Air Law Relating to Airports

Dr. V. Balakista Reddy
Professor of Law and Registrar
Head, Centre for Aerospace and Defence Laws (CADL)
NALSAR University of Law, Hyderabad
E-mail- balakista@gmail.com

Scheme of Discussion

- Importance of Airports in Economic Development
- Airports Governance before and After De Regulations
- ICAO, Airport Charges :Doc 9082. and Sovereign Right of States
- LPG and Its Impact on Airports
- The Projections of the Economic outlook: 2008 - 2027
- Privatization and Types of privatization and Process of Privatization
- Privatization in Developed Countries – UK and USA
- Privatization in India- Legal Challenges
- Reliance Airport Developers Pvt. Ltd. *v*. Airport Authority of India 2006
- REGULATORY COMPLIANCES and Conditions of Licenses
- PPP and Concession agreements
- Privatization of Airports - Emerging Legal Issues
- Conclusion

Importance of Airports

- An essential part of the air transport system
- As economic engines and gateway to regions
- As focal points for regional development
- Not only infrastructure providers for airlines
- Re-positioned themselves as an integral part of the travel value chain
- Becoming more entrepreneurial and changing the way of operation
- •Traditionally - seen as the responsibility of governments to manage and operate, typically in line with strategic, economic and defense policies
- •Therefore, public ownership and governance of airports was not questioned throughout most of the history of aviation.

Optimism Indian Aviation Industry

- As India's aviation market expands at the fastest pace in the world, the country plans to increase the number of airports to between 150 and 200 by 2035, from around 100 at present.
- The expansion could cost more than $60 billion, with the private sector expected to foot most of the bill. To lure investment, the government hopes to implement policies to ensure that private investors can recover their money and earn solid returns.
- According to the Ministry of Civil Aviation, the number of domestic and international passengers totalled more than 139 million in 2017, a 17% increase over 2016.
- The number of domestic passengers, who account for more than 80% of the total, has seen double-digit growth for the 42nd consecutive month, dating back to September 2014.
- "India posted the fastest domestic passenger growth in 2017 for the third year in a row, followed by China and Russia," said the International Air Transport Association.

Problems in Excising airports

- Due to Frequent flight delays, more cancelled flights, long lines, dirty bathrooms, uncomfortable seats, bad fast food, crying children, or…….???????????????????
- safety concerns, lack of comfortable seating, rude staff, hostile security, poor facilities, no (or few) services to pass the time, bribery, being kicked out at night or just general hassles of being in the airport.
- Lack of comfort, convenience, cleanliness and customer service??????
- These all issues associated with the operation, management and development of airport.
- **Governance**
- Are often characterized by their ownership, but it is the governance structure that determines how an airport is managed, operated and developed, for instance, an airport can be owned by government but operated by independent authority (Reimer et al.,
- Virtually, all airports traditionally - owned and managed by the public sector

Airports Governance Cont..

- Beginning of airline deregulation (e.g. act or process of removing or reducing state regulations) in the US in 1978.
- •Acted as a worldwide catalyst of change in the philosophy of how airlines and airports are owned and managed .
- Three key developments witnessed within the airport sector
- Airport Commercialization
- Airport Privatization
- Airport ownership diversification
- •The deregulation movement - brought a new wave of thinking into the management of airports around the world in the mid 1980s.
- Since then, significant changes - in the way airports are owned, managed and operated.
- •Attention turned by policy makers towards reforming airport governance.

Dr. V. B a l a k i s t a R e d d y
Professor of International Law NALSAR
University of Law, Hyderabad

Airports Governance Cont..

- In the 1980s, governments around the world – faced enormous pressures from taxpayer or the International Monetary Fund in the case of developing countries to control or reduce government deficits .
- •However the forces of reform - slow to deal with airports for a number of reasons - the pace of change quickened from the mid 1990s.
- And started to be a significant presence of privately, or partially privately, owned airport in the 1990s .
- Corporatization, commercialization and privatization of airports - became worldwide trend.
- Increasingly different strategies pursued by countries to liberalise airports by means of two forms of freeing industry from government control - privatization and deregulation

Airports Governance Cont..

- •Liberalisation refers to a relaxation of government restrictions usually in the area of social or economic policy.
- •Rising passenger demand led to:Airport congestion, The need to invest in additional capacity and Innovation to increase the productivity of existing airport infrastructure
- Priorities were established by government for government spending - airports being at the bottom of the list.
- •To respond to these needs.
- Countries around the world - moved toward commercialized airport governance.
- Applying business-like approaches and allowing market forces, incentives and mechanisms to affect the delivery of services.
- Thus ‘commercialization’ of the airport industry began to take place
- The pace of change varied considerably in different parts of the world, with Europe generally leading the way.
- •By contrast, airports in areas such as those in Africa and South America - generally held on to more traditional attitudes towards airports and experienced less change

Airports Governance Cont..

- The growing commercialization of the aviation industry - the major driving force behind airport governance reform, where business principles are applied with more emphasis on the development of commercial activities
- •1980s - dominated by airport commercialization, due to the dramatic growth in air travel brought about by deregulation in the airline industry in North America
- Focused to make airports More self - sufficient and responsive to growing demand and investment needs. More likely to offer services at a lower cost and further develop their business. To generate revenue for the government from the sale or lease of the asset and promote regional development.
- Airport commercialization models appeared to range from partial to full privatization to some form of public-private partnership.
- 1990s - airport privatization became a reality.
- •The momentum to privatization of airport - gaining throughout most of the world, however global crisis affected this trends in 2002 and 2007-2008 .

