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1.2.5. - DOMESTIC AIR LAWS IN INDIA

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MODULE I:
DOMESTIC
IMPLEMENTATION
OF
INTERNATIONAL
AIR LAWS IN
INDIA, UK & USA

IMPLEMENTATION OF INTERNATIONAL LAWS AND INTERNATIONAL AIR LAW IN INDIA

Law, as an instrument of orderliness in the society, cannot keep itself confined to private individuals and intra national affairs. The ever increasing interactions between people and states have contributed to making the world, in the words of Marshall McLuhan, „A Global Village“. A legal system impervious to these changes would find itself hopelessly out of sync in tune with the changing times and consequently irrelevant. Therefore the field of International Law has come into its own in order to take on these challenges. It must be emphasized however that International Law does not exist for its own sake. The same developments as mentioned above cannot hope to sustain themselves if there is no order in their conduct. The globalized world needs international law as badly as, if not more than, law itself does!

International Law, in the present context, is considered as one of the most significant concepts, which has been gaining momentum at a fast pace in the world community. There has been several occasions, since the evolution of human civilization, where efforts have been put by mankind throughout the world in order to legitimize the concept of International Law in a broader perspective, with the sole objective of maintain universal brotherhood and keeping international war and conflicts at bay. Since the formation of the world community, especially after the Second World War (1939-44), inferences of International Law can be found quite frequently. The presence of International Law has increased by leaps and bounds which is quite evident from the fact that almost all the sovereign nations of the world, irrespective of their political, social, economic, religious or geographical background, have voluntarily accepted the authority of International Law.

Modern technology, communications and trade have made states more interdependent than ever before, and more willing to accept International rules on a vast range of problems of common concerns. Many of the structural changes that have taken place in the world economy since the early 1980s originated in technological progress. The technological innovation, triggered by the deregulation trends of the 1970s, facilitated the emergence of a huge global market for funds and financial instruments. This globalization process, as the phenomenon came to be described, made innovation, together with flexibility in the location of production, distributions and service facilities, even more crucial for profitability. The interplay between trade, investment, technology, and services, as well as their financial interpinning, has accordingly increased in density, giving additional impetus to the growth of interdependence.

The practice of States regarding the relationship of International Law and Municipal Law is divergent. Application of International Law depends largely upon the Legislature as well as the Judiciary of a State. They are expected to take cognizance and endeavor to honor the international obligations of the State. It has to be realized by them that neither Municipal Law nor International Law is supreme, but they are concordant to each other. They both have been made to solve the problems of human beings in different areas. If they refuse to accept the rules of International Law, relations between the States would obviously become tense and the high ideals of ‘maintaining international peace and security’ will be at peril.

Issues and Perspectives on International Law

The approach of a particular states municipal courts to international law will be characterized by that states attitude to and reception of international law—an attitude which may and does differ according to the type of international law question involved—treaty or customary international law. Before discussing what happens in practice in India a brief mention must be made of the theories which have evolved on the relationship of municipal law to international law. These are traditionally divided into two principal schools—Monism and Dualism. To put simply, a state is monistic if it accepts international law automatically as part of its municipal law and does not demand an express act of the legislature, whereas if a state is dualistic, international law will only become part of its municipal law if it has been expressly adopted as such by way of a legislative act. India, as well as most of the world, falls within the dualistic school, which is made clear on perusal of Article 253 of the Constitution.

Relation between International Law and Domestic Law

International law is generally defined as the body of rules and regulations which determines the conduct of sovereign states. According to traditionalists' view International law regulates the relations between or among sovereign states. This view was opposed by modern jurists who have opined that international law not only regulates the relations between or among states alone, but also regulates the conduct of International Institutions, individuals and non-state entities to a certain extent. International law is essentially comprised of two bodies of law: Conventional International Law (treaty based law) and Customary International Law (law based upon state practice).

Implementation is the very object for which any law is formulated; same is the case with international law. But in case of international law, direct implementation is not possible as the states do not surrender their sovereignty to any external force. The other impediments to implement international law is that the we have different legal systems around the world such as Civil Law, Common Law, Islamic Law, Socialist Law, Sub- Saharan Law, African Law and Law in East- Africa all having different adjudication mechanisms, which evidently show a lack of uniformity in the application of international law in the domestic sphere.

The relationship between the municipal and international law is made clear in the landmark case of *Alabama Claims Arbitration*⁴ wherein it was concluded that neither municipal legislative provisions, nor the absence of them, could be pleaded as a defense for non-compliance with international obligations. This view was by endorsed by the Permanent Court of International Justice in an advisory opinion to hold that“...a State which has contracted valid international obligations is bound to make in its legislations such modifications as may be necessary to endure fulfillment of the obligations undertaken.” This view was thus incorporated in Article 13 of the Draft Declaration on the Rights and Duties of the States 1949 and more authoritatively in Article 27 of the Vienna Convention of the Law of Treaties, 1969. While the general rule regarding third party states is contained in Article 34 of VCLT, the obligations of State Parties who have signed the treaty but not ratified it are enunciated in Article 18, which is relevant to us for the present purposes. This means that even though India may have signed the treaty, till its ratification, it cannot by its commissions or omissions derogate from the spirit of the treaty. The implementation of international law at the domestic level is based on various theories adopted by nations:

- a) Monistic Theory
- b) Dualistic Theory
- c) Transformation Theory
- d) Specific Adoption Theory
- e) Delegation Theory

At this juncture certain questions do arise such as:

Why do states feel compelled to abide by international law? Is legislation the only way of incorporating international law principles into domestic law? If an inconsistent domestic law can prevail over the international law in the domestic arena, does this negate any usefulness a customary international law may provide? What needs to be looked into is can individuals invoke international law before domestic courts? More importantly, can they gain rights under international law, which they can enforce within the municipal legal system? Also, what needs to be examined is the extent to which municipal courts will give effect within the domestic system to rules of international law that is contrary or not contrary to domestic law? The approach of a particular state's municipal courts to international law will be characterized by that state's attitude to and reception of international law- an attitude which may and does differ according to the type of international law in question- treaty law or customary international law. The role of the domestic courts in the application, enforcement and development of international law has been inconsistent. The practice of domestic law is that it deals with issues between the individuals, and between the individual and the administrative apparatus of the government whereas international law on the other hand deals basically between two states, though it includes non-state entities, multinational corporations and individual in their modern definition.

India and International Law

In 1947 India joined the family of Sovereign Nations. Under British rule her external relations with other nations had been part of British foreign policy. Internal relations between Indian rulers had been reduced to a quasi-international character in the last century. British rule brought India in the nineteenth century into the framework of a new empire and her external relations were henceforward conducted from London. In spite of the existence of over 600 Princely States side by side with the provinces of British India their mutual relations did not call for a solution of legal problems on the basis of international law proper, as the rulers of the native States did not possess external sovereignty.⁶ These relations were a matter of co-ordination of all parts of the Indian Empire under British rule and amounted to wide control of the provinces and to the suzerainty or paramount of the Crown over the surviving vassal States. However, as the Indian rulers enjoyed internal independence, the various legal systems in force in their States, together with the private law of British India, occupied English and Indian lawyers with numerous problems of private international law. Indian courts as well as the Judicial Committee of the Privy Council had to tackle these problems continually and their solution was pre-dominantly determined by rules of private international law as evolved in England.

Independent India was faced with new legal problems. She acquired full international personality with its international rights and duties, and her external relations were conducted from New Delhi. She absorbed, together with the provinces of British India, all the native

States, and became a Federal State with a written Constitution. A new internal law of inter-State relations, both public and private, needed to be evolved within the Federal framework. The distinction between these two branches of law which, in the view of generations of English lawyers, was of an academic character, assumed practical importance in India. Embodying the structure of a State in a written Constitution means the adoption of a system of public law near to American constitutional law and practice, as it provided the only worthwhile precedent on the subject within the Common Law community. Apart from problems of government and administration constant changes in Indian private law called for the revision of certain provisions of the private international law of India.

In this age of globalization and interdependence, principles of international law affect all states, small and large, rich and poor, weak and powerful alike. Many of the structural changes that have taken place in the world economy since the early 1980s has resulted in liberalizing capital, Labour, services, IPRs etc. which in turn has increased the interdependence. Hitherto, we were only dealing with the national issues, which came before the Various Indian Courts including the Supreme Court along with the High Courts and District Courts. But hereafter, the comfort of dealing with only Municipal Laws is fast dwindling for our Courts, since now we have to deal with the conflicts which have international dimensions.

International Law has come to impinge on core aspects of national life-economic, social, and cultural. India's interest in international law has always been profound with the progress and development of international relations in various parts of the world. This is *inter alia* reflected in a number of recent decisions of the Supreme Court of India in which it has been compelled to refer to developments in international law. The fact that successive governments have been vigorously pursuing policies of liberalization, calling for greater integration into the world economy, is only going to increase the intervention of international law in the national life. It is, therefore, imperative that not only the lawyers, policymakers, bureaucrats and academicians need to have a sound understanding of the subject but it is more important that the Judiciary become aware of the interface between international law and municipal law and harmonize the implementation of both laws.

The Indian Constitution and International Law

India's Constitution is among the longest and most detailed in the world. It was therefore natural that the important subject of International Law's application in the India should be covered therein. A brief summary of the relevant provisions is made below: Article 51 (c), a part of the Directive Principles of State Policy (DPSPs), is the first express mention of International Law in the Constitution. It reads: (The State shall endeavor to)...foster respect for international law and treaty obligations in the dealings of organized peoples with one another. Plenty of questions have been raised about the value and efficacy of this Article, considering it forms part of the DPSPs and have been held to be unenforceable by the Courts. However this argument is flawed as it does not take into account the persuasive value of the DPSPs and the many decisions of the Supreme Court that have upheld their importance in the governance of the country and the determination of government policy. Article 73 of the Constitution deals with the extent of Executive power of the Union i.e. the Central Government. International relations, which are a Union function, also find mention. The

Article reads: Subject to the provisions of this Constitution, the executive power of the Union shall extend... (b) To the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement. Article 246 bestows the Parliament with the power to legislate on Entry 14 of List I. Since that has not been done till now, the President's treaty making powers remain wide ranging and free of any restrictions. Hence, the Executive will be very much within its power to bind India internationally under a valid treaty, without referring to the Parliament, or require legislation sanctioning money expenditure, or require a change in existing laws for implementation of the treaty obligations of the Union. Further power on the Parliament to make laws as regarding International law is bestowed by Article 248. A rather general provision, it states that Parliament has exclusive power to make laws with respect to any matter not contained in the State or Concurrent List.

Direct reference to the same is made in Article 253. It reads: Legislation for giving effect to international agreements- Notwithstanding anything in the foregoing provisions of this chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

The subjects of exercise of this power under Article 253 are enunciated in Entries 10 to 21 of List I of the Seventh Schedule which pertain to International Law. In making any law under any of these entries, Parliament is required to keep Article 51 in mind.⁹ Entry 1410 of the Union List confers on the Union Parliament exclusive power to make laws with respect to "entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries". Also Entry 10 of that List provides for „Foreign affairs; all matters which bring the Union into relation with any Foreign Country". For quite some time after the commencement of the Constitution not much use was made of these provisions. But now it almost all legislations on environment since mid-1970s have been enacted under this provision. Legislations relating to TRIPS, ensuring India's conformity with WTO membership, are also being enacted under this provision.

