

AVIATION LIABILITY- INDIAN SCENARIO

Dr Moses George



NEED FOR INTERNATIONAL CONVENTIONS

- Aircraft- moves rapidly from one jurisdiction to another
- Legal systems in the world- Civil/Common law etc
- Different National laws govern private air law questions
- Need to indicate which law shall apply
- But rarely unify all of private air law



AVIATION - LIABILITY

- Airlines liability
- ATC liability
- Air Navigation Service Liability
 - Ground / Satellite based
- Third Party Liability - Rome convention
- Product liability - Aircraft and other systems



LIABILITY ISSUE – INTERNATIONAL INITIATIVES

- Warsaw Convention 1929
- Hague protocol 1955
- The Montreal Agreement 1966
- Guadalajara convention 1961
- Guatemala City Protocol 1971
- The Montreal protocol 1975
- The Montreal Convention 1999
- Rome convention



WARSAW CONVENTION 1929

○ Historical Background

- 1920s commercial aviation started
- After 1st world war- air power effects
- Sovereignty concept w.r.t air space
- Limitation of the liability of the carrier

○ Maritime law

○ Risk involved with the new industry

- Safety risks, financial risks
- Insurance argument – easy if liability is limited
- Speedy settlement - in case of limited liability
- Burden of proof- If limited liability, reversal of burden of proof



WARSAW CONVENTION

- Signed on October 12, 1929
- Came into force – article 37- on 13 Feb 1933
- USA did not participated in negotiations
- US sent a observer
- Realising the importance- senate gave consent
- USA ratified on 15th June 1934
- Absence of US – more civil law principles



WARSAW- MAIN ASPECTS

- Applicability
- Traffic documents
- Liability of the air carrier
- Notification of Damages
- Jurisdiction



APPLICABILITY

○ Art.1.1 International carriage of

Persons, baggage, goods

Defn-International carriage - Place of departure and place of destination either (or both) in any contracting states

Stoppage - is permitted even in non contracting state

- Agreed stoppage only

Carriage by Several successive carriers – considered single
deemed to be undivided carriage



APPLICABILITY

- Only to air carriers using aircraft- gliders, Balloons – defined as A/c
 - Ref Aircraft Act 1934
- International air transport, National law may allow w.r.t domestic carriage
 - Hague protocol
- Ticket clarify – International or Not
- Case law- Gerin Vs Imperial Airways- 1936
 - Domestic leg of an International carriage- may or may not -Intention of the party , and objective facts of ticket



APPLICABILITY – NATIONALITY OF CARRIER/ PASSENGER

- Nationality of carrier /passenger is irrelevant
- State of origin and destination are only issues



APPLICABILITY

- Single operation , Series of operation Article 1.(3)
- Warsaw convention applies to all legs of journey
 - Documentary evidence – intention of the party
 - date and time of bookings
 - Place of issuance of travel bookings
 - bookings by same travel agent
 - Coordination of different flights



APPLICABILITY- COMBINED MODE

- Combined mode of carriage- Air + road/sea
- Loses Warsaw protection of limited liability
- Road leg – leads to loss of protection under Montreal Protocol 4 regime



APPLICABILITY –STOPPAGE

- Agreed Stoppage
- Space as an agreed stoppage
- Space Adventure –a US- Russian venture
 - carrying passengers from a point on earth to a point in outer space to feel weight less and back.
- Applicability of Warsaw convention
 - Point in outer space is not located in another state.



APPLICABILITY

- Not Applicable
 - Mail and postal packages
 - Experimental Trial/test flight
 - Military carriages
 - Between two colonies of same state.



VALIDITY OF DOCUMENTS

- Art 3(1)-Requirement of delivery of ticket -
 - Place and date of issue
 - Place of departure and destination
 - Agreed stopping places
 - Name and Address of the carrier/s
 - Statement – subject to rules regarding liability as per convention



VALIDITY OF DOCUMENTS

- Delivery of Ticket a necessary condition
- Case Law – French Court 25th June 2009
 - Carrier carrying person for free- Gratuitous carriage- no ticket issued
- Non- issuance of ticket results into the inapplicability of limit as per Warsaw
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NOTICE

- Notice regarding applicability of Warsaw convention is required for applying the limits
- *Size of the lettering – unreadable- unnoticeable*
- *size of 10 point letter size as per Montreal agreement 1966*
- *Montreal convention accommodate electronic ticket – Art 3*
- *Montreal Convention – Notice or absence does not effect application of the convention*