Privatization Governance cont..

- •Privatization means, in a broader sense, usually associated with the transfer of management of an airport, and in many cases the ownership as well, to the private sector by a variety of methods such as
- Share floatation Trade sale Concession Project finance privatization and Management contract
- By 2007, airport privatization - in most every developed country and in many developing economies, however still much debate over the rationale of airport privatization.
- •For many countries, transferring airports, considered as national or regional assets to the private sector - a politically sensitive policy.
- Issues of airport ownership and governance always remained as a controversial topic.
- •Over the last two decades - have been widespread moves to corporatize, privatize and deregulate airports around the World.

Airports Governance Cont..

- Attention - slowly been shifting to questioning the efficiency of airports and air traffic control systems as deregulation and privatization of the airline industry and its markets became the norm.
- These changes created a great diversity of airport ownership and governance structures in the ways which countries tackle the airport ownership and governance issues, especially since the British government privatized their airports in 1987.
- Thus, the status of airport ownership started exerting considerable influence over
- How airports are financed And how airports may be managed.
- Airport Governance - sets the bounds of authority in which airport management can make decisions.
- •Essential to attaining long term sustainable growth of airport.
- •Provides effective assurance for all interested parties including shareholders and creditors, and uses of funds in an efficient and transparent way.

Airports Governance Cont..

- An important aspect of airport governance - whether or not the airport is subject to regulation with respect to user charges or business practices.
- •Airport Governance took place in an effort to:
- Access capital markets for development and reduce reliance on general tax levies Create a more efficient and cost effective mission focused organization Reduce political involvement in commercial and business decisions
- However, Governance – a complicated issue as the definition of airport governance varies across countries to address airport problems.
- Interested to maximize revenues on privatization than others. Focused on promoting and protecting airline competition. Willing to become involved in detailed economic regulation than others. Protect current or former national carriers.

ICAO and Airports

- The basic principles established by ICAO in the area of charges for airports and air navigation services are expressed in Article 15 of the *Chicago Convention*
- Every airport in a contracting State which is open to public use by its national aircraft shalllike-wise, subject to the provisions of Article 68, be open under uniform conditions to the aircraft of all the other contracting States. The like uniform conditions shall apply to the use, by aircraft of every contracting State, of all air navigation facilities, including radio and meteorological services, which may be provided for public use for the safety and expedition of air navigation.
- Any charges that may be imposed or permitted to be imposed by a Contracting State for the use of such airports and air navigation facilities by the aircraft of any other Contracting State shall not be higher,
- In summary, Article 15 of the Chicago sets out the following three basic principles:
- — uniform conditions shall apply to the use of airports and air navigation services in a Contracting State by aircraft of all other Contracting States;
- — the charges imposed by a Contracting State for the use of such airports or air navigation services shall not be higher for aircraft of other Contracting States than those paid by its national aircraft engaged in similar international operations; and
- — no charge shall be imposed by any Contracting State solely for the right of transit over or entry into or exit from its territory of any aircraft of a Contracting State or persons or property thereon.

ICAO’S POLICIES ON CHARGES :Doc 9082.

- Additional and more detailed policy guidance on charges for airports and air navigation services is provided in Doc 9082.
- The policies on user charges are revised periodically by the Council following major international conferences on airport and air navigation services economics, although most of the basic philosophy and principles have remained unchanged over the years.
- Section I of Doc 9082 addresses issues that are common to airports and air navigation services: scope and proliferation of charges; organizational and managerial issues; economic oversight; economic performance; consultation with users; prefunding of projects; and currency issues.
- Section II of Doc 9082 concerns airport charges and is, together with Section I, the focus for the description in this part of the manual.1Paragraphs 2 and 3 of Section I of Doc 9082 express concern over the proliferation of charges on air traffic.
- It is recommended that States:
- i) permit the imposition of charges only for services and functions which are provided for, directly related to, or ultimately beneficial for, civil aviation operations; and
- ii) refrain from imposing charges which discriminate against international civil aviation in relation to other modes of international transport.

ICAO and Airport User Charges

- Cost basis for Airport charges
- Where an airport is provided for international use the user shall bear the full share cost of providing the airport.
- User charges should be non-discriminatory, cost-related, transparent and should be finalized after due consultation with users
- Statement by the council to contracting states on charges for airport and Route Air Navigation facilities (1973) had the following clause– 9 (i):
- The cost to be shared is the full economic cost to the community of providing the airport and its essential ancillary services, including appropriate amounts for interest on capital investment and depreciation of assets, as well as the cost of maintenance and operation and management and administration expenses, but allowing for all revenues, aero or non-aero, accruing from the operation of the airport to its operators.
- The above clause continued upto 2001 (Doc 9082/6). Subsequently, this clause was changed to 22 (i) doc 9082/7:

Dr. V. B a l a k i s t a R e d d y
Professor of International Law NALSAR
University of Law, Hyderabad

ICAO and Airport User Charges Cont..