The relevance of Article 253 cannot be overstated. While India is a signatory to various international treaties and covenants and being a party to WTO and GATT, it is obligated to fulfill its trans-national obligations. While doing so, the Legislature should give effect to the will of the makers of the Constitution and not act contrary thereto or inconsistent thereto. The *State of West Bengal v. Kesoram Industries Ltd*, (2004) 10 SCC 201, para 239 10 seventh Schedule: List I - Union List: 14 stipulates for: "Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries." *Maganbhai Ishwarbhai Patel v. Union of India*, (1970) 3 S.C.C. 400; A.I.R. 1969 SC 783

India's implementation of international law principles can be traced back to even the pre-independence era. The British India during the colonial period was treated as a separate state, with an international legal personality of its own. It was a member of League of Nations. It was a party to statute of Permanent Court of Justice and General Act on the Pacific Settlement of Disputes, 1928. It entered into treaties and ratified them. It has a dubious distinction of ratifying the 1937 Geneva Convention for the Prevention and Punishment of Terrorism, which the UK and other nations did not ratify. British India was also a

participated in the San Francisco conference which led to establishment of the United Nations.

After independence, the most specific article dealing with international law in the Indian Constitution is Art. 51 of the Directive Principles. It says: The State shall endeavor to promote international peace and security; maintain just and honorable relations with nations; foster respect for international law and treaty obligations in dealings of organized people with one another; and encourage settlement of international dispute by arbitration. Now the immense growth of international law, and shift in India's economic policy approach has changed the situation in fact to be more relevant to the growth of India as a nation.

Other relevant provisions of the Indian constitution are:

- a) The Preamble, recognizing and declaring the Sovereignty of India;
- b) Fundamental Rights, Part-II of the Indian Constitution treads on the path laid down by the International Covenant of Civil and Political Rights.
- c) Directive Principles of State Policy (Part IV), have been interpreted by the courts keeping in mind the international conventions, e.g. they have been described as forerunner of the UN convention on right to development as inalienable human rights¹;
- d) Article 73, extent of executive power of Union over the matters within the jurisdiction of Parliament of India;
- e) Article 245 (2) providing for extra territorial jurisdiction to the laws made by the Parliament of India,
- f) Article 246, parliament's exclusive power to make law on the matters enumerated in Schedule VII, List I;
- g) Article 248 read with entry 97 of the List I, Schedule VII, rests the residuary powers with the Union of India;
- h) Article 253 read with entry 14 of the Union List in Schedule VII, Parliament's exclusive power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or body.
- i) Art. 260 recognizes the Central Government's competence to act in legislative, executive, judicial capacity for any territory which is not part of India by agreement with the government of that territory, subject to any law relating to foreign jurisdiction for the time being in force;
- j) Art. 363, bars the jurisdiction of Indian Courts except the Advisory jurisdiction (Art. 143) in any dispute arising out of any provision of a treaty, agreement, covenant, engagements and or other similar agreement entered into before commencement of Constitution of India ;

¹Air India statutory Corporation v. United labor Union, AIR 1997 SC 645

k) Art.372, pre- constitution laws to be continued in force unless repealed, altered or amended by a legislature or competent authority.

Treaty making and implementation in India

India is a party to most of the international treaties, which forms part of international law. It is the general proposition of law that once consent has been given, the Consenter is estopped from going back on the same. India is under a duty to carry out in good faith, its obligations arising out of these treaties. This imposes on it a positive duty to implement and enforce the same in its municipal legal system. Moreover, since international law is a result of the consent given by states in the first place, they are under solemn obligations to give effect to those rules in their respective jurisdictions.

Entering into treaties and agreements with foreign powers is one of the attributes of State Sovereignty. Now, the concept of State Sovereignty has changed the command of sovereign to science of social adjustment. The advent of globalization and the enormous advances made in communication and information technology have rendered independent states interdependent. Every state has entered into and is entering into treaties –be it multi-lateral or bilateral- which has a serious impact upon the economy and the social and political life of its society. In spite of the fundamental importance of the treaty-making power, it has unfortunately received very little attention in our country, though in many other countries, good amount of research and debate has gone into it. We in India cannot afford to ignore this subject any longer, particularly because of the experience of WTO treaties signed by India without consulting or without taking into confidence either the parliament or people which is likely to affect us adversely.

Since, India does not follow the concept of separation of powers strictly, in the field of treaty-making it often gives rise to a debate as to whether one organ overrides the authority of another. The core issue in our system of government, as on today, is not whether the state sovereignty is restricted by such treaties, but whether the exercise of state sovereignty (i.e. treaty making) by the executive government restricts the parliamentary sovereignty to an unacceptable extent. To elaborate the core issue, the several questions that arise in this behalf are: (1) which treaties are deemed to be insufficiently important to be referred to the parliament? (2) Who is determining the importance of a particular treaty for being referred to the parliament? (3) At what stage should the parliament come into the picture- whether before entering into the treaty or after it is signed but before it is ratified and only when legislation is required to be made to give effect to the treaty? (4) what form should be the reference to Parliament be-should it be subjected to a positive resolution of approval or should the reference to parliament be subject to a positive resolution of approval or should it be provided that the treaty be laid before the House for a particular period, on the expiry of which the parliament must be deemed to have approved it by default and so on?

Indian Judiciary and International Law

An analysis of the above mentioned provisions and the related case law on the subject helps us pinpoint the place of International Law in India. International law has no supremacy over municipal law in the Indian Constitution.

It was first held in *Birma v. State of Rajasthan* by the Supreme Court that certain treaties such as those affecting private rights must be legislated by Parliament to become enforceable.¹³ This was reiterated in *Ajaib Singh v. State of Punjab* that an International law principle is not part of the law of the land unless it is adopted as such by an Act of Parliament. Furthermore like all Acts, it too must be tested on the anvil of Article 13 of the Constitution.¹⁴ It rejected the contention of the Government that as a consequence of an agreement between India and a foreign country (Pakistan), the Abducted Persons (Recovery and Restoration) Act of 1949 should be deemed to be valid. The Court stated that it has been held that the Supreme Court of the US that it had the power to set aside treaties, inspite of clear provisions in the US Constitution that declared the same to be the Law of the Land. It quoted *Ware v. Hylool* and *State of Missouri v. Holland* to buttress its point. There is no provision in the Constitution of India which declares that all treaties to which the Government of India is a party shall be vested with statutory authority. Article 51 declares the directive principle that the State shall foster respect for every international law and treaty obligations and Article 253 empowers Parliament to make any law for the purpose of implementing the treaty obligations of India, but neither of these two Articles empowers Parliament to make a law which can deprive a citizen of India of the fundamental rights conferred upon him.

In *Shri Krishna Sharma v. State of West Bengal*, it was held that the provisions of the Anglo Tibet Trade Regulations of 1914 that were apparently in conflict with statutory law would have to give way to the latter. In *Re Berubari Union*, the Supreme Court exercising its advisory opinion under Article 143 of the Constitution held that any matter relating to the cession of territory should certainly involve a legislative enactment. This was in reference to the situation in West Bengal/East Pakistan where a number of enclaves and exclaves were formed due to old agreements. This had made the task of administration very difficult.

In *Maganlal Ishwarbhai Patel v. Union of India*, it was prayed by the petitioner that the Government of India be restrained from ceding without approval of Parliament areas in the Rann of Kutch to Pakistan. The question before the Court was whether the Award in relation to the ceding territories needed to be implemented in the form of a binding legislation. The Apex Court observed that boundary between two States was indefinite and only by the Award of the International Tribunal could the true boundary of India and Pakistan be determined. However, the award does not give rise to obligation to cede Indian Territory and it did no more than define on surface of earth a boundary. In the light of this, it was held the Award itself was the operative treaty. It is relevant to note that the Hon'ble Court held that though in this case the Award need not be implemented through a domestic legislation, yet, in cases where citizen's right are involved, legislation to that effect is unavoidable.

In the landmark case of *Vishakha v. State of Rajasthan* that dealt with the sexual harassment of women at the workplace, the Supreme Court held that the international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them... to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee..”

It is significant to examine the basis of the Hon'ble Court's decision. It was to recognize the doctrine of Legitimate Expectation even in cases of unimplemented international instruments. Therefore, it was held that in the absence of domestic law occupying the field, to formulate

effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant. This was done to uphold the guarantee of gender equality, right to work with human dignity as found in Articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. It is also significant to note that the Court observed the executive power of the Union is, to be available till the Parliament enacts legislation to expressly provide measures needed to curb the evil. This balanced opinion, did not in any way undermine the relevance of Article 253 nor did it leave the field exclusively for the Executive.

In the case of *Nilabati Behera v. State of Orissa*, a provision in the ICCPR was referred to support the view taken that „an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right“, as a public law remedy under Article 32, distinct from the private law remedy in torts. Similarly, in *Arnit Das v. State of Bihar* the Court construed U.N. Standard Minimum Rules for the Administration of Juvenile Justice as providing a suitable backdrop for the Juvenile Justice Act, 2000.

There are no express provisions contained in the Constitution directly dealing with the relationship of international law and municipal law. Interestingly though, the courts have applied rules of customary international law in the cases of sovereign immunity and more recently in environmental litigation. There is no support in the Constitution for upholding the doctrine of incorporation.² This has led to imposition of regulations and guidelines on the Executive in the name of “well-established principles”, as was seen in *Vellore Citizens Welfare Forum v. Union of India*³, in a manner oblivious to the various developmental concerns that have to be factored in while accepting such principles as a part of our domestic legal regime.

When it comes to treaties, the approach has been better in terms of development of principles of incorporation as well as interpretation of treaties. The probable reason for this could be the indicators and direction offered by the Constitution itself. The Indian Constitution empowers the Parliament to make treaties under Article 253⁴ of the Constitution. Hence, as mentioned earlier the treaty making power will have to be exercised in the manner contemplated by the Constitution and subject to the limitations imposed upon it. The executive authorities at the center are empowered to make any kind of treaty, convention or agreement and such treaties for its effective implementation are legislated by the parliament⁵. This scheme under the Indian Constitution thus resembles that of the dualistic system in international law.

As mentioned earlier, the Indian practice of implementation of international law is by adopting both customary and conventional practice. Regarding the enforcement of customary international law in India, the Supreme Court in *Peoples’ Union for Civil Rights v. Union of India*⁶, held that it is an accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the

²Nishant Kumar Singh, “The Indian Constitution and Customary International Law: Problems and Perspectives”, *The Student Advocate* Vo. 12 (2000) 81, 95.

³(1996) 5 SCC 647.

⁴Article 253.Legislation for giving effect to international agreements.

⁵⁵*In Re: The Berubari Union*, AIR 1960 SC 845.

⁶ AIR 1997 SC 568

domestic law. In other cases beginning with *In re Berubari*⁷, *MaganBhai v. U.O.I.*⁸, *Keshavanada Bharati v. State of Kerala*⁹, *Vishakha v. State of Rajasthan*¹⁰, the Supreme court re-iterated that various international covenants, particularly to which India is a signatory or party, becomes part of national law, in so far as there is no conflict between the two.

Summary

What comes through from these judgments is that the Supreme Court has been relying on the Treaties/Conventions, for example, those pertaining to human rights and environment, which elucidate and effectuate the people's fundamental rights, in particular, Article 21 of the Constitution. Any beneficial international law instruments are necessarily taken into consideration while considering a violation of rights. For instance, the Supreme Court has relied on international conventions in analyzing the right to maternity benefits under India's Maternity Benefit Act 1961. However, many instruments have not been incorporated as part of Article 21 of the Constitution. Yet the courts enforce these obligations leave apart construing it in consonance with municipal law. Such obligations are only those within the corpus of customary international law. A relevant example of this is the 1951 Convention on the Status of Refugees and its Protocol of 1967, to which India is not a party, yet certain protections are afforded to refugees in India based on provisions which incorporate norms of customary practice. However, one legitimate exception to this is, being a persistent objector to a practice; in which case, the norm will not be binding on India. However, it must be made clear that this is hardly the case with India.