LIABILITY OF THE CARRIER

- Article 17
 - liability for damages sustained in the event of death or wounding of the passenger
 - Or any other bodily injury
- By an accident
- Limits set out in the convention (1,25,000 Francs)



LIABILITY OF THE CARRIER

- Art 18
- Liability for damage / loss of Checked (registered) baggage
- Limit- 250 Francs/Kg
- Art 19 - Liability for Delay
- Art 23. Any provision to relieve the carrier from the liability or to fix a lower liability is null and void.
- Art 25 Limits not applicable – wilful misconduct of the carrier-
- damage resulted from an act or omission of the carrier or its agent, done with an intention to cause damage



LIABILITY OF THE CARRIER

- Presumption of liability- Burden of proof on air carrier.
- Carriers defense- Art 20
 - Injury not by negligence of carrier or its agent,(Because to prove the other way would be difficult for the passenger)
 - It has taken all measures
 - Action is time barred -2 years – Art. 30



LIABILITY - CARRIER

- Accidents occur in the course of Embarking and disembarking
- Definition – embarking disembarking
- Factors
 - The passengers **activity** at the time of accident.
 - The extent to which the carrier was exercising **control** (or should have exercised control)
 - **Location** of the accident
 - Eg Wheel chair passengers, Unaccompanied minors
 - **ICAO Annex 9 , 3.45 facilitation-**
 - **Carrier responsible for custody and care of passengers and crew until they are accepted by the state authorities for examination**



ACCIDENTS

- Warsaw convention- Liability in case of Accidents – Art 17
- Not defined by Warsaw and Hague protocol
- Deference between *Accident* and *Incident*
- Definition- Annex 13 of ICAO convention
- *Accident-an occurrence associated with the operation of an aircraft which takes a place between the time any person board the aircraft with intention of flight until such time all such persons have disembarked , in which passengers are fatally or seriously injured, the aircraft sustains damage or structural failure, or the aircraft is missing or is completely inaccessible.*
- See Rule 68 of The Aircraft Rules 1937



JURISDICTION

- Art 28- *four fora*, which may be competent to hear an action under Warsaw convention
 - *The residence of the carrier-*
 - *The principle place of Business of the carrier*
 - *An airlines place of business through which the contract has been made*
 - *The place of destination*
- *Alternate dispute settlement is not permitted*
 - *See Montreal Convention provision*



HAGUE PROTOCOL

- Warsaw- Too much protection to carriers
- Growing Consumer interests
- Improvement of Warsaw convention
- Diplomatic conference in 1955



HAGUE CONVENTION

- Art 3. Simplified rules regarding requirement of notice- unlimited liability in case of non-delivery of ticket
- Attorneys fee and other costs of litigation –separately
- Art 22- Liability limits- Doubled - 2,50,000 gold franc
- Art 25. Clear definition to wilful misconduct.
 - misuse of term misconduct. New article inserted whereby the liability of the servants and agents are fixed at the same limit as the carrier as long as they are within the scope of its employment
- US did not ratify rather denounced the treaty.- liability was too low



MONTREAL AGREEMENT 1966

- Reason – US refusal to ratify Hague Convention
- Based on Art 22(1) – special agreement to for higher liability
- Special agreement between air carriers and UAB
- Liability limit increased – upto \$ 58000, and \$75 000 inclusive of legal fee.
- Absolute liability instead of presumption of liability
- Notice regarding applicability of Warsaw convention(IATA passenger ticket page 5)



GUADALAJARA CONVENTION 1961

- Which clarifies rather than amend the warsaw convention
- Explanation – Carrier, Contracting carrier, Actual carrier
- Distribution of liability between Contracting carrier and Actual carrier.
- Wilful misconduct can not a ground for unlimited liability against the actual carrier , due to cancellation, overbooking, strike



GUATEMALA CITY PROTOCOL 1971

- ICAOs initiative to avoid piece meal approach like Montreal agreement 1966 by US
- For conserving uniformity of Warsaw system
- Modernisation of some provisions of Warsaw System
- Increasing the liability limits and flexibility into their application
- But never came into effect



MONTREAL PROTOCOLS

- 4 Additional Montreal protocols
- 1,2,3 protocols converts Gold Franc limits of earlier conventions to Special drawing rights
- 1. W.r.t Warsaw convention
- 2. W.r.t Warsaw as amended by Hague Protocol
- 3. W.r.t Warsaw as amended by Hague protocol and Guatemala city protocol
- Additional Protocol no 4.-sets up a regime for cargo liability limits conversion from Gold Franc to Special Drawing Rights