- *The cost to be shared is the full cost of providing the airport and its essential ancillary services, including appropriate amounts for cost of capital and depreciation of assets, as well as the costs of maintenance, operation, management and administration ,but allowing for all aero revenues* ***plus contributions from non-aero*** **revenues** ***accruing from the operation of the airport to its operators.***
- *The revised version of ICAO doc 9082, approved by the Council in October 2011 and to be published shortly as the ninth edition, further clarifies the position of ICAO on the subject of the cost basis for airport charges.*
- ***The new version leaves no doubt that ICAO stands neutral on the subject of dual or single-till, leaving it to the economic oversight adopted in each state to decide on this matter.*** *From the above it is evident that:*
- *ICAO does not propagate Single Till, even if it did earlier, it changed the same after 2001 as is evident from the relevant clause reproduced. Even if contribution (not all contribution/revenue) from non aero revenue is to be taken it is only from airport operations not from other activities like hotel, real estate etc.*

ICAO and Airports

- ICAO plays a vital role here, by way of Annexes 14 and 17, in creating a level playing field for the airport industry ensuring that all airports play by the same rules in these essential areas.
- The fundamental postulate which establishes a global legal basis for the provision of airports is contained in Article 28 of the Convention or International Civil Aviation which provides that each Contracting State undertakes, as far as practicable, to provide in its territory, airports, radio services, Meteorological services and other air navigational facilities to facilitate international air navigation in accordance with the standards and practices recommended or established from time to time, pursuant to the Convention

ICAO, Airport Charges and State Responsibilities

- 1.19 As noted in Part A above, Article 15 of the Chicago Convention establishes the basic charging principles for airports and air navigation services and reinforces the concept of freedom of access and non-discrimination set forth in Article 11 with respect to the use of facilities and services for the aircraft of the Contracting States in the operation of international air transport.
- 1.20 Also relevant is Article 68, which sets forth that each Contracting State may designate the route to be followed within its territory by any international air service and the airports which any such service may use.
- 1.21 Under Article 28 of the Chicago Convention, Contracting States are assigned basic responsibilities. For example, it is the State that is responsible for the provision of airport and air navigation facilities and services, in accordance with the standards and practices recommended or established from time to time, pursuant to the Convention.
- 1.22 In addition, States undertake obligations under their air services agreements, where again the State alone is responsible for the observance of stipulations addressing, for example, access to certain airports and routes and key charging principles such as non-discrimination, cost-relatedness, transparency and consultation with users

LPG and Airport Privatization

Liberalization, Privatization and Globalization (LPG) have become the buzzwords in today's world.

Beginning of Deregulation.

States have become interdependent rather than independent States.

Concept of Sovereignty is lost.

Hence it is very much pertinent to understand:

Need for Privatization of the Airports,

Process of Privatization of Airports,

Prevailing Controversies surrounding Privatization of Airports,

Extent of Transparency in the process of Privatization of Airports

Legal Framework

LPG and Airports

- At present the airport business is experiencing tremendous change to meet the ever-increasing growth of air traffic.
- Airports need to expand as and when needed especially for handling larger aircraft carrying more passengers than previously.
- Globally, there has been aggressive investment programs by airports to satisfy this demand.
- Due to the current economic climate, governments are reducing their funding of large airport projects and are shifting this burden of debt to the private sector.
- This evolution is seen in varying stages around the world in the out sourcing of activities such as: - award of management contracts of airport facilities, initiating public/private joint ventures, - BOT project financing etc.
- In the Asian region where tourism contributes significantly to the GDP of our nations, Asian airports are slowly accepting the idea of commercialization and privatization of their airport facilities.

Dr. V. B a l a k i s t a R e d d y
Professor of International Law NALSAR
University of Law, Hyderabad

Economic outlook: 2008 - 2027

- Airports face decreasing financial gains of weak airlines, diminishing government relief packages and tight lending markets.
- ¬There is a significant shift in aeronautical revenue sources from aircraft to per passenger charges.
- ¬Operating expenses reached US$55b in 2008 consuming 57% of airport revenues
- capital expenditure continues to rise.
- ¬the airport industry is managing US $250b in debt and has added US $26b in annual capital cost to the airport industry balance sheet in 2008.
- ¬with the advent of low cost airlines and their demand for no-frills facilities and Alliances, there is a need for consolidated terminal operations and features that suit their model
- ¬these changes adds costs to operations, terminal, equipment and passenger processing.

Dr. V. B a l a k i s t a R e d d y
Professor of International Law NALSAR
University of Law, Hyderabad

Airport Investments & Private Sector

- Private Investment in Airports is increasing
- Driven by strong growth of air travel (Asia/Pacific)
- Pressure on airport infrastructure to adapt to growing demand and changing technology
- Governments facing dilemma of:
- 1.How to finance airport facilities to meet growing demand, on limited public funds?
- 2.How to improve service levels at airports?
- 3.How to operate airports to maximize commercial potential?
- Governments turning to private sector to meet investments/operational requirements for airports' expansion

Current/Future Trends

- Airports - shifting their business models from government owned public utilities to commercial enterprises with many possible variations within different models as mentioned before for own unique situation of airports- one size does not fit all:
- •Increasing number of airport privatizations - throughout the world, however almost 50% of the airports in the world are still in the hands of government despite decades of privatization of state enterprises .
- The privatization of airports - an ongoing and accelerating global trend over the past two decades and already significantly involved in the operation of European airports and likely to continue.
- Initiated in the UK, progressing across Europe and the Australia/New Zealand region – likely to be close to the top of Asian governments in the near future
- In the UK, every major and regional airport, except Manchester - privatized and a mix of partial privatizations generally accompanied by some form of price regulation in continental Europe.
- The trend - picking up in Asia being privatized and likely to be attractive assets from the private investor's view point - both financial investors and airport specialists
- •However, the move to airport privatization in some major economies is just beginning such as Russia, India and China.