Domestic Implementation of Air Law in India

Aviation law is the branch of law that concerns flight, air travel, and associated legal and business concerns. The purpose and need for aviation law occurs from the globalization and expanding nature of human interaction as we move from the seas to the air and to beyond our atmosphere. Air law may be defined as "the body of rules governing the use of airspace and its benefits for aviation, general public and nations of the world." Air law concerns the management of global airspace.

Recently, air law has produced enormous economic growth in the world. Almost two billion people fly in a year out of six billion populations. Transport of air passengers, cargo helps grow national economy and tourism. Aviation today is a safe and expeditious means of transport world over. The development of a country is linked to the growth of airports, aircrafts and air routes. Aviation is a big national industry today. Since air law is a part of modern international law, national aviation law are interlinked with the International air law and since India is a party to almost all the treaties and conventions, most of the legislations are implemented to give effect to those treaties and conventions.

The Globalization, Liberalization, Privatization, De-regulation and Re-regulations are forcing global community to enforce the existing international treaties and conclude more

⁷ AIR 1960 SC 845

⁸ AIR 1969 SC 783

⁹ AIR 1973 SC 1461

¹⁰ (1997) 3 SCC 433

international arrangements keeping in view of the above developments. In simple terms we may define air law as “the body of rules governing the use of airspace and its benefits for aviation, general public and nations of the world.” Air law concerns the management of global airspace. Transport of air passengers, cargo helps grow national economy and tourism. Aviation today is a safe and expeditious means of transport world over. The development of a country is linked to the growth of airports, aircrafts and air routes. Today aviation is a big national industry in most parts of the world.

Air law is connected with a myriad of areas of law, such as civil law and private international air law in the context of the liability of the air carrier for damage sustained in the course of carriage by air; criminal law, which found its way into air law upon the occurrence of hijacking and other criminal acts committed on board aircraft; the law pertaining to the financing of aircraft, and also space craft, and related assets; tax law; competition law in the context of airline alliances; European Community law and environmental law. Today the protection of vital national security and of national economic interests is fading away in a world of liberalization, privatization and globalization. Nevertheless, the major part of the aviation sector, that is, the part including the operation of air services, is the only sector which is not subject to the regime of the World Trade Organization and the GATS. This is likely to remain so for the years to come.

On February 18, 1911 India's first commercial airplane flew between Allahabad and Naini. In 1912, India's first commercial international flight operated by the erstwhile Imperial Airways took place and connected Delhi to Karachi and beyond. In 1932, J.R.D. Tata flew an air mail service airplane, after which Tata Airlines ventured into scheduled air transport services. At the time of India's independence in 1947, nine air transport companies, carrying both air cargo and passengers, operated in the country. To further strengthen the national aviation sector, the Government of India and Air India - Tata Airlines was renamed Air India in 1946 – set up a joint sector company, Air India International Ltd. In order to address the deteriorating financial health of India's civil aviation sector, the Government of India passed the Air Corporations Act of 1953, which nationalized all carriers providing services within India's civil aviation industry.

Up until the late 1980s, India's civil aviation sector remained monopolized by India's government owned airlines. However in 1986, the Indian government once again granted permission to private sector companies to provide air taxi service. Additionally, India's Open Sky Policy of 1990 and the Air Corporations (Transfer of Undertakings and Repeal) Act of 1994 further freed up India's civil aviation industry and eradicated the government carrier monopoly. While these policy changes led to a dramatic increase in the number of private airline carriers; due to viability issues, by the end of the 20th century all private air carriers, except Jet Airlines and Air Sahara, exited the market.

In 2003 the introduction of a new type of airline service called low cost carriers - LCCs or no-frills air service - by Air Deccan, reinvigorated India's civil aviation sector. By bringing competition into the Jet Airlines-Air Sahara duopoly, Air Deccan brought a new competitive spirit to India's civil aviation. Furthermore, introduction of low cost airlines also changed the perception that air travel was reserved only for the elites. By 2007 mergers and acquisitions became common in India's civil aviation sector. Within a span of two years Air India and

Indian Airlines merged, as did Jet Airways and Air Sahara, and Kingfisher Airlines and Air Deccan. As India's civil aviation sector developed and evolved over time, in order to guide market participants the Ministry of Civil Aviation and Government of India periodically responded to new industry challenges by setting up and amending existing regulatory frameworks. Until 1994 the Directorate General of Civil Aviation (DGCA) controlled every aspect of flying including the licensing of pilots, certifying aircraft and issuing all rules and procedures governing Indian airports and airspace. However, in 1994 an Act of Parliament established the Airports Authority of India (AAI). This Act gave the AAI the power to manage all national and international airports and administer every aspect of air transport operation through the air traffic control.

In 2008, the Airports Economic Regulatory Authority of India Act established the Airports Economic Regulatory Authority (AERA) of India. AERA regulates tariffs and other aeronautical charges, as well as monitors airports' performance standards. Within the Indian context of airport regulation, AERA takes the following things into consideration: airports are natural monopolies; airports are public goods, both in the case of Brownfield and Greenfield airports the Government of India has made land available for acquisition, often under the Land Acquisition Act, to airport developers at a very low cost. Lastly, the same Act established the Appellate Tribunal which handles appeals from service providers and consumer groups.

Currently, India maintains bilateral Air Service Agreements (ASAs) with 108 countries. While 72 foreign airlines fly in and out of India, four private domestic carriers - Jet Air, IndiGo, SpiceJet and Kingfisher - fly to 35 destinations in 25 countries. Air India, the national carrier maintains a number of international routes: seven destinations in North America, nine destinations in Europe, 12 destinations in the Gulf, two destinations in the Middle East, two destinations in Africa, and 13 destinations in West and East Asia. At the normative level, the Aircraft Act, 1934 created the fundamental legislative framework for manufacture, possession, use, operation, sale, import and export of aircraft in India while the Carriage By Air Act, 1972 implemented the Warsaw Convention, 1929 in India. These legislations have been supplemented by host of statutory rules and notifications covering different aspects of aircraft operations and several security related enactments like the Tokyo Convention Act, 1975 and the Anti-Hijacking Act, 1982.

After years of talks and negotiation, the "open skies" Air Transport Agreement between the United States of America and India was signed on 14.04.2005 opening a new era in civil aviation partnership. Although there are a number of rules and regulations that have been covering the aviation sector in India, but still there are a number of problems that are prevalent even today which need immediate attention. In spite of all such struggle, the Indian aviation industry is one of the most prosperous one in the world which needs a positive effort from the Indian government to implement various international Conventions.

India's large land-mass encompasses five flight information regions and is run by nine area control centers. It is a region of low density traffic, and 55 per cent of its airspace is oceanic. Most of the terrain is mountainous and poor national telecommunications makes it almost impossible for India to meet ICAO's communications requirements. The Country's ATC problems are due to insufficient ground based navigation aids and restricted VHF radio and

radar coverage. Radio wave propagation limitations reduce accuracy and reliability of aids and communications, and the heavy dependence on voice rather than data restricts the use of automated air traffic control facilities. Airspace is inefficiently use, resulting incapacity restrictions. Apart from communication difficulties with neighboring states and on the other side of India's adjacent oceans, the country's specific problems make a satellite based system the only viable solution.

India has an eminent position in the civil aviation sector with a large fleet of aircrafts. In all, 56 airlines are operating scheduled air services to and through India and 22 foreign airlines are over flying Indian Territory. There are over 450 airports and 1091 registered aircrafts in the country. In addition to the three public sector airlines Air India, Indian Airlines, Alliance Air – there are two private operators – Jet Airways, Sahara India Airlines. There are also 41 non-scheduled air transport operators. Additionally 34 applicants have been granted NOC by the Ministry of Civil Aviation for setting up nonscheduled air transport operation. Air Transport has a significant role to play in a vast country like India with major industrial and commercial centers located far apart.

In the course of the 1970s, the US introduced the deregulation process upon which the then European Economic Community followed suit. It started its own phased cross-border liberalization process. That movement forced states to open their air transport markets – and to forget about national, vital economic interests. This was so far a unique venture which was completed in 1997, the moment on which all intra-Community services were made available to Community air carriers. Perhaps unsurprisingly, international air law and European Community (henceforth: EC) law did not form a natural bond.

The Developments in the Asia/Pacific Region and in India. The Asia/Pacific region offers abundant opportunities as the fastest growing aviation region in the world. The reasons for this optimism includes the strong economic expansion, significant ethnic ties with various countries, increase in leisure time, moves towards air transport liberalization and vigorous efforts to promote tourism to/from the region. The size and economic potential of the region has acted as a catalyst for development of new aircraft types, and manufacturers foresees a big market for future new aircraft. Within this region, India is a long-term potential giant.

The most serious impact of deregulation and liberalization of the aviation industry is being felt by airlines in developing countries. This may well lead to the formation of regional airlines from a number of small carriers in order to improve efficiency and productivity, to reduce cost and to maintain market share. Alternatively, airlines could greatly benefit from combined operations and joint projects, such as joint scheduling, sharing of equipment, crews and ground facilities, pooling of aircraft parts and support equipment, and cooperative arrangements for aircraft overhaul and maintenance. The rapidly changing environment of world air transport makes it essential that governments of developing countries and airline management should be very clear about their objectives and the need for close cooperation and sharing of scarce national resources. Increasingly, governments around the world are viewing privatization of government-owned and controlled companies as an important factor in attaining broad economic and public policy objectives, and airlines are no exception.

The Main reasons for this trend are: To act as a catalyst for deregulation and liberalization of important industries; to raise finance through the sale of state enterprises and to reduce the

cash drain on public funds by privatizing government-owned companies; to free government enterprises from political interference and civil service constraints so that they can become economically viable and profitable; and to introduce and encourage competition with a view to optimizing resources¹⁰. The size and importance of India's potential market is not matched by the size of its national carriers due to a variety of factors, an important one being the low priority that was attached to Civil Aviation in a resource constrained economy. The basic thrust of India's aviation policy is two-fold, To widen air links through negotiation of new agreements and review of existing ones. To formulate a comprehensive approach to obtain increased opportunities for its national carriers abroad.

Whereas international air law proceeds from adherence to sovereignty and state supervision of air transport, not only for safety and security but also for economic matters such as market access and pricing, the EC proclaims the market approach: from internal market via the common market to an open market. This market approach is also governed by principles regarding the protection of passengers and other consumers, and the environment. Frictions between European Community law and international law will not only arise and have not only arisen in the area of economic regulation but also of consumer and environmental protection.

Air law therefore is concerned with the national and global order. It provides order in air-space. It makes possible the duties and rights of the member states of the ICAO. Above all air law is vitally concerned with the economic activities of the modern societies. Air law also provides a means for cooperation among nation based on sovereign equality and fair and equal opportunity.

Aviation being a means of mass transportation in modern era, air law has therefore an important role in shaping of social and economic life and public order in India and in the global society. A large part of air law in India is contributed and developed by the International Civil Aviation Organization (ICAO). National aviation is interlinked with the international air law. Although air law is based on the notion of air space sovereignty of nation states, many issues concerning air law and transport are increasingly being studied in the light of a global community consensus.

Globally, civil aviation is undergoing technological advances in several areas which have impact on agreements. A major supporting development for the aviation industry in most parts of the world has been the globalization and liberalization of economies and an increasingly active role for the private sector in the economic development of the countries. These economic changes brought about structural changes in civil aviation throughout the world and also in the approach towards bilateral agreements and open skies. In 1944, the international aviation community and representatives of various States organized a major international conference in Chicago to consider regulation of international air transport with a view to developing and ensuring safe secure, efficient, and economical international air transport services and to avoid arbitrary action of the States which could hinder such development. This conference culminated in signing of three major agreements, which may be described as follows:

India has not remained insulated from the global trends. The liberalization process in the aviation sector commenced in 1986 and is still continuing. International as well as domestic

routes have been opened to private carriers. Within the ambit of bilateral air services agreements, India is liberalizing its policy in granting additional traffic rights to foreign airlines. India has offered 'open skies' policy to the ASEAN. Also, India offered to SAARC countries, additional frequencies and also additional landing points.. The "open skies" policy for international cargo is continuing. The policy relating to international tourist charter flights has been liberalized. India has also signed a bilateral open skies agreement with the USA. The liberal approach has led to significant growth in air traffic.