MONTREAL CONVENTION 1999

- Warsaw system – with other conventions and protocols
- Other states initiatives, Japan, EU, IATA etc
- ICAO's initiative to avoid patch work of treaties
- Global uniformity
- Unlimited liability
- More coherent system- Contractual and Actual carries
- Based on better Consumer rights
- Advance payments



MONTREAL CONVENTION 1999

- Ratifications as on Sept 2018- 132 States +EU
- Came in to effect on 4/11/2003



MONTREAL CONVENTION 1999

- Major provisions
- Liability- from Limited liability to unlimited liability
 - Two tier liability-
 - Strict liability upto SDR 113,100 special drawing rights (SDR),
 - Second tier liability above SDR 1,13,000
- Second tier liability- Carrier may choose to avoid- Burden of proof on the carrier
- Passenger /claimant never has to prove any fault of any kind to recover 100% of proven damages.
- Note SDR- a mix of currency values established by the International Monetary Fund (IMF) equal to roughly US\$170,000 1,00,000

MONTREAL CONVENTION 1999

- Major provisions
- Scope –Actual carrier , contractual carrier
- Carrier includes Agents of actual and contractual carrier, GHA also an agent
- Documentation- Electronic ticket and waybills are valid
- Failure of Notice not to affect the liability limits



MONTREAL CONVENTION 1999

- Defense of the carrier - Lack of negligence or that of third party
 - Only above SDR 1,13,000
- Art.28. Advance payment to meet immediate economic needs
- Art 37. Claims against Third parties by the Carrier
- Limited Liability w.r.t delay SDR 4150 /passenger –
Currently SDR 4694



MONTREAL CONVENTION 1999

- Baggage liability
- Warsaw system – SDR 17 /KG
- Montreal System- SDR 1000 w.r.t destruction, loss, damage, delay per passenger- not as per weight (increased to SDR 1,113 w.e.f 1/1/2010)
- Special declaration of Interest
- Cargo Limit SDR 17 per KG
- Damage to be proved



MONTREAL CONVENTION 1999

- Jurisdiction
- In addition to 4 jurisdictions , the principal or permanent residence of the passenger in case of his death or injury
- Cumulative Conditions
- Court should be in a state to/from where carrier operates / conducts its business from its leased or owned premises



MONTREAL CONVENTION

○ Elaboration required

- The assessment of damages on the basis of National Laws
- Non- Physical injury – compensation
- Legal basis for exceeding limit of 1,13,000 SDR- Is it a presumed fault on the part of the carrier
- The need for Definition of Delay
- Liability in the context of code sharing and franchising arrangements



PART II

Indian Response to International Conventions



INDIAN SCENARIO

- 1911- first commercial flight
- First Air law - Indian Airships Act 1911
- 1919 Paris convention
- 1920 Royal Air force operated airmail
- 1929-30 –India had 36 International flights
- The Indian Carriage by Air Act 1934
- The Indian Aircraft Act 1934



CARRIAGE BY AIR ACT 1972

- The Indian Carriage by Air Act 1934- repealed
 - To give effect to the Warsaw convention 1929
- Amended as per Hague protocol 1955
- Montreal Convention- Amendment of 2009-w.e.f 1.7.2009
- Montreal Convention- 3rd Schedule of Carriage by Air Act 1972



CARRIAGE BY AIR ACT 1972

- Contains three sets of liability norms
- Section 3 & First Schedule-Warsaw Convention Section 4 & Second Schedule – Hague Protocols
- Section 4A & Third Schedule – The Montreal Convention
- Section 8 empowers Central Govt to come out with notification to extend carries liability norms to domestic carriage with or without modification.



MANGALORE AIR CRASH

- Analysis of judgment of Kerala High Court
 - WA 1197 and WA 1237 of 2011
 - Judgment date 25.Aug 2011
 - Division Bench of Kerala H.C Ernakulam
- Facts
- Air India Express flight crashed in Bajpe airport on 22.5.2010 while landing
 - 158 passengers killed and 10 injured
 - Cause of crash – pilot error
 - Air India does not dispute liability



MANGALORE CRASH- JUDGMENT

- Rule 28- Advance payment made by Air India,
 - Advance payment Rs .10 Lakhs for adult passenger and Rs.5 Lakhs for child passenger
- Claim settlement mechanism of Air India- through negotiated settlement by attorneys