Current/Future Trends Cont..

- India - currently in the process of establishing public-private partnership models for its major airports and imposing price regulation (for instance a 74% share of India's two biggest airports (Mumbai and New Delhi sold to private consortia and several others seem for potential privatization) and China also looking at privatising its airports.
- •Looking across the globe - a broad array of ownership types, governance and price regulation combinations but airports in many countries- still publicly owned including the US and some member states of the European Union.
- **Trends towards consolidation of airports.**
- Airport alliances (for instance, Schipol engaged in a new alliance with Aerporto De Paris (ADP): know-how transfer and cost savings through standardization of processes and common new developments, joint purchasing in aviation and non- aviation related business areas.
- Formation of multi airport companies (e.g. companies involving common ownership of a number of airports, or cases in which an airport has a majority holding, or at least a strategic minority holdings in other airports such as Schipol's interest in Brisbane airport).
- 'Strengthening the development of the dual hub strategy' to reduce hub competition.

Current/Future Trends Cont..

- Competition among Hub systems is soaring.
- □Intensification of the expansion of hub-and-spoke system in Europe, Asia and Middle East and setting up international alliances.
- •The airport ‘customer’ is changing.
- □Institutionalizing customer and stake holder relations and use of growth of social media.
- •Concept about ‘more than aviation’ increasing.
- □Focus on non-aviation revenues and marketing oriented approach.
- Understanding Business Fundamentals
- □focused on cost effectiveness, value for money, outsourcing of airport activities.
- •Reshaping the airport experience with new technologies
- •High-tech products, new technologies, e-commerce, e-ticketing.
- •Maintaining airport sustainability practices
- □Environmental, social and economic practices.
- Trends of airport ownership and governance.
- □Transformation in the nature of airport ownership and operation in recent years. □moving gradually from a regulated and public controlled activity towards a liberalized and commercially-oriented activity. □Now a diversity of corporate governance structures at airports and likely to continue in future.

Privatization and Types of privatization models

- Privatization mean- the transfer of the management ownership of an airport to the private sector.
- Types of Privatization—
- 1. Share flotation --Airport company's share capital is issued and traded on the stock market. Government owner will give up total or partial ownership, while transferring economic risks and effective control to the new shareholder.
- 2. Trade Sale --some or all of the airport will be sold to a trade partner or consortium of investors. management and technological expertise of the partners as well as financial capabilities will be taken into account when agreeing on sale.
- 3. Concession-Airport management company or consortium will purchase a concession or lease to operate the "privatized" airport for a defined period of time, commonly between 20 to 30 years.
- 4. Project Finance-A company will usually build or redevelop and then operate an airport or specific facility, such as a terminal, for a certain length of time. At the end of this period, ownership will revert back to the government
- 5. Management Contract--ownership remains with the government and the contractor takes responsibility for the day to-day operation of the airport
- the contractor will pay a management fee, usually related to the performance of the airport.

Privatization of Airports has lead to a numerous problems which are as follows

1. Revenue earning opportunities of Airport Authorities of India is lost.
2. Discrepancies in floating Tenders.
3. Closure of Revenue earning Airports
4. Non-compliance of legal provisions under various enactments and the Constitution of India by Concession Agreements.
5. Collection of User Development Charges by a Private Company
6. Job Security
7. Cultivates commercial thinking instead of **national perspectiveness**, a set back to the socialistic pattern of distribution of national income,

Dr. V. B a l a k i s t a R e d d y
Professor of International Law NALSAR
University of Law, Hyderabad

Privatization of Airports and Emerging Legal Issues in UK

- United Kingdom was the first nation to privatise its airports, and a variety of ownership structure have been adopted.
- British Airports Authority (BAA) is the Spanish owned operator of six British airports (including Heathrow Airport) and Naples Airport in Italy, making the company one of the largest transport companies in the world.
- BAA stems from British Airports Authority and it is owned by a consortium led by Group Ferrovial, a Spanish firm specialising in infrastructure.
- The source of revenue for the BAA is from charging landing fees to airlines and increasingly from retail operations within those airports.
- BAA does not operate all UK airports – most are in the ownership of local authorities or other corporations.
- As a part of Margaret Thatcher's moves to privatise government owned assets, the Airports Act 1986 was passed which mandated the creation of BAA plc as a vehicle by which stock market funds could be raised.

Dr. V. B a l a k i s t a R e d d y
Professor of International Law NALSAR
University of Law, Hyderabad

UK Cont..

In the early 1990s, the company sold one airport (Prestwick International Airport).

There are strong drivers towards this privatization activity, but equally there are significant dis-benefits that merit consideration. There were several reasons for the strong performance i.e. economic performance which include

(i) airports can anticipate their costs far better than can airlines,

(ii) airports can benefit from their monopolistic position in the supply chain,

(iii) airport terminals and surrounding land can be put to profitable non-aeronautical commercial use.

However, airports are also subject to the threats that are posed to air travel generally which includes

(i) massive and continuous improvements in information and communication technology that intrude on both the business and leisure travel markets,

(ii) much improved surface transport such as high speed trains, threatening

Privatization in USA

- U.S. Commercial airports, while publicly owned, operate in Partnership with the Private Sector.
- 2. U.S. commercial airports have collaborated with the private sector to control costs and improve services.
- Few public owned airports are privately managed.
- The use of private investment funds, such as bonds, is subject to the scrutiny of credit rating agencies.
- While federal grants have played a significant role in developing airport infrastructure, airports' net income and bond financing has also played a key role.