Need and Importance of Air Law

Law follows technology is a common saying, and the law technology nexus is growing stronger than ever before. Air and space law was and is a perfect example of the bond between law and technology. We have to depend on the process of legislation in our effort to develop international law to meet the new situation, and much of the legislation has had to be cut out of the whole cloth with little reference to conceptions which previously prevailed. Air law therefore is concerned with the national and global order. It provides order in space. It makes possible the duties and rights of the member states ICAO. Above all air law is vitally concerned with the economic activities of the modern societies. Air law also provides a means for cooperation among nation based on sovereign equality and fair and equal opportunity. Foremost among the chief priorities for aviation administrations and airlines is the safety and security of passengers, general public, ground personnel and property. Indeed, the improvements in the technology, which restored safety to modern aircraft, have also contributed to a great risk of loss to passengers as evident in a number of disasters in recent years. Fundamentally, governments cannot divest themselves of the responsibility to ensure an optimum level of safety, security and efficiency in civil aviation. Casualties have remained high due to the total destruction of aircraft in flight. Safety and security assurances are absolutely necessary if international tourism and the airline industry are to thrive.

Before Second World War there were little cases relating to air collisions. The few instances that have occurred since have been easily settled, but in the present day circumstances more and better rules are urgently needed. Civil Aviation have been greatly affected by social unrest since 1960, in various forms – hijacking, shooting down, sabotage – like explosions in aircraft, missile attacks against aircraft, armed attacks on airports, passengers, and aviation property and bombing. The motive ranges from political ideology to extortions and murders. These growing rates of incidents on various occasions prompted the suggestions of implementation of law and establishment of courts in order to deal with this aspect of aviation.

The fallout of these acts of unlawful interference in terms of human casualties, air services disruption and adverse economic impact is incalculable. The acts of unlawful interference diminish and undermine the civil aviation system and can be resisted only by a systematic worldwide vigilance and enhancement of security measures. The various incidents have added urgency for evolving an extremely stringent system of security control, leading to new acts, regulations and policies on security for airport managements, air carriers and airport police.

On the other hand Air Safety is also of paramount importance in air transport. The phrase "air safety" generally connotes the minimization of dangers, risks, and hazards during aircraft

operation, bearing chiefly on safety standards established by aviation technology and the competence of personnel involved in aircraft operation. In other words, air safety presupposes precautions against accidents of any kind, either by preventing their recurrence or by trying to minimize their effect. The recent concern about safety record signals a fundamental change in approach to international civil aviation in the coming years. As the air transport activity continues to grow, there are fears of an unacceptable spurt in air accidents. The challenge to the aviation industry and government is to determine how accidents should be minimized and safety improved further, in order to maintain the public confidence in air travel.

There is also compelling and urgent need to address the environmental effects of air transportation. Because of strong growth in demand, emissions of some pollutants from aviation are increasing against a background of emissions reductions from many other sources. In addition, progress on noise reduction has slowed. Millions of people are adversely affected by these side effects of aviation. As a result of these factors and rising value being placed on environmental quality, there are increasing constraints on the mobility, economic vitality and security of the nation. Airport expansion plans have been delayed or cancelled due to concerns over local air quality, water quality and community noise impacts. Military readiness is challenged by restrictions on operations. These effects are anticipated to grow as the economy and demand for air transportation grow. If not addressed, environmental impacts may well be the fundamental constraint on air transportation growth. Hence, there is need of effective legislation on this matter also.

Apart from this aviation law also aims to create the conditions for a viable, healthy air transport sector and to aid in the national development. It is necessary for maintaining effective relationship among different countries. India's large land-mass encompasses five flight information regions and is run by nine area control centers. It is a region of low density traffic, and 55 per cent of its airspace is oceanic. Most of the terrain is mountainous and poor national telecommunications makes it almost impossible for India to meet ICAO's communications requirements. The Country's ATC problems are due to insufficient ground based navigation aids and restricted VHP radio and radar coverage. Radio wave propagation limitations reduce accuracy and reliability of aids and communications, and the heavy dependence on voice rather than data restricts the use of automated air traffic control facilities. Airspace is inefficiently use, resulting incapacity restrictions. Apart from communication difficulties with neighboring states and on the other side of India's adjacent oceans, the country's specific problems make a satellite based system the only viable solution.

Civil Aviation regulations in India are dealt by the Aircraft Act 1934, the Aircraft Rules 1937, the Constitution of India 1950, the Incorporation of the International Standards and Recommended Practices of the Chicago Convention 1944, Convention Act 1975, Anti-Hijacking Act 1982 and Suppression of Unlawful Acts against the Safety of Civil Aviation Act 1982 and the 1994 amendments to the later two acts.

Under the Indian Constitution 1950, the subject "civil aviation" comes in the Union List. Thus, any criminal activity - unlawful interference against civil aviation occurring anywhere in India - is the Union Government's responsibility. Article 253 of the Constitution empowers Parliament to make any law for the whole or any part of the territory of India for implementing treaties, international agreements, and conventions including the international

civil aviation agreements. Following the Commonwealth practice, treaties are not required to be ratified by Parliament. They are not self-executor, however. Parliamentary legislation will be necessary to implement provisions of a treaty within the country. Indeed, Parliament has passed legislation to implement international treaties and conventions. Section 4 of the Aircraft Act 1934 also empowers the Union Government to make rules to implement the provisions of the Chicago Convention 1944.

A number of issues presently confront airlines in India, which need to be resolved. These include: improving financial viability of airlines, formulation of civil aviation policy, further liberalization of trade in international air services, regulation of domestic airlines including fares, raising the limit of FDI in domestic airlines, continuing Route Dispersal Guidelines in the present form, privatization of Air India, etc.

India today has a large civil aviation network. There are 122 airports in the country today, out of which 11 are international airports, which are maintained by the International Airport Authority of India, established in 1986.

There are a number of legislations that have come into practice on the pipeline of international air law norms, such as, the Airship Act, 1911, a pre-independence Act which in itself is a unique feature in the world, the Air Corporations (Transfer of Undertakings and Repeal) Act, 1994 which came into existence after the repeal of the previous Airport Corporation Act, 1953, the Airport Authority Act, 1994, w.e.f. 1995, the Aircraft Rules, 1937, the Airport Infrastructure Policy, 1997, the Aviation Policy, 2000, to name a few. At the normative level, the Aircraft Act, 1934 created the fundamental legislative framework for manufacture, possession, use, operation, sale, import and export of aircraft in India while the Carriage By Air Act, 1972 implemented the Warsaw Convention, 1929 in India. These legislations have been supplemented by host of statutory rules and notifications covering different aspects of aircraft operations and several security related enactments like the Tokyo Convention Act, 1975 and the Anti-Hijacking Act, 1982.

After years of talks and negotiation, the “open skies” Air Transport Agreement between the United States of America and India was signed on 14.04.2005 opening a new era in civil aviation partnership. Although there are a number of rules and regulations that have been covering the aviation sector in India, but still there are a number of problems that are prevalent even today which need immediate attention. In spite of all such struggle, the Indian aviation industry is one of the most prosperous one in the world which needs a positive effort from the Indian government to implement various international Conventions.

The air transportation operations in India are governed under *The Aircraft Act, 1934, The Aircraft Rules, 1937, The Air Corporation Act, 1953, The Air Corporation Act, 1953, The International Airports Authority Act, 1971, The Carriage by Air Act, 1972, The Tokyo Convention Act, 1975, The Anti-Hijacking Act, 1982, The National Airports Authority Act, 1985, The Airports Authority of India Act, 1994, The Air Corporations (Transfer of Undertakings and Repeal) Act, 1994.*

IMPORTANT CASES

1. *Indian Airlines Limited v Prabha D. Kanan*, Supreme Court of India, 10 November 2006

Facts: Regulations were framed by Appellant No. 1 in the year 1994 by Act No. 13 of 1994. The Parliament enacted Air Corporations (Transfer of Under-Takings and Repeal) Act, 1994 (for short "the 1994 Act") whereby and whereunder, the right, title and interest of Indian Airlines were transferred to Indian Airlines Limited. In terms of Section 45 of the 1953 Act, the Corporation made Regulations.

Issue: Constitutionality and/ or validity of Regulation 13 of the Indian Airlines (Flying Crew) Service Regulations (for short "the Regulations") is in question in these appeals which arise out of a judgment and order dated 30th August, 2005 passed by the High Court of Bombay in Writ Petition No. 2030 of 2003.

Judgment: The Court held that –

“As at present advised, we do not intend to enter into the said controversy. The judgment of this Court in *Air India* (supra) is binding on us. We have, therefore, no other option but to hold that Regulation 13 would not apply to the case of Respondent. However, despite the same, we are of the opinion that the interest of justice would be sub served if the nature of relief to Respondent granted by the High Court is upheld.”

The court, therefore, hold that although Regulation 13 is not unconstitutional but the same is not applicable in case of Respondent. However, court was furthermore of the opinion that in the peculiar facts and circumstances of this case and keeping in view the fact that she had put in 20 years of service she be paid eight years' salary towards both back wages as well as for loss of employment in future. This will be on the basis of her last drawn basic pay and dearness allowance. The Corporation will pay Respondent the amount refunded by her towards the provident fund and gratuity at the rate of interest provided under the Statutes governing them. The relief granted to Respondent shall, in our opinion, sub serve the interest of justice.

Both the appeals were allowed in part and to the extent mentioned hereinbefore. No costs.

In a case of judicial review, where no appeal against the punishment imposed on an employee is provided for, the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India would not confine its jurisdiction only to the known tests laid down therefor, viz., illegality, irrationality, procedural impropriety. It has to delve deeper into the matter. It would require a deeper scrutiny.

Keeping in view the situational changes and, particularly, outsourcing of the sovereign activities by the State, the Supreme Court has been expanding the scope of judicial review. It includes the misdirection in law, posing a wrong question or irrelevant question and failure to consider relevant question. On certain grounds judicial review on facts is also maintainable. Doctrine of unreasonableness has now given a way to doctrine of proportionality

2. *Air India Cabin Crew Association, Mumbai v (1) Union of India, Ministry of Labour, Through the Government Pleader; (2) Air India Limited; (3) V.A. Ferreira Executive Director - HRD and I/s, Air India Limited, Mumbai* 2007

Facts: By this petition under Article 226 of the Constitution of India, the petitioners challenge the order by which some service conditions were changed, dated 6th March, 2007 issued by respondent No. 3 for and on behalf of respondent No. 2 (hereinafter referred to as the impugned order) by which the crew complement is rationalized in the manner stipulated in the same. Respondent prior to impugned order signed several record notes and agreements agreeing to determine crew complement after discussion with petitioner-union unilaterally reduced crew compliment. Hence, present petition. The crew compliment as stipulated was effective from 15th March, 2007. The present petition was filed on 13th March, 2007. An application for urgent ad-interim order was made before the Division Bench of this Court on 14th March, 2007. This Court directed that the impugned order should not be acted upon. This ad-interim order is continuing till date.

Issues: 1. whether the principle of mutuality and bilateral agreement would govern determination of cabin crew complement or not?

