damage arising out of delay of passengers, baggage, or cargo. However, the carrier could evade the liability by proving that all the measures were taken to elude the damage that it was inconceivable. The European court made its position clear in *Friederike Wallentin – Hermann v. Alitalia*[34] by laying down that the political instability or meteorological circumstances incompatible with the operation of the flight are relevant only if they create an unexpected risk, but are not directly an exemption.

Injury or Death to Passengers

The Warsaw Convention and Montreal Convention in essence, packed same mandate along with relevant modifications. The liability mechanism works on two basic principles, viz. Presumption of liability that could be thrusted upon the carrier and exception available against unlimited liability.

In *Manufacturers Hanover Trust Co. v. Alitalia Airlines*[35] the court asserted that the airline has to prove that all the prudent and imperative measures had been taken up to forestall any mishap from an objective standpoint such that the benefits of defence shall be available to the airline accordingly. The court in *Barboni v. CieAir-France*[36] gave some hiatus to airline from liability. The court held that in case of a bomb threat if airline sticks to emergency evacuation, and in pursuance of such evacuation, if any injury befalls on passenger due to escape chute, the airline is absolved from the liability claim on the ground that it was not possible for the airline to take any other measures.

[33] 773 F Supp. 482 (D.D.C. 1991).
[34] C-549/07 EJC.
[35] 429 F Supp. 964 (SD NY 1977).
[36] 36 RFDA355 (1982).

However, In *Goldman v. Thai Airways International Ltd.*[37] The court observed that the passenger could not be considered a party to contributory negligence if he keeps his seat belt unfastened and suffers injury when no sign or announcement is made by the aircraft crew to keep seat belt fastened.

Mental Injury

Across the jurisdictions it is inhibit that in case of mental injury the airline could not be held liable. There has been a long debate during the negotiations of the instruments relevant to liability regime.[38] Article 17 (1) of the Montreal Convention enunciates that the compensation for mental injury is out of the orbit of the Convention. Similarly, the courts have also interpreted the provision accordingly across the jurisdictions. In *Eastern Airlines Inc. v. Floyd et al.,*[39] the US Supreme Court observed that the mental injury alone cannot be claimed, there must be some sort of physical manifestation of injury to sustain a claim under Art 17.

Interpretation by the Indian Courts

Indian courts have been comparatively reluctant in giving liberal interpretation to the 1972 Act, which has embraced the spirit of Warsaw System and Montreal Convention. The courts in India could not be considered as consumer friendly in terms of aviation liability claims.

In *Airport Authority of India v. Ushaben Shirishbhai Shah*[40] it took more than two decades to answer the question purporting to computation of compensation amount. The facts of the case stated that the pilots of Air India landed the aircraft at Ahmedabad airport despite the poor visibility which resulted in accident. The Gujarat High Court calculated the compensation amount on the basis of victim's income in 1988 and awarded 7.53 lakhs. This was certainly, as opined elsewhere, an inadequate amount.[41]

In yet another accident of Mangalore air crash case filed under the Third Schedule of the Act 1972, the court shown very regressive approach. In that case namely *S. Abdul Salam*

[37] 3 All E.R 693 (1983).
[38] Havel & Sanchez, *supra* note 9.
[39] 499 U.S. 530, 111 S. Ct 1489 (1991).
[40] 1 G.L.R. 321 (2010).
[41] Sandeepa Bhat, *Air Carrier Liability for Passenger Death or Injury under Carriage by Air Act 1972* 5(2) Nirma University Law Journal (2016).

vs Union of India and National Aviation Company of India Ltd[42] the compensation was awarded on an average of Rs. 80 lakhs. However, the amount individually varied from Rs 7.755 Crore to Rs 35 Lakhs.

In the instant case, the plaintiff was awarded Rs 35 lakhs in this case. Accordingly, he contended that the principle of strict liability, to the extent of 100,000 SDR (Rs 75 Lakhs) should be applied in the case. The Single Judge concurring with the argument of the plaintiff, opined that whilst computing the compensation, factors such as age, income, earing, etc. should not be the parameter as no such references are specified in the Third Schedule of the Act 1972. Resultantly, Court awarded compensation of 1,00,000 SDR on the basis of no-fault liability under the Third Schedule.

An appeal was preferred by the respondent before the Division Bench of Kerala High Court. The decision of Single Bench was overturned by the Division Bench. The Division Bench observed that in order to compute the compensation various factors such as age, income, earning, etc. are indispensable. Currently, the case is under an appeal before the Supreme Court.

The major challenge which is apparent in Indian judicial system is the overburdening of cases before courts. This effect of such burdensome is visible on cases relating to aviation claims as well. There are also some pertinent issues where the judges generally overlook the international developments in the aviation field. It perhaps leads to restricted interpretation of the legislative provisions. It also ultimately leads to denial or delay in justice as aviation claims are chiefly regulated at the international spectrum and as such the ignorance of its development at said spectrum is not desirable.

CONCLUSION

There has been a substantial progress in the development of aviation liability principles since its inception. Different jurisdictions incorporate and interpret such principles as per convenience and prevailing domestic conditions. For instance, the United States lights the torch of objectivism *id est* the airline should show from the objective standpoint that it has not been negligent.[43] French courts have also embraced this approach.[44] Further, the Courts in

[42] I.L.R 2011 (3) Ker. 457.
[43] RUWANTISSA ABEYRATNE, AVIATION AND INTERNATIONAL COOPERATION – HUMAN AND PUBLIC POLICY ISSUES, Springer (2015).
[44] *Id.*

Europe and United States have interpreted the provisions in favour of victims such as there is no contributory negligence on the part of passenger if he keeps seat belt unfastened through the flight and suffers injury when no sign was given by the aircraft control panel to keep belt on.[45]

India has now and then brought principal amendments in its domestic laws, viz. a new jurisdiction clause has been added through amendment to 1972 Act in pursuant to Montreal Convention. However, the issue of multiplicity of adjudicatory bodies, in the recent past, has created new headache. Presently, the aggrieved consumers can approach either to courts or the consumer forums. This availability of two options creates multiplicity of adjudicatory bodies ultimately result into complexities. The European countries have started new arbitration mechanism in this sector whereby a consumer and service provider can surmount the issue. The scope of this new phenomenon of aviation liability arbitration also need to be explored in the Indian context. The inherent issue of computation of damage is already existing in the international instruments, the interpretation to which has varied among different jurisdictions. To which, India has also shown inconsistent approach.

The international aviation instruments do not provide any adjudicatory body which could provide interpretation in case of conflict of opinion. It is basically left open to the domestic jurisdictions to give meaning to those instruments. This has given wide scope of manoeuvring to domestic courts. However, European and American courts have interpreted the provisions objectively and in pro consumer manner, Indian courts have been bit reluctant.

To conclude, India should make an effort for having a dedicated forum to address the liability claims expeditiously. As the number of liabilities claim in near future is going to rise up and since litigation is ever mounting up, *ergo* it is right time to have a separate adjudicatory body to deal with these claims.

[45] *Id*. at 219.