Dr. V. B a l a k i s t a R e d d y
Professor of International Law NALSAR
University of Law, Hyderabad

Privatization in USA Cont..

- In recent years, the sale or lease of U.S. airports has generated considerable interest. Supporters of privatisation believe that many major U.S. commercial airports can operate on a sound economic basis with government assistance.
- This has lead to Privatisation of Airports on three major reasons:
- (i) They note that private entities would provide additional private capital to help finance airport development.
- (ii) That the private operators would more efficiently develop and manage airports and, in the process, reduce airlines' passengers' costs.
- (iii) Federal requirements on the use of airport revenue are changed, the sale or lease of airports by local or state governments would generate a quick infusion of cash for them, while reducing the need for local, State, and Federal grants and eliminating tax subsidies.

Dr. V. B a l a k i s t a R e d d y
Professor of International Law NALSAR
University of Law, Hyderabad

USA Cont..

Criticism on Privatisation in U.S.:

Nevertheless, privatisation often faces vocal opposition, for a number of reasons.

(i) One focus of opposition centers on the loss of control of a critical public good through its transfer to a private entity.

(ii) A second, potential loss of public sector jobs and reduced pay.

(iii) A price increases to the User.

(iv) Governments at all levels are highly reluctant to raise taxes and therefore have been disinclined to fund long term investment needs, private investment in infrastructure can be a logical solution

Noteworthy, private sector concerns about a public-private alliance include availability of financing, uncertainty of revenue streams, risks associated with the environmental review process, tort liability and potential changes in political leadership

Dr. V. B a l a k i s t a R e d d y
Professor of International Law NALSAR
University of Law, Hyderabad

Indian Airports

- 449 airports/airstrips in the country
- 126 airports managed by AAI
  - 13 international
  - 85 domestic
  - 28 civil enclaves at defence airfields

- **Airport Privatization: Earlier Non-AAI Airports**

1. Cochin
   - Government of Kerala (35%)
   - Investor Directors and Relatives (37%)
   - Public and NRIs (14%)
   - Central PSU (AI, BPCL) (7%)
   - Commercial Banks (6%)
   - Facility Providers (AI, BPCL, SBT) (1%)

Airport Privatization: Earlier Non-AAI Airports

2. Bangalore
   - Karnataka State Investment and Industrial Development Corporation (13%)
   - AAI (13%)
   - Siemens Projects (40%)
   - Larsen & Toubro (17%)
   - Unique Zurich Airport (17%)
3. Hyderabad
   - Government of Andhra Pradesh (13%)
   - AAI (13%)
   - GMR Group (63%)
   - Malaysia Airports Holdings Berhad (11%)

Transaction Agreement

- Transaction governed by Operations Management and Development Agreement (OMDA)
- 30-year concessions agreement with a further 30-year option
- A mandatory Capital Expenditure program with key projects to be completed by March 2010
- Massive liquidated damages for non-compliance
- A series of objective and subjective service standards to be adhered to
- Aeronautical charges currently as per AAI rates. In future, an independent regulator (AERA) will decide
- Limiting the use of land for non-Aero purposes to 5% in Delhi and 10% in Mumbai
- Minimum non aeronautical revenue 40%
- Retention of all staff initially and then of a significant number even after 3-years
- ATC would still be under the control of AAI/DGCA
- First right of refusal, if within 10% of best bid for a second airport within 150 km

Reliance Airport Developers Pvt. Ltd. *v*. Airport Authority of India 2006

- The Reliance Airport Developers case was decided in November 2006 by a two-judge bench in Supreme Court. This was a very significant decision which came in the wake of the Government's scheme of privatizing the Delhi- Mumbai airports.
- The process for restructuring and modernisation of Delhi and Mumbai airports had gained momentum as part of the first step of Indian Government's avowed policy of privatisation of strategic national assets. But the whole process came under a big question mark with Reliance Group's petition whereby they alleged that the whole project was infested with several major defects, in view of which the project should be grounded.
- The case brought up a number of key issues relating to the privatisation of the airports, ranging from the discretion handed out to the public functionaries in so far as accepting the view of any one of the committees set up as part of a multi-tier system is concerned, to the question of judicial review of such actions. The case saw "reasonableness" of the government's decision being discussed, along with the possibility of any mala fide intentions behind the scenes.
- The Supreme Court ended up removing the final roadblock on the Rs 5100 crore airports modernisation scheme by rejecting the Anil Ambani-owned Reliance Airport Developers Limited's (RADPL) appeal against rejection of its bid for both Delhi and Mumbai terminals. The appeal was held to be sans any merit at all. But the judges also put the evaluation committee in the dock by questioning its decision to alter the scoring norms.
- This case not only saw a range of important legal issues being discussed and mulled upon, but also clarified the current position as regards many moot points of law. But at the same time, a lot was left hazy, and in want of clearer legal directions.

Bidding Issues in Privatization

- issues and challenges regarding airport privatisation are broadly divided in three phases:-
- Firstly, pre bidding i.e. land acquisition.
- Secondly, bidding process, construction, concessions given and regulatory compliances to be followed while constructing the airport and also a look on the current policy of the government regarding FDI.
- Thirdly, pre launch phase that includes giving the place on lease to various airlines, restaurants, duty free shops, private cargo, private taxi stands, parking place and also developing the nearby area as a SEZ to recover the investment so made.