2. Whether alteration or reduction of cabin crew complement is a condition of service or not.

Judgment: It was held by the Court, as per settlement of 1997 only suggestions of petitioner would be considered. Settlement also indicate that crew compliment is a matter to be decided unilaterally. Rationalization and management of resources is right of respondents only and hence Respondent was not under an obligation to take bilateral agreement however, it should not adversely prejudice the workforce by its unilateral decision. The Court further held that decision was not arbitrary, capricious, unfair, unreasonable and violative of mandate of Articles 14 and 21 of the Constitution Of India, 1950 as alleged. Consequently the writ petition fails. Rule is discharged. However, there shall be no order as to costs. Ad-interim order to stand vacated forthwith.

The principle followed in this case was that - “Rationalization and management of resources is a right that management possesses and while doing the same it may consider the suggestions of workers but is not under an obligation to take bilateral agreement however it cannot adversely prejudice the workforce by its unilateral decision.”

3. *International Airport A.I. Officers Association v Union of India and Another, 2005*

Facts: This writ petition challenges the constitutional validity of Section 12(3)(r) of the Airport Authority of India Act, 1994 (hereinafter referred to as the 'AAI Act') as being inconsistent with the provisions of the Sections 12(1) and 12(2) of the said AAI Act as well as on the ground of being ultra vires of Article 14 and 21 of the Constitution of India.

Issues: The present writ petition has been occasioned by the answer to a Parliamentary question wherein it was stated as will the Minister of Civil Aviation be pleased to state-

- (a) Whether the Government is considering to privatize some of the Airports in the country;
- (b) If so, the details thereof and the reasons therefore;

(c) The airports selected for privatization;

Judgment: The Court observed that:

“The Rule of construction is well settled that when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect should be given to both. This is what is known as the rule of harmonious construction.”

“The essence of harmonious construction is to give effect to both the provisions. Bearing these principles in mind it is legitimate to hold that Section 100(4) prescribed period of limitation of one year in respect of the scheme proposed under the provisions of the new Act, while in the case of a scheme under Section 68-C of the old Act, pending on the date of enforcement of the new Act, namely, July 1, 1989, the period of one year as prescribed under Section 100(4) should be computed from the date of commencement of the new Act. This interpretation would give full effect to both the sections --Section 100(4) and Section 217(2) (e) of the new Act.”

“The statute must be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute.”

Thus the position of law laid down by the Hon’ble Supreme Court and as noted in the text by Justice G.P. Singh’s statutory interpretation is clear that the provisions of the statute should be construed harmoniously so as to ensure that the provisions of one section do not defeat those of another unless reconciliation between the two sections is impossible.

Thus the Court found no merit in the writ petition and the writ petition was, therefore, dismissed.

4. National Aviation Company of India Limited (Erstwhile M/s Vayudoot Limited) v Ashok Kumar Parmar and another, 2010

Facts: The appellant/plaintiff had filed a suit for declaration, mandatory and permanent injunction. Plaintiff was appointed Deputy Commercial Manager with the defendant department i.e. M/s Vayudoot Limited with effect from 12.06.1989. In June 1990 he had applied for special leave for two years which was granted to him for a period of one year. On 19.8.1992, the plaintiff again applied for a 19 days leave for visiting his family in Canada. He was accordingly proceeded to Canada where he fell sick. He sought extension for leave by another month. His application was accompanied by medical certificate. On reaching India he found two letters dated 30.9.1992 and 07.10.1992 sent by the defendant intimating him that his services had been terminated on account of his unauthorized absence from service. By the present suit he had challenged the legality of the aforesaid letters.

Issues: In the body of the appeal the questions of law have been formulated on page 5 which are 12 in number. They are reproduced and inter alia read as follows:

1. Whether the First Appellate Court committed an error in law by not considering that the Appellant had "voluntarily abandoned the services" of the Respondent and no notice of termination was required?

2. Whether the First Appellate Court committed an error in law by ignoring the fact that extension of leave could have been obtained only during the subsistence of the leave and not post facto i.e. after the expiry of the leave?
3. Whether the First Appellate Court committed an error in law by ignoring the fact that there was no material on record to show that the alleged leave/extension of leave of the Respondent was sanctioned by the Competent Authority of the Appellant?
4. Whether the First Appellate Court was justified in dismissing the RCA No.09/2009 on the ground that the letters dated 30.09.1992 and 09.10.1992 were not sent at the Respondent's address in Canada?
5. Whether the First Appellate Court committed an error in law by not considering the fact that in terms of clause 5(b) of the appointment letter dated 05.05.1989, the respondent if at all entitled was entitled for 30 days salary only in lieu of the notice period.
6. Whether the First Appellate Court was justified in dismissing the RCA No.09/2009 on the ground that no opportunity was given to the Respondent to show cause the contemplated action of the Appellant?
7. Whether the First Appellate Court has wrongly held that the Appellant was under a bounden duty to hold an enquiry against the plaintiff in terms of Vayudoot Ltd. Service Rules?
8. Whether the First Appellate Court erred in law in relying on the judgment titled "Delhi Transport Corpn. Vs. D.TC.Mazdoor Congress" [AIR 1991 SC 101 1990 Indlaw SC 224]?
9. Whether the First Appellate Court erred in law in relying on the judgment titled "Jai Shanker Vs. State of Rajasthan: [AIR 1966 SC 492 1965 Indlaw SC 260]?"
10. Whether the First Appellate Court was justified in dismissing the RCA No.09/2009 on the ground of limitation?
11. Whether the First Appellate court was justified in dismissing the RCA No.09/2009 on the ground that it was not filed by duly authorized person?
12. Whether the First Appellate Court erred in law in not relying on the judgment titled "Central Co-operative Bank Ltd. vs. Shibbulal&Ors." [AIR 1988 MP 3 1987 Indlaw MP 229]?

Judgment: This appeal is yet at its initial stage i.e. on its maintainability. Only a substantial question of law arises can this Court interfere and not on any other count.

5. NipaDhar (nee Ghosh) v National Aviation Company of India Limited and others, Calcutta High Court, 10 December 2010, Civil Appellate Jurisdiction [Original Side]

Facts: The service of the petitioner was terminated on the ground that she was overweight. She was an airhostess naturally working as a Cabin Crew. She was grounded due to her overweight in September 1997. In spite of lapse of four years since after her being grounded, she failed to make up the deficiency as a result her service was dispensed with by the

employer. It further appears that clause 9(11) (b) of the letter of appointment was pressed into service in passing the aforesaid order. Clause 9(II)(b) of the letter of appointment provides that the appointment shall be liable to be terminated in the event the petitioner fails to maintain her weight within the prescribed weight limit.

Issues: i) Is the writ application maintainable on the factual premises admitted and on the legal questions canvassed?

ii) If the writ application is maintainable, whether order of termination may pass the test of Article 14 of Constitution of India, satisfying ingredients of reasonableness, non-arbitrary & non-discriminatory concept and also the concept of malice in law on factual and legal premises as pleaded and canvassed?

iii) Whether decision making process of termination of service is legal and valid by applying the terms of appointment, notification of employment and terms of settlement and provision of alternative job under disability Act, outcome of Constitutional mandate?

iv) What relief, if any could be granted by the Court?

Judgment: In the instant case it appears that the appellant joined in the service of Airhostess and she became a permanent staff of the respondent Company. Before terminating her service the concerned authority did not take care of her other rights as could be available on the admitted position of her suffering from phobic anxiety to flying and increase of body weight due to adverse reaction of medication, to cure it. It is true that right to work is not a fundamental right, but once a person is appointed to a post/office, be it government or private, right has to be dealt with as per public element.

Considering the aforesaid principles of law and points discussed and the Court's findings and observation above, writ is maintainable and the Court held that there was breach of Article 14 and 21 of the Constitution of India. The order of termination accordingly was not legally sustainable and it was set aside and quashed. From the various documents presented during the proceeding, it was proved that the appellant was suffering from phobic anxiety in flying and accordingly disable to perform flying duty.

The writ application was accordingly allowed. Appeal was also allowed accordingly.

DOMESTIC IMPLEMENTATION OF INTERNATIONAL AIR LAW IN EU, UK AND USA

EU -Origin and development of Regionalism

European regionalism took a concrete form during the late 1940s. The treaty establishing the Benelux Customs Union was signed in 1944 by the governments in exile of Belgium, Netherlands and Luxembourg in London, and entered into force in 1947. In 1952, Denmark, Sweden, Iceland and Norway (Finland joined in 1955) established the Nordic Council, an inter parliamentary organization with the goal to forge the regional Nordic co-operation.[9] The Nordic Council's statutes set out in the 1962 Helsinki Agreement, according to which the

parties undertake "to seek to preserve and further develop co-operation between our nations in the legal, cultural and financial areas as well as in matters relating to transport and protection of the environment".

In the 1951 Treaty of Paris, France, West Germany, Italy, Belgium, Luxembourg and the Netherlands established the European Coal and Steel Community (ECSC) to pool the steel and coal resources of its member-states. The same states established on March 25, 1957 by the signing of the Treaty of Rome the European Atomic Energy Community and the European Economic Community, most important of two European Communities. The EU has for long been a staunch supporter of regional cooperation and integration as a key element of global governance.

Although the member States of the European Union enjoy "freedom of the skies" between their various territories this is as a result of a multilateral agreement rather than their specific membership of the Union.. From the position of international aviation law each member of the Union is a separate sovereign State and countries outside the Union have to negotiate separate air service agreements with each member State. Traffic carried out by States from outside the Union between States which are members of the Union is international air transport not Cabotage. In 2003 the Commissioner (=Minister) for Transport for the Union, Neil Kinnoch, favoured the members States being considered as one, i.e. like a federation, for the purpose of negotiating air traffic rights, but up to 2005 members of the Union were still considered to be separate sovereign states. Consequent to such a move services between members might be considered to be Cabotage.

EU and Air Transport Regulations

Deregulations in other parts of the world Under the influence of deregulation in the United States, other industrialized countries, such as Australia, Canada, European Union (EU) countries and Japan adopted policies to liberalize the aviation industry and to bring about a more competitive environment. The structural changes in the Canadian airline industry bear a great similarity to developments in the US. In a period of de facto deregulation, starting in 1984, the airline industry in Canada moved rapidly toward a high degree of market concentration, before the new National Transportation Act came into effect in 1987. The liberalization in the air transport regulatory structure in the European Union ranks second to those in the United States and Canada in their significance for the international airline industry. Initially, developments were slow as a more cautious approach was taken considering that most of the major international airlines were owned by their governments. It was only in 1987 that important moves were made toward a common air transport policy.

A major landmark was the decision of the European Court of Justice in the *Nouvelles Frontières* case in April 1986, that air transport agreements are subject to the competition rules of the Treaty of Rome, Signed in 1957 by six European Countries. This meant that airlines may be prosecuted for violation unless exemptions have been granted to them under policies agreed upon by the Council of Ministers. The implications of this judgment put considerable pressure upon the European Community (EC), presently European Union (EU), to develop and agree upon an air transport policy. In December 1987, the Council of Ministers adopted a package of legal instruments put to them by the Commission and thus took the first step toward a general liberalization of the European air transport industry.

In addition, the European Civil Aviation Conference (ECAC), currently comprised of thirty-three European States, developed two International Agreements on intra-European airfares and capacity sharing. The EC and ECAC liberalization measures adopted in 1987 were followed by other regulatory changes, covering further reductions in capacity and tariffs control and additional provisions for freer market process, prior to the completion of a single European market by the end of 1992. The EU third package on air transport regulations became effective on 1 January 1993. There are three different regulations:

Regulation NO. 2407—the licensing regulation, dealing with the requirements for the issue and revocation of operating licenses to air carriers established in the Community

Regulation No. 2408—the access regulation, giving access to intra-Community routes to Community air carriers, and

Regulation No. 2409—the fares regulations, whose purpose is to abolish government intervention in the determination of fares on intra-Community routes.

As a result, all air services within EU countries may be regarded as having a special status under the EU third aviation package a domestic traffic and thus providing EU-based airlines with the opportunity to open new routes, whereas non-EU airline services within EU-countries may be considered cabotage traffic. This could bring about a new dimension in future negotiations concerning air service agreements.