COMPENSATION SETTLEMENT

- Min Amount of settlement for death –25 lakhs
- Max settlement - 7.575 Crores
- Average - 80 Lakhs
- Settlement for Injury upto - 45.7 lakhs
- Total settlement amount - 50 crores



WRIT PETITION - GROUNDS

- WP filed by legal heirs of **Mohammed Rafi**, who was killed in the crash, who was working as a sales man in UAE at a monthly salary of Rs 25000.
 - The Petitioner in WP filed claim for the death and received advance amount of Rs. 20 Lakhs
 - Grounds
 - India has adopted Montreal convention in 2009
 - Minimum compensation of Rs 1,00,000 SDR is payable irrespective of age, income, loss of dependency, or any other factor.
 - Single judge bench allowed the petition
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WRIT APPEAL - GROUNDS BY AI

- **National Aviation Co Ltd Vs S. Abdul Salam**
- **Grievance**
- Insurance coverage only for legally payable
- Insurance will refuse any payment not as per Act and Rules
- Impact on premium payment for future Insurance coverage
- **Grounds**
- Montreal convention(3rd Schedule of Carriage by Air Act 1972) neither prescribes any minimum payment nor any maximum payment limits
- But compensation based on actual proof of damage caused or injury suffered



WRIT APPEAL BY PETITIONER

- The petitioner in WP challenged the single judge decision
 - For raising compensation from 1,00,000 SDR to 1,13,100 SDR as per rule 24(1)
 - Based on British parliament decision based on Rule 24(1)
 - GoI has not amended Rule 21(1) substituting the amount



DIVISION BENCH DECISION

- No limits as per 3rd schedule- unlimited
- Only strict liability upto 1,00,000 SDR
- No upper limits – only it is not strict liability
- If at all Rule 21(1) provides for minimum compensation of 1 lakh SDRs, then it applies not only for death of the passenger, but for bodily injury as well. as per the Rule 17(1)



RULE 17(1)

- R.17(1) The carrier shall be liable for damages sustained in case of *death or bodily injury* of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.



RULE 21.1

- **R.21.(1)** For damages arising under sub-rule (1) of rule 17 ***not exceeding one lakh Special Drawing Rights*** for each passenger, the carrier shall not be able to exclude or limit its liability.
- (2) The carrier shall not be liable for damages arising under sub-rule (1) of rule 17 to the extent that they exceed for each passenger one lakh Special Drawing Rights if the carrier proves that--
- (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or
- (b) such damage was solely due to the negligence or other wrongful act or omission of a third party.



DIVISION BENCH DECISION

- Advance payment of compensation, as per Rule 28, shall not be treated as a recognition of liability and the advance payments made will be adjusted against damages finally determined.



DIVISION BENCH DECISION

- This Rule makes it clear that damages payable is to be determined based on sound principles of law and there is **no concept of minimum compensation payable** because if minimum is payable, then certainly Rule 28 could have provided for minimum payment **as advance compensation** and there is no scope for providing set off of minimum amount against final award



DIVISION BENCH DECISION

- However, the carrier is liable to pay only actual damages proved by the claimants in the case of death and by the victims in the case of injury. The liability so payable can be determined through negotiated settlement or by civil court of competent jurisdiction
- Rule 21(1) of the Third Schedule to the Act or any other provisions of the Act or Rules does not provide for payment of any minimum compensation by the air company for death or injury of a passenger in an air accident.



SUMMARY

- No upper or lower liability
 - Strict liability *up to* 1,00,000 SDR
 - Liability beyond 1,00,000 SDR carrier has certain grounds of defense
 - Actual damage to be proved for compensation.
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CONSUMER PROTECTION ACT

- Service, consumer
- Deficiency in service
- Burden of proof- on complainant
- Burden of proof – in relation to Carriage by Air Act
- Relatively less compensation
- Who is the consumer- airlines or passenger in case of ATC, ANS, Airport



CONSUMER PROTECTION ACT

- Overlap of CPA and Carriage by Air Act 1972
- Supreme court – *Trans Mediterranean Airways Vs Universal Exports & Oths*
- *Section 3 of the CPA gives additional remedy for deficiency of service and that remedy is not in derogation of any other remedy under any law.*
- *Consumer Forum have jurisdiction under carrigae by Air Act 1972*
- *By Section 5 of Carriage by Air Act this is not applicable in case of death (Section 5 –excludes liability of the carrier under any other Act in case of death)*



Thank you