REGULATORY COMPLIANCES

- On any Greenfield airport to be developed under the Policy Guidelines, activities relating to Air Traffic Services (ATS), security, customs and immigration would be reserved for central government agencies. Provision of these services would be governed by the policy to be laid down by the Central Government from time to time. Prior to grant of license, an applicant for license shall procure the following clearances:
- (a) Defence clearance (b) Air Traffic Services (ATS (c) Security:
- (d) Customs: (e) MHA Clearance: (f) Immigration: (g) BCAS Clearance: (h) Airport Meteorological Services:
- A memorandum of understanding would be entered into between the Airport Company and each GOI agency/department providing the following Reserved Activities, setting out the terms and conditions on which the said services shall be provided by the relevant GOI agencies/departments:
- (i) Customs Control; (ii) Immigration Services; (iii) Health Services; (iv) Plant Quarantine Services; and (v) Animal Quarantine Services
- The memorandum of understanding would be issued and revised from time to time by the Ministry of Civil Aviation

Dr. V. B a l a k i s t a R e d d y
Professor of International Law NALSAR
University of Law, Hyderabad

Conditions of license

- As a condition of license, the licensee would be required to:
- (a) make available its airport services, free of charge and to the extent necessary, for meeting exigencies such as war, natural disaster/calamities, internal disturbances etc. in accordance with the provisions of the Union War Book; (b) provide uninterrupted landing and parking facilities for defence and other para-military aircrafts, free of landing and parking charges, and also provide the infrastructure facilities and equipment required for defence operations; (c) make available to the security agencies access to the airport for periodic and surprise inspections; (d) obtain approval of the relevant agencies for hiring of foreign nationals for senior decision making positions in the management of the private airports; (e) adhere to the security measures laid down by the BCAS and DGCA; (f) obtain prior verification of the credentials of foreign firms to be engaged for construction, ground handling or other important activities at the airport; (g) obtain clearance relating to the FDI limits in the construction/development of private airports from relevant authorities. Any change in the control or ownership shall be subject to security clearance from national security angle; (h) ensure the requisite infrastructure for handling international passengers and crew who must pass through immigration and customs; and (i) ensure appropriate arrangements for health services and plant quarantine at international airports.

Dr. V. B a l a k i s t a R e d d y
Professor of International Law NALSAR
University of Law, Hyderabad

The Issue of scope of Judicial Review in the present case

- It was the respondent's submission in this case, that the appellant is trying to enlarge the scope of judicial review.
- The Supreme Court refused to buy the argument of Reliance Airport Developers Ltd for review of the government policy on privatisation of its huge assets and laying down proper guidelines on it, saying such a plea in a case purely based on contractual obligations could not be entertained.
- It said that being a party to a contract under the privatisation policy, how can RAL ask for laying down the guidelines. At the most appellant can raise the issue of 'fair and transparent' procedure not adopted in its case... The court ruled out any possibility of going into other issues.
- Administrative action is stated to be referable to broad area of Governmental activities in which the repositories of power may exercise every class of statutory function of executive, quasi-legislative and quasi-judicial nature. It is trite law that exercise of power, whether legislative or administrative, will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary

Reliance Airport Developers Case Cont..

- **Whether the bidding should have been scrapped in totality? (Issue of other alternatives)**
- RAL contended that as GMR has been allowed to match the financial dealing of appellant for Mumbai airport, the same modality should have been adopted for the other bidders. SC had a very firm approach to this argument, not accepting it for the simple reason that when bench mark is crossed, financial consideration is the determinative factor because of revenue sharing. The court also felt that though emphasis was led that the constitution of Committees of non technical persons could not have thrown much light on the ultimate decision, yet it is to be noted that all the three Committees were part of the government machinery, and that the real issue was to assess correctness of the EC's decision.
- Also, a committee made up of technical experts does hold a greater say on matters as relating to this case.
- Carrying on with its argument, the court agreed with the respondents on the fact that the RFP has to be considered in the context of other documents like substantial document OMDA, execution of the agreements culminating to the final master plan. Initial development plan is nothing but a projection which has to be broadly in line with OMDA. Undisputedly, OMDA is prepared by the GOI and AAI.

Privatization of Airports in India-An Initiative

- India has an ailing economy suffering from an overdose of bureaucratic control and from lavish, imprudent, and unproductive government spending.
- An insulated economy that was build under sheltered, seller's market conditions with a heavy emphasis on import substitution and self-reliance, it is now finding itself unable to mobilise enough foreign exchange to finance its critical imports.
- Simultaneous efforts to liberalise and open up the economy seem to have accentuated the sickness in both public and private sectors.
- India has an ailing economy suffering from an overdose of bureaucratic control and from lavish, imprudent, and unproductive government spending.
- An insulated economy that was build under sheltered, seller's market conditions with a heavy emphasis on import substitution and self-reliance, it is now finding itself unable to mobilise enough foreign exchange to finance its critical imports.

Privatization of Airports in India Cont..

- Simultaneous efforts to liberalise and open up the economy seem to have accentuated the sickness in both public and private sectors.
- The Naresh Chandra Committee Report identified a number of loopholes in the current system and suggests improvements.
- The Government of India decided to privatise airports in order to induce efficiency and avoid the burden of investing in the same. This is in lie with world trends where airports are being seen more as businesses than infrastructure providers.
- Hence, the Privatisation of Airports in India has taken a stride by introducing various policy framework, regulatory mechanisms, amendments to the enactments etc

Reasons advocating Privatization of Public run Airports

The following are the reasons for privatization of airports in India:

- Changes in international and domestic politics.
- Performance of Public Sector Undertakings.
- Magnitude of fiscal compulsion and external debt.
- Inherent efficiency of Private Sector companies etc.