The European Aviation Safety Agency (EASA) is an agency of the European Union (EU) with offices in Cologne, Germany, which has been given regulatory and executive tasks in the field of civilian aviation safety. It was created on 15 July 2002,[1] and it reached full functionality in 2008, taking over functions of the JAA (Joint Aviation Authorities). EFTA countries have been granted participation in the agency.

Improved air traffic safety and price transparency are key features of the new European Union (EU) air transport regulation, set to enter into force on Nov. 1, 2008. The new regulation lays down rules for the granting of licenses and for the control of airlines and market access, thereby ensuring more competition in the air transport field and better quality for the public.

The new legislation requires airlines to include all taxes and charges in their published ticket prices. This will enable passengers throughout the EU to be better informed about prices and to compare offers. Price discrimination based on place of residence is banned.

The new regulation, which was adopted by co-decision procedure, lays down common rules for the operation of air transport services in the European Community and changes present legislation (the "third air package," which comprises regulations (EEC) No 2407/92, No 2408/92 and No 2409/92). "It is vital that all the players keep to the same rules. That is one condition of liberalization in Europe that has been a real success story, with more travel possibilities and lower prices," said Antonio Tajani, European Commission (EC) vice president with responsibility for transport. "Fair competition is the key to success: with price transparency, passengers will know in advance how much they are going to pay and will be able to make informed choices."

Since the liberalization of air transport in the EU in 1997, the industry has expanded as never before, which has contributed to economic growth and job creation in the following ways: The number of airlines has increased and brought a general growth in traffic and more competition on air routes. The number of routes has increased by more than 60% and now more cities are served, particularly in remote areas. The emergence of new competitors has brought price reductions on many routes, allowing more Europeans to travel by air.

Travelers will be better informed and able to compare prices. From now on, ticket prices will have to be published inclusive of all taxes and charges. Also, passengers will be able to see the breakdown of the different categories of costs making up the final price: tariff, taxes, airport charges and other fees. Travelers will benefit from precise information on actual prices, making it possible for them to avoid misleading advertising and compare prices more easily. In addition, it will not be possible to impose optional additional charges on passengers without their express consent or "opt-in". Moreover, any price discrimination between passengers solely on the basis of their place of residence within the EU or their nationality will be prohibited. National authorities will have more oversight on companies so as to guarantee quality, ensure safety and prevent bankruptcies.

The new regulation ensures stricter and more harmonized application of the rules everywhere in the EU: Airlines' operating licenses will be monitored with the same level of severity in all member states. The criteria for the granting and validation of the license to operate in the EU are clarified. The leasing of aircraft registered in the EU is made easier, but stricter requirements are introduced for the leasing of third country aircraft in order to ensure safety standards. The rules applicable to public service obligations have been revised. The revisions were done to reduce red tape, simplify implementation of the new rules and prevent abuses. The EC may require an economic report explaining the context of a public service obligation and analyzing its adequacy. The needs of the outermost regions are taken into account by allowing, if necessary, a concession extended to five years. More effective measures have been adopted for cooperation between airports serving the same city or conurbation.

Under the control of the EC, traffic distribution rules will have to be non-discriminatory. Airports will have to set up effective transport infrastructures for the passengers' benefit. In addition, the remaining restrictions in bilateral air service agreements between member states have been abolished with respect to intra- community air services and code-sharing.

UK – Origin and development of Air Transport Regulations

The Civil Aviation Authority (CAA) is the public corporation which oversees and regulates all aspects of aviation in the United Kingdom. The CAA head office is located in the CAA House on Kingsway in Holborn, London Borough of Camden. The CAA Safety Regulation Group is in the Aviation House in Gatwick Airport in Crawley, England.

The CAA was established in 1972, under the terms of the Civil Aviation Act 1971, following the recommendations of a government committee chaired by Sir Ronald Edwards.[3] Previously, regulation of aviation was the responsibility of the Air Registration Board. The current main Act of Parliament regulating aviation in the UK is the Civil Aviation Act 1982. Responsibility for air traffic control in the UK passed to NATS in the run-up to the establishment of its public-private partnership in 2001.

Functions: The CAA directly or indirectly regulates all aspects of aviation in the UK. In some aspects of aviation it is the primary regulator, in other areas, where the responsibility for regulation has passed to the European Aviation Safety Agency (EASA), the CAA acts as EASA's local office, implementing the regulations. Representatives from the CAA sit on EASA's advisory bodies, taking part in the Europe-wide regulation process.

Responsibilities

- The CAA's responsibilities include:
- Flight Crew, Aircraft Engineer and Air Traffic Controller licensing;
- Medical regulation of safety-critical aviation personnel;
- Licensing of aerodromes and other aviation facilities;
- Maintaining the UK register of aircraft;
- Licensing of aircraft;
- Regulation of aircraft airworthiness and related engineering functions.

Economic regulation, including the regulation of monopoly and near-monopoly organizations involved in the provision of aviation services (for example National Air Traffic Services and BAA Limited), as well as regulating aviation-related organizations operating in a competitive marketplace (for example UK-based airlines); Development of aviation policy, both within the UK and Europe-wide.

ATOL - The CAA also oversees the Air Travel Organizers' Licensing (ATOL). The ATOL license offers financial protection for travellers booking package tours, in the form of insurance to provide return journeys for holidaymakers stranded abroad by the sudden bankruptcy of an airline or tour operator.

UK- Recent Development in Air Transport Developments

In December 2003 the Government published The Future of Air Transport White Paper which detailed the Government's approach to the future development of air transport. The White Paper does not in it authorize or preclude any development, but seeks instead to define a "national strategic framework for the future development of airport capacity" over the next 30 years. The principal conclusion is that the two extremes of failing to provide additional airport capacity, and encouraging growth without regard for the wider impacts, are equally unacceptable options. Instead a "balanced and measured approach" to the future of air transport in the UK is adopted. The Government's approach is designed to cater for the forecast growth in demand, thus supporting economic prosperity nationally and enabling ordinary people to travel at reasonable cost, whilst at the same time managing and mitigating the environmental impacts of aviation and ensuring that the costs associated with them are reflected in the price of air travel. In December 2006 the Government published the Air Transport White Paper Progress Report 2006 to report on progress made in "... delivering a sustainable future for aviation." The report re-iterates the Government's commitment to the strategy defined in the original White Paper, stating that it "... strikes the right balance between economic, social and environmental goals."

In 2010 the new Coalition Government abandoned the approach taken in the White Paper and ruled out further airport expansion of London's three main airports (Heathrow, Gatwick and

Stansted). However in a speech on 31st October 2011 to the Airport Operators Association to mark the close of submissions to the Government's public consultation on its aviation policy, the Secretary of State for Transport Justine Greening said that expansion elsewhere in the South East has not been ruled out. At the same event, the Labour Party's Shadow transport secretary Maria Eagle announced that the Party had abandoned its support for a third runway at Heathrow Airport but said that the Government must also drop its moratorium on new airport capacity in the South East. On 2 November 2011 the Thames Hub proposal was launched by Lord Foster. This attempts to integrate several infrastructure components (flood barrier, hydroelectric generation, rail lines) and includes plans for one of the World's largest airports. It would be capable of handling 150 million passengers a year, have 4 runways and be built on a platform in the Hoo Peninsula in Kent.

The current availability of airport capacity has been identified as an important constraint on the ability to meet the increasing demand for air travel. In many cases airport capacity is already fully used in meeting current demand. At Heathrow and Gatwick airports the runways are full for "... virtually the whole day". In 2003 the runway at Birmingham airport was expected to reach full capacity by 2009 at the latest, whilst terminal capacity at Edinburgh airport had reached its limit. Government forecasts that year suggested that by 2030 the number of passengers could rise to between 400mppa and 600mppa, representing a two- to threefold increase, and a figure of 500mppa by 2030 was regarded by the Government as "robust". In 2006 the Government reported that at 228mppa the demand for air travel the previous year was in line with the 2003 forecast, but also revised the forecast demand for 2030 downwards to 465mppa as a result of capacity constraints, even taking into account proposed airport developments.

Within the United Kingdom, the agency entrusted with the task of regulation is the Civil Aviation Authorityⁱ. The UKCAA is an agency that was hived-off the Department of Trade and Industry in 1971, and evolved as a result of dissatisfaction with its predecessor, the Air Transport Licensing Board (ATLB), due, principally to three recurrent defects, first, the lack of a working relationship with the minister, second, the inability to produce durable policies to guide its licensing decisions, and third, the lack of expertiseⁱⁱ. These defects were highlighted by the *Report on Air Transport in the seventies*ⁱⁱⁱ, and the alternative proposed was an agency that would combine the various aspects of regulation, such as economic and safety regulation, licensing and air traffic control, further, such alternative had to account for the objections raised by independent airline operators to departmental licensing due to the lack of any assurance of fair treatment from the government^{iv}, while remaining accountable to the minister. A reconciliation was effected through the creation of the Civil Aviation Authority, which while operating within the broad framework proposed by the Edwards' Committee Report, was subject to the Secretary of State for Trade's guidance on policy.

Such formulation of the organization of the agency sought the realization of the benefits that accrue from administration outside the department, such as limited governmental influence and continuity of policy, while circumventing the problem of how to maintain a modicum of control over the agency with regard to the manner in which the broad discretion granted ought to be exercised^v, through the system of policy guidance.

However, the Court of Appeal has applied a limitation on the nature of such policy guidance, stating that such guidance cannot reverse or contradict the broad objectives of the UKCAA^{vi}. Baldwin believes that the court's approach misconstrued the nature of the UKCAA, and to a great degree resulted in the structuring of discretion by the UKCAA itself, with exercise by the Secretary of State^{vii}. Baldwin's argument revolves around the nature of the CAA, where he proposes that rather than being a quasi-judicial body that warrants protection from executive interference, the CAA is a composite body that exercises executive as well as judicial functions, with excessive employ of discretion being limited by executive guidance of policy. Thus, he submits that executive interference is required in order to limit the internalization of discretion granted by the broad policy, and thus the court, through its pronouncement limiting the ability of guiding policy essentially reduces the effectiveness of such exercise as a check on the employ of discretionary power by the UKCAA.

In essence, the UKCAA operates as a regulatory body that is largely independent of government influence in matters pertaining to its decision-making process, and while checks have sought to be applied to its exercise of discretion, these have been further qualified by the Court, which has reduced the degree to which the body is accountable to Parliament. In such manner, the operation of the UKCAA illustrates a gradual movement of decentralization of the administration, representing a reconciliation of the two systems of administration, with the benefits of either entwined in operation.

USA– Origin and development of Air Transport Regulations

A Brief History of the FAA: The Federal Aviation Act of 1958 was an act of the United States Congress, (signed by President Dwight D. Eisenhower), that created the Federal Aviation Agency (later the Federal Aviation Administration or the FAA) and abolished its predecessor, the Civil Aeronautics Administration (CAA). The act empowered the FAA to oversee and regulate safety in the airline industry and the use of American airspace by both military aircraft and civilian aircraft.

Origins of the FAA: Aviation industry leaders believed the airplane could not reach its full commercial potential without federal action to improve and maintain safety standards. At their urging, the Air Commerce Act was passed in 1926. This landmark legislation charged the Secretary of Commerce with fostering air commerce, issuing and enforcing air traffic rules, licensing pilots, certifying aircraft, establishing airways, and operating and maintaining aids to air navigation. A new Aeronautics Branch in the Department of Commerce assumed primary responsibility for aviation oversight, and William P. MacCracken, Jr., became its first director.