The primary objective of privatization of airports are:

- To provide efficient, safe and economical services to airlines and passengers.
- The State should choose the option that is best suited for achieving this objective after careful consideration of planning.
- Regardless of the organisational structure or the legal status, the State remains ultimately responsible for Safety and Security

PPP in Airports Sector

- Public Private Partnership is used for any scenario under which the private sector assumes a greater role in the planning, financing, design, construction, operation and maintenance of a transportation facility compared to traditional procurement methods.PPP can be applied to a large range of transportation functions across all modes.
- These include (i) Project conceptualization and origination; Design; Financial planning and finance, Construction, Operation, Maintenance; Toll Collections and Program Management.Typical procurement packages include:
- a) Private sector operations and maintenance on a performance basis,
- b) Design-build for fixed fee on fixed time framer.
- c) Project build-operate-transfer (BOT)”
- d) Design build-operate transfer (BOT).
- e) Design-build finance-operate- transfer (DBFO); and,
- f) Build-own-operate (BOO)
- g) Build-own-operate- Transfer (BOOT)

Need for Privatization of Airports

- Need for Capital Investment
- 2. Airport Capacity Issues
- 3. Standard of Indian Airports
- 4. High Airport Charges
- Monopoly in Airport Infrastructure
- **Modes of Privatization**
- 1. Full Privatization and 2. Partial Privatization
- (i) Concessions
- (ii) Strategic Partnership
- (iii) Management Contracts

Dr. V. B a l a k i s t a R e d d y
Professor of International Law NALSAR
University of Law, Hyderabad

Benefits of Privatization of Airports

- Increased Operating Efficiency
- 2. Additional Operating Revenues
- 3. Improved Customer Amenities
- 4. Reduced Risk of unwise Investment
- 5. Lease Proceeds
- **Risks Involved in Privatization of Airports**
- Monopolistic Abuse by Private Player
- Loss of Governmental Control
- Private players becoming over-sensitive to fluctuations in share price
- Diversification of Operations pursued by Private airports
- Safety and Security may suffer when profits are main objective etc.
- The Leasing Entity (Private Player) may become Bankrupt.

Dr. V. B a l a k i s t a R e d d y
Professor of International Law NALSAR
University of Law, Hyderabad

Measures for Successful Privatization of Airports

- Air Traffic Forecasts
- Airport Facilities Development Plan
- Review of Operations
- Review of Regulatory Mechanism
- Financial Review etc.

Dr. V. B a l a k i s t a R e d d y
Professor of International Law NALSAR
University of Law, Hyderabad

Objective of PPP airport projects

- To meet growing need of airport infrastructure in India
- To meet the financial requirement to support such growth
- To infuse private funds in the airport infrastructure Sector-
- To increase the standards of Indian airports- to International standards
- **Alternative Models of Privatisation**
- Full privatization.
- Partial privatization.
  - Concessions.
  - Strategic partnership(s).
  - Management contract(s).

Legal Changes Introduced

- **Amendment of AAI Act 1994**
- Reasons for the amendments
- Section 3 aa. Applicability of AAI Act to PPP airports
- In relation to providing ATS
- To issue directions under S.37 - Power of AAI to issue directions
- For the purpose of Chapter VA – Eviction
- Section 2.nm private airport defined
- Section 12.3.aa establishing/assisting PPP airports
- Section 12 A- Lease by the authority
- **New set of agreements introduced**
- OMDA – Brown field airports
- Concession agreements- Greenfield airports

Dr. V. B a l a k i s t a R e d d y
Professor of International Law NALSAR
University of Law, Hyderabad

Legal Changes Cont..

- **Airports Authority of India Act.1994 And Amendment 2003.**
- As can be seen from the Preamble of the Act, it has been enacted with a view to provide for the constitution of the Airports Authority of India for the better administration and cohesive management of the airports and civil enclaves and for matters connected therewith or incidental thereto.
- Section 3 of the Act provides for the constitution and incorporation of the Airports Authority. Section 12 lays down the functions of the Airports Authority of India.
- Section 12(1) provides that it shall be the function of the Airports Authority of India to efficiently manage the airports, the civil enclaves and the aeronautical communication stations.
- Section 12(2) provides that it shall be the duty of the Airports Authority of India to provide air traffic service and air transport service at any airport and civil enclaves.
- Section 12(3) provides that without prejudice to the generality of the provisions contained in sub-sections (1) and (2), the Airports Authority of India may perform various functions stated there under including that prescribed under clause (a), namely, plan, develop, construct and maintain runways, taxiways, aprons and terminals and ancillary buildings at the airports and civil enclaves.

Legal Changes Cont..

- To achieve this purpose, the Airports Authority of India (Amendment) Act, 2003 (Act 43 of 2003) was enacted. It brought about the amendment to section 2 by insertion of clause (nn), insertion of new clause (aa) in section 12(3) and new sections 12-A and 22-A in the Act. These amendments were brought in to enable the Airports Authority of India to establish airports or assist in the establishment of private airports and also to lease the airport premises to private operators with the prior approval of the Central Government. By virtue of these amendments, some of the functions of the Airports Authority of India can also be assigned to lessees subject to the exception that air traffic services and watch and ward functions will continue to be provided by the Airports Authority of India
- The Statement of Objects and Reasons to the Amendment Act throws light on the Parliamentary intention and it reads as follows: "At present, the Airports Authority of India is a statutory organization under the administrative control of the Government of India, Ministry of Civil Aviation. It manages 94 civil airports and 28 civil enclaves at defence airports in the country.
- There is need to improve the standard of services and facilities at the airports to bring them at par with international standards.
- To facilitate the process for such improvement, there is need, both for the infusion of private sector investments as also for restructuring of airports.