In 1934 the Department of Commerce renamed the Aeronautics Branch the Bureau of Air Commerce to reflect the growing importance of aviation to the nation. In one of its first acts, the Bureau encouraged a group of airlines to establish the first air traffic control centers (Newark, New Jersey, Cleveland, Ohio, and Chicago, Illinois) to provide en route air traffic control. In 1936 the Bureau took over these centers. Early en route controllers tracked the position of planes using maps and blackboards and little boat-shaped weights that came to be called "shrimp boats." They had no direct radio link with aircraft, but used telephones to stay in touch with airline dispatchers, airway radio operators, and airport traffic controllers. Although en route ATC became a federal responsibility, local government authorities

continued to operate airport towers. While the Department of Commerce worked to improve aviation safety, a number of high profile accidents called the department's oversight responsibilities into question. A 1931 crash that killed all on board, including popular University of Notre Dame football coach Knute Rockne, elicited public calls for greater federal oversight of aviation safety. Four years later, a DC-2 crash killed U.S. Senator Bronson Cutting of New Mexico.

To ensure a federal focus on aviation safety, President Franklin Roosevelt signed the Civil Aeronautics Act in 1938. The legislation established the independent Civil Aeronautics Authority (CAA), with a three-member Air Safety Board that would conduct accident investigations and recommend ways of preventing accidents. The legislation also expanded the government's role in civil aviation by giving CAA power to regulate airline fares and determine the routes individual carriers served. In 1940 President Roosevelt split the CAA into two agencies, the Civil Aeronautics Administration, which went back to the Department of Commerce, and the Civil Aeronautics Board (CAB). The offshoot of the original CAA retained responsibility for ATC, airman and aircraft certification, safety enforcement, and airway development. CAB responsibilities included safety rulemaking, accident investigation, and economic regulation of the airlines.

On the eve of America's entry into World War II, for defense purposes, CAA extended its air traffic control system to include operation of airport towers. In the postwar era, ATC became a permanent federal responsibility at most airports. The postwar era also witnessed the advent of commercial jets. The British Overseas Aircraft Corporation introduced the first commercial jet service in 1952. The 36-seat Comet flew at 480 miles per hour. The top cruising speed of the DC-3 piston aircraft, in comparison, was about 180 miles per hour. By the mid-1950s, U.S. companies began designing and building their own jet airliners.

On June 30, 1956, a Trans World Airlines Super Constellation and a United Air Lines DC-7 collided over the Grand Canyon, Arizona, killing all 128 occupants of the two airplanes. The collision occurred while the aircraft were flying under visual flight rules in uncongested airspace. The accident dramatized the fact that, even though U.S. air traffic had more than doubled since the end of World War II, little had been done to mitigate the risk of midair collisions.

Birth of Federal Aviation Agency

On May 21, 1958, Senator A. S. "Mike" Monroney (D-OK) introduced a bill to create an independent Federal Aviation Agency to provide for the safe and efficient use of national airspace. Two month later, on August 23, 1958, the President signed the Federal Aviation Act, which transferred the Civil Aeronautics Authority's functions to a new independent Federal Aviation Agency (FAA) responsible for civil aviation safety. Although FAA technically came into existence with the passage of the act, it actually assumed its functions in stages. Under the provisions of the act, the FAA would begin operations 60 days after the appointment of the first FAA Administrator. On November 1, 1958, retired Air Force General Elwood "Pete" Quesada became the first FAA Administrator. Sixty days later, on December 31, FAA began operations.

With no dedicated office space for the FAA, employees of the growing agency were housed in several widely dispersed buildings around Washington, DC, including some "temporary" buildings of World War II vintage. The FAA worked to obtain a headquarters building to consolidate employees in one location, and on November 22, 1963, FAA's Washington headquarters staff began moving into the newly completed Federal Office Building 10A, at 800 Independence Avenue, SW. Excitement about the new building quickly evaporated on move day as employees heard the news that President Kennedy had been assassinated in Texas.

From Agency to Administration

President Johnson, concerned about the lack of a coordinated transportation system, believed a single department was needed to develop and carry out comprehensive transportation policies and programs across all transportation modes. In 1966, Congress authorized the creation of a cabinet department that would combine major Federal transportation responsibilities. This new Department of Transportation (DOT) began full operations on April 1, 1967. On that day, the Federal Aviation Agency became one of several modal organizations within DOT and received a new name, the Federal Aviation Administration. At the same time, Civil Aeronautics Board's accident investigation function was transferred to the new National Transportation Safety Board.

Labor Organizes

In January 1968, New York controllers formed an employee organization, the Professional Air Traffic Controllers Organization, or PATCO. Within six months, PATCO had a national membership of over 5,000 controllers. To highlight difficult working conditions and growing NAS congestion, in July 1968, the PATCO chairman announced "Operation Air Safety," which he described as a campaign to maintain FAA prescribed separation standards between aircraft. A period of discord between management and PATCO culminated in a 1970 "sickout" by 3,000 controllers. Although controllers subsequently gained additional wage and retirement benefits, tensions between the union and management did not ease.

In February 1972, the National Association of Air Traffic Specialists (NAATS) became the exclusive representative for all flight service station specialists, those controllers who supported general aviation pilots. FAA and NAATS concluded an agency-wide collective bargaining agreement on June 1, 1972, the first such contract between FAA and a national labor organization.

Evolving Duties

Almost from its creation, the agency found itself faced with a number of unexpected challenges. In 1961, for example, the first series of aircraft hijackings in the U.S. occurred. In August of that year, the federal government began employing armed guards, border patrolmen recruited from the U.S. Immigration and Naturalization Service, on civilian planes. In September, President Kennedy signed an amendment to the Federal Aviation Act of 1958, which made it a crime to hijack an aircraft, interfere with an active flight crew, or carry a dangerous weapon aboard an air carrier aircraft. To help enforce the act, a special corps of FAA safety inspectors began training for duty aboard airline flights. In March 1962 Attorney

General Robert Kennedy swore in FAA's first "peace officers," as special U.S. deputy marshals. These men worked as safety inspectors for the FAA flight standards organization and carried out their role as armed marshals on flights only when specifically requested to do so.

FAA responsibilities increased even more in the late 1960s. An economic boom brought with it growing concerns about pollution and noise. Aviation, on the cutting edge of technological innovation, became an early area of environmental concern for the public, especially as more and more airplanes traversed the national airspace system (NAS). In 1968, Congress vested in FAA's Administrator the power to prescribe aircraft noise standards.

With continued growth in the nation's airspace, it quickly became evident that airport safety and capacity had to be increased to prevent system delays. Between mid-1959 and mid-1969, the number of aircraft operations at FAA's airport traffic control towers had increased by 112 percent. Schedule delays cost the air carriers millions of dollars annually, not to mention the cost to passengers over and above inconvenience and discomfort. The Airport and Airway Development Act of 1970 placed the agency in charge of a new airport aid program funded by a special aviation trust fund and made FAA responsible for safety certification of airports served by air carriers.

Air Traffic Control Automation

Realizing the need for continued air traffic control system modernization to keep up with technological developments, FAA began modernizing the NAS in the mid-1960s. The civilian ATC system being replaced by NAS En Route Stage A was essentially a manually operated system employing radar, general purpose computers, radio communications, and air traffic controllers. For terminal airspace, the FAA was developing the automated radar traffic control system (ARTS).

To help monitor and even restrict flights moving from one air route traffic control center to another, FAA established the Central Flow Control Facility at its Headquarters. Opened in April 1970, the new facility collected, correlated system wide air traffic and weather data, detected potential trouble spots, and suggested solutions. On July 29, FAA established the Air Traffic Control Systems Command Center to integrate the functions of the Central Flow Control Facility, Airport Reservation Office, the Air Traffic Service Contingency Command Post, and Central Altitude Reservation Facility.

USA- Recent Development in Air Transport Developments

Recent Developments: By the mid-1970s, the FAA had achieved a semi-automated air traffic control system using both radar and computer technology. This system required enhancement to keep pace with air traffic growth, however, especially after the Airline Deregulation Act of 1978 phased out the CAB's economic regulation of the airlines. A nationwide strike by the air traffic controllers union in 1981 forced temporarily flight restrictions but failed to shut down the airspace system. During the following year, the agency unveiled a new plan for further automating its air traffic control facilities, but progress proved disappointing. In 1994, the FAA shifted to a more step-by-step approach that has provided controllers with advanced equipment.

In the 1990s, satellite technology received increased emphasis in the FAA's development programs as a means to improvements in communications, navigation, and airspace management. In 1995, the agency assumed responsibility for safety oversight of commercial space transportation, a function begun eleven years before by an office within DOT headquarters.

As the new century began, issues facing the FAA included the progress of reforms aimed at giving the agency greater flexibility. Airline accidents, although rare in statistical terms, showed the need for further safety advances. The huge volume of flights challenged the capacity of the airport system, yet demonstrated the popularity of air travel. In September 2001, however, the air transportation system was challenged by terrorist attacks in which hijacked airliners were used as missiles that killed thousands of U.S. citizens as well as many others from around the world. The government's response included legislation, enacted in November that established a new DOT organization. This new Transportation Security Administration received broad powers to protect air travel and other transportation modes against criminal activity. Its creation was the latest step in the evolution of U.S. government's civil aviation role to meet changing needs and priorities.

The U.S. use of "cabotage" to prevent foreign access to its vast internal market

About 75% of the US airline industry's revenue comes from passengers and about 15% from freight, of which the largest contributor is the US Postal Service; and 10% from other sources. Of the passenger revenue nearly 80% is currently derived from domestic traffic and only 20% from international traffic. Retention of this vast domestic 'sabotage' market exclusively to US operators is jealously guarded by the US government.

Whilst the US wishes to freely operate between European States on the basis of unfettered fifth freedom rights through "Open Skies" type bilateral it appears so far that it has not been prepared to relinquish its own "Cabotage" rights, in respect of the USA, gained from the Chicago Convention. In respect of the component States of the USA, Air Pacific (a Fiji carrier), under this policy, when operating a route such as Nadi - Honolulu - Los Angeles - New York would be unlikely to be given the privilege to pick up passengers originating in Honolulu for either Los Angeles or New York. Hardly "open skies". Some States which have negotiated "open sky" type agreements at the present time either have no or insignificant services into the USA.

So far most 'open skies' agreements have generally incorporated unrestricted rights for both US and bilateral partner carriers to operate between the two countries, including to intermediate and beyond points. However, they have not included cabotage rights, have not relaxed the limits on foreign ownership of US carriers and have not provided the right of the establishment of services by foreign airlines within the United States. Nor have they removed the advantages conferred on US carriers by virtue of the 'Fly America' policy, one which generally requires persons travelling on US government related journeys to fly on US airlines.

The Airline Industry Bailout

Congress passed the Air Transportation Safety and System Stabilization Act (P.L. 107-42) in response to a severe liquidity crisis facing the already-troubled airline industry in the aftermath of the September 11th terrorist attacks. Congress sought to provide cash infusions to carriers for both the cost of the four-day federal shutdown of the airlines and the incremental losses incurred through December 31, 2001 as a result of the terrorist attacks. This resulted in the first government bailout of the 21st century. Between 2000 and 2005 US airlines lost \$30 billion with wage cuts of over \$15 billion and 100,000 employees laid off.

In recognition of the essential national economic role of a healthy aviation system, Congress authorized partial compensation of up to \$5 billion in cash subject to review by the Department of Transportation and up to \$10 billion in loan guarantees subject to review by a newly created Air Transportation Stabilization Board (ATSB). The applications to DOT for reimbursements were subjected to rigorous multi-year reviews not only by DOT program personnel but also by the Government Accountability Office and the DOT Inspector General.