Concession agreements

- First introduced in Bangalore Greenfield airport
- Salient features
- Govt concession defined
- CNS- ATM agreement
- term 30 years + 30years – choice to the operator
- Standards to be maintained – defined
- New Concept of Concession fee introduced
- Monopoly within 150 Kms permitted + closure of old airports
- Protected from policy changes – and to allow all type of operations
- Permission for Non- airport activities

Reserved Activities

- (i) Customs Control;
- (ii) Immigration Services;
- (iii) Health Services;
- (iv) Plant Quarantine Services; and
- (v) Animal Quarantine Services
- **Resultant Changes**
- Monopoly of AAI over Airports removed
- Role of AAI has been reduced from that of regulator to CNS- ATM service provider
- Govt control over planning, design, operation and management of airport reduced
- Freedom for the private companies to decide- May result in better airport services
- However, Reserved Activities continue under Govt Control

PPP projects effect on AAI-

- Standards of Airports in India redefined
- International standards will become the bench mark
- Competition will help AAI to develop better airports- qualitative advantage
- Better facilities can be introduced
- Revenue reduction
- **Emerging Issues**
- New set of agreements and a new legal frame work
- Immunity – AAI airports Vs PPP airports
- PPP airports "state" or Not
- PPP airports and RTI Act
- Airport standards
- Airport Charges
- Monopoly

Privatization and Legal Questions

- Whether Privatization of Airports is a part of Public Sector Reform or a Structural Adjustment Program?
- Whether Policy of the Government on Privatization of Airports is converting the Airports Authority of India into a sick industry thereby closing down the AAI leading to socio-economic-legal problems?
- Whether Government of India has adequate legal framework/Policy to deal with the Privatization of Airports?
- Whether an appropriate Policy Document shall be created after having thorough analytical socio-economic and legal research?

Privatization and Legal Questions

- Whether Privatization of Airports:
- a) has led to the transferring the employees from PSU to Private Sector?
- b) increases efficiency and employment?
- c) leads to deterioration in labour relations?
- d) gives social and economic protection to labour?
- e) takes place in isolation under ailing economy?
- f) involves complex social and labour issues?
- g) effect employment and job security?
- h) is going to solve the Air Traffic Control Problems?
- What are the legal implications involved due to the impact of Public Private Partnership?
- Whether Privatization of Airports raises doubts about the application and efficacy of the fundamental rights in the Indian Constitution?

Privatization of Airports - Emerging Legal Issues

- Airport Infrastructure Issues
- Air Traffic Control Issues
- Operating Issues
- Policy Issues
- Financing Issues
- Safety and Security Issues
- Competition Law Policy Issues
- IPR Issues Relating to Patents, Trademarks and Designs in Aircraft
- Cabin Crew Safety Issues
- Air Cargo Legal IssuesTax Issues
- Issues related to Concession Agreement
- Issues related to Slot Allocation
- Land Acquisition, Rehabilitation and Resettlement Issues
- Issues relating to Code Sharing Agreement

Privatization of Airports - Emerging Legal Issues Cont..

- Issues pertaining to Leasing and Financing of Aircraft
- Issues relating to Survival of Low Cost Airlines
- Environmental Issues
- Dispute Settlement
- Financing of Aircraft
- Issues relating to Survival of Low Cost Airlines
- Environmental Issues
- Dispute Settlement Issues
- Issues pertaining to Aviation Liability
- Issues related to Health impacts from Noise Pollution
- Issues related to Impact on and regulation of fees paid by Airport Users
- Impact on Labour Regulations
- Issues related to Land Acquisition
- Re-Fuelling Infrastructure-Ownership and Investment Issues

Privatization of Airports - Emerging Legal Issues Cont…

- Airport based SEZ's Issues
- Mergers and Acquisitions
- Issues relating to Landing Rights
- Pre-emptive Rights and Privatization
- Bird Strikes against Aircrafts-Issues of Liability
- Predatory Pricing Issues
- Issues pertaining to Passenger Service Fee, User Development Fee and Airport Development Fee
- Issues pertaining to Communication, Navigation Surveillance (CNS)
- Issues pertaining to Air Transport Management (ATM)
- Route Navigation Facility Charges (RNFC) – Issues
- Issues pertaining to Joint Venture in Civil Aviation
- Aircraft Hijacking
- FDI and Changing Dimensions of Ownership Issues
- Airliners-Consumer Liability Issues

Dr. V. B a l a k i s t a R e d d y
Professor of International Law NALSAR
University of Law, Hyderabad

Conclusion

- Develop airport policy to guide potential private investors.
- Improve concession oversight in order to reduce re-negotiations and poor performance of vendor or private operator.
- Improve public perception of joint venture arrangement approach to airport management and operations.
- Ownership models and structures continue to evolve in the Caribbean Region.
- Our Human Resource personnel in the industry need to share data among island states on the topic at hand.
- Revival of the Caribbean Association of Airport Executives is a good place to start.