Ultimately, the federal government provided \$4.6 billion in one-time, subject-to-income-tax cash payments to 427 U.S. air carriers, with no provision for repayment, essentially a gift from the taxpayers. (Passenger carriers operating scheduled service received approximately \$4 billion, subject to tax.) In addition, the ATSB approved loan guarantees to six airlines totaling approximately \$1.6 billion. Data from the US Treasury Department show that the government recouped the \$1.6 billion and a profit of \$339 million from the fees, interest and purchase of discounted airline stock associated with loan guarantees. The United States of America possesses one central agency for promulgating aviation guidelines, the Federal Aviation Authority (FAA), supplemented by other federal and state level associations. The emergence of the FAA has occurred in stages that reflect the growth of the aviation industry in the United States. The requirement of establishing safety guidelines and certifying pilots and aircrafts led the Department of Commerce to the task upon itself, coupling it with that of operating lighted airway systems and improving radio communication. This was followed, in 1936, by the assumption of control of the first centres of air traffic control whose primary function was to ensure that aircrafts followed particular channels in order to prevent collision^{viii}. In 1936 these functions were shifted from the Department of Commerce and vested in a independent agency, called the Civil Aeronautics Authority, which was split two years later into the Civil Aeronautics Administration and Civil Aeronautics Board, with the former in control of the manner of operation of airports, and the latter regulating the entry into and exit from markets, safety, subsidies and dictating the pattern of routes that aircraft ought to follow^{ix}. In 1958, as a result of a series of mid-air collisions and the advent of the introduction of jet airliners to the civil aviation scene, Congress amalgamated the functions of the Civil Aeronautics Authority and Civil Aeronautics Administration to create the Federal Aviation Agency, which operated within the broad policy considerations of '*economic regulation, all-cargo air transportation, general safety, international air transport action and strengthening competition*'^x. In 1966, Congress created the Department of Transportation for management of major federal transportation responsibilities; the Federal Aviation Agency became one of several modal organizations within the Department of Transportation, and was re-christened *Federal Aviation Administration*^{xi}. The structure of the FAA has continued to evolve since its inception; initially, the system of administration favored involved direct

control of the FAA over operations in the field, however, this gradually progressed to a decentralized model where greater authority was transferred to the constituent regional elements of the FAA, this process finally resulted in a reorganization of the FAA along six key lines in order to maximize efficiency^{xii}.

Considering that the FAA forms part of a cabinet department, the Department of Transportation, the degree of control exercisable by the Ministry on the manner of operation is greater than that to which the UKCAA is subject. Further, with respect to the FAA, it would be pertinent to note that its structure highly decentralized, due to which, while it formulates regulations, its subsidiary elements are entrusted with ensuring compliance. In respect of operation, the Directorate General of Civil Aviation (DGCA) in many ways mirrors the FAA, though it would be pertinent to note that within the US, the power of Congress to control the exercise of the power delegated is limited by the constitutional framework, where the function of reviewing the legality of an administrative act is exercisable solely by the courts^{xiii}.

In this manner, the operation of the aviation regulation agency is reduced to ensuring conformance with the aviation policy formulated by the concerned Ministry, rather than one that is evaluative of the policy.

MODULE II:
CIVIL AVIATION
GOVERNANCE IN
INDIA, AIRCRAFT ACT,
1934 & AIRCRAFT
RULES, 1937

PART I- CIVIL AVIATION GOVERNANCE IN INDIA

Entry 29, List I, VII Schedule read with Art. 246 of the Indian Constitution vests the Parliament of India with the exclusive jurisdiction to legislate in relation to '*Airports; aircraft and air navigation; provision of aerodromes; regulation and organisation of air traffic and of aerodromes.*' This centralised control over the aviation industry ensures that airports are set up in suitable locations which have the ability to deal with passenger and cargo inflow and support airport projects. State governments can approach the Central Government to acquire property for conducting aviation activities.⁴⁶ While the overall legislative framework for the sector is provided primarily by the Airports Authority of India Act, 1994 and the Aircraft Act, 1934, the Ministry of Civil Aviation identifies key issues facing the aviation industry and provides policy to address the same.

MINISTRY OF CIVIL AVIATION

The Ministry of Civil Aviation of Government of India is the nodal Ministry responsible for the formulation of national policies and programmes for development and regulation of Civil Aviation and for devising and implementing schemes for the orderly growth and expansion of civil air transport. Its functions also extend to overseeing airport facilities, air traffic services and carriage of passengers and goods by air. The Ministry also administers implementation of the 1934 Aircraft Act and is administratively responsible for the Commission of Railways Safety.

Located at Rajiv Gandhi Bhavan at the Safdarjung Airport in New Delhi, the Ministry of Civil Aviation is responsible for formulation of national policies and programmes for the development and regulation of the Civil Aviation sector in the country. It is responsible for the administration of the Aircraft Act, 1934, Aircraft Rules, 1937 and various other legislations pertaining to the aviation sector in the country. This Ministry exercises administrative control over attached and autonomous organizations like the Directorate General of Civil Aviation, Bureau of Civil Aviation Security and Indira Gandhi Rashtriya Udan Academy and affiliated Public Sector Undertakings like National Aviation Company of India Limited, Airports Authority of India and Pawan Hans Helicopters Limited. The Commission of Railway Safety, which is responsible for safety in rail travel and operations in terms of the provisions of the Railways Act, 1989 also comes under the administrative control of this Ministry.

NATIONAL CIVIL AVIATION POLICY (NCAP), 2016

The first version of the civil aviation policy was released in November 2014, but was vehemently opposed to by the industry which prevented its implementation. After revamping the original policy based on stakeholder suggestions, the Government released the NCAP, 2016 which focuses on to creating safe, secure, affordable and sustainable air travel that can be accessed by the masses across India.⁴⁸ A few of the key changes implemented by the NCAP 2016 are out-lined below:

A. Regional Connectivity

The NCAP 2016 introduces a new Regional Connectivity Scheme (“RCS”) which is to come into effect in the second quarter of 2016-2017. Under the RCS, the MCA targets an estimate airfare of INR 2,500 per passenger for flights travelling on RCS specified routes for a distance of approximately 500kms – 600kms. This reduced airfare is intended to be achieved through a revival of un/under – served airports / routes and the development of new No-Frills Airports (costing INR 50 – 100 crore each) through the combined contribution of both Central and State Governments. These airports may also be developed through a public private partnership with State Governments. Specifically, State Governments will (for a period of 10 years):

- reduce VAT on Aviation Turbine Fuel at RCS airports to 1% or less;
- provide land, multi-modal hinterland (road rail, metro etc.) connectivity, and
- police / fire services free of cost and as required; c. provide power, water and other utilities at concessional rate.

The Central Government shall also provide (for a period of 10 years) that:

1. no airport charges be levied for operations under RCS;
2. Landing, Parking and Terminal Navigation Landing charges be waived
3. Route Navigation and Facilitation charges be levied on a nominal basis
4. service tax on tickets be levied on 10% of the taxable value
5. airlines be permitted to operate ground handling services themselves at all RCS airports
6. airlines operating under the RCS be permitted to enter into code sharing agreements

Further, a reduced excise duty of 2% shall be levied on Aviation Fuel drawn by operators from the RCS airports for an initial period of three years. The Viability Gap Funding (“VGF”) required to support the RCS shall be provided jointly by the Central (through the MCA) and State Governments. The MCA’s share of the VGF shall be provided to the airline operator by establishing a Regional Connectivity Fund (“RCF”) which shall be operated by the Airports Authority of India. The RCF shall be funded by a levy notified by the Government at a future date under the Aircraft Act, 1934. Such levy shall be applicable to all domestic routes other than Cat II / Cat IIA routes, RCS routes and small aircrafts (less than 80 seats) irrespective of the routes, as well as any premium realized from the allotment of additional capacity entitlements on international routes.

Similar concessions have also been provided for cargo operations and air freighters operating from RCS airports.

B. 5/20 Requirement for International Operations

Since October of 2004 Indian airline operators have been permitted to fly international routes only if they have been flying domestic routes for 5 years and have a fleet of 20 aircrafts (the “5/20 Rule”). The issue of whether to keep the 5/20 rule has been a hotly debated topic with new / small airline operators arguing for a more level playing field. The Government has addressed the issue in the NCAP 2016 by allowing all domestic airline operators to fly international routes provided that they deploy 20 aircrafts or 20% of their total capacity (determined in terms of average number of seats on all departures), whichever is higher for domestic operations.

C. Maintenance, Repair and Overhaul

The Indian Maintenance, Repair and Overhaul (“MRO”) sector is slowly gaining momentum which is high-lighted by the fact that India currently has several MRO service providers like Air Works India Engineering, Max MRO Services, Horizon Aircraft Maintenance, and Aman Aviation & Aerospace Solutions which have earned European Aviation Safety Agency (“EASA”) approval. However, approximately 90% of the total MRO business of Indian carriers is still spent outside India in countries like Sri Lanka, Singapore, Malaysia, and the UAE. Based on India’s technology and skill base, the Government is taking active steps to promote the use of domestic MRO services by carriers across Asia. To this extent, the NCAP 2016 provides that:

- a. foreign MRO experts will be provided visas promptly;
- b. foreign pilots operating an aircraft to and from India for the purpose of servicing at an Indian MRO entity will be issued Temporary Landing Permits, subject to conditions;
- c. Airport Entry Passes for MROs will be need based and not restricted if required conditions are met;
- d. the MCA will try to ensure that State Governments notify MRO activities as ‘zero-rated’;
- e. adequate land for MRO service providers will be made in all future airport/heliport projects, where possible; and
- f. airport royalty and additional charges will not be levied on MRO service providers for a period of five years.

D. Ground Handling

Ground Handling Services (“GHS”) in India include services such as aircraft cleaning, cargo handling, transport services, ground support equipment, servicing/maintenance, and security. The NCAP 2016 provides that all domestic scheduled operators will be permitted to carry out self-handling at all airports by engaging either their own subsidiary or a third party ground handling service provider like Air India, Aviaexpert, Celebi/NAS etc. Foreign airlines continue to be prohibited from self-handling such services. Further, airport operators are obligated to ensure that at least three ground handling service providers are available at all

major airports to ensure fair competition. By permitting domestic scheduled airline operators to engage non-AAI ground handling service providers, the Government has dramatically transformed the MRO sector and has opened a significantly larger market opportunity for third party providers. With air traffic in India projected to triple over the next decade CAPA expects to see India become a USD1 billion ground handling market by 2023.

ATTACHED OFFICES OF MINISTRY OF CIVIL AVIATION IN INDIA

I. DIRECTORATE GENERAL OF CIVIL AVIATION

The Directorate General of Civil Aviation (DGCA) is the Indian governmental regulatory body for civil aviation under the Ministry of Civil Aviation. This directorate investigates aviation accidents and incidents. It is headquartered along Sri Aurobindo Marg, opposite Safdarjung Airport, in New Delhi. The Government of India is planning to replace the organisation with a Civil Aviation Authority (CAA), modelled on the lines of the American Federal Aviation Administration (FAA).

DGCA has fourteen Regional Airworthiness Offices (RAO) at Delhi, Mumbai, Chennai, Kolkata, Bangalore, Hyderabad, Cochin, Bhopal, Lucknow, Patna, Bhubaneswar, Kanpur, Guwahati and Patiala. It has also five Regional Air Safety offices located at Delhi, Mumbai, Chennai, Kolkata and Hyderabad. It has a Regional Research and Development Office located at Bangalore and a Gliding Centre at Pune.

The Directorate General of Civil Aviation (DGCA) is the regulatory body in the field of Civil Aviation, primarily dealing with safety issues. It is responsible for regulation of air transport services to/from/within India and for enforcement of civil air regulations, air safety, and airworthiness standards. The DGCA also co-ordinates all regulatory functions with the International Civil Aviation Organisation (ICAO).

Private operators were allowed to provide air transport services. However, no foreign airline could directly or indirectly hold equity in a domestic airline company. By 1995, several private airlines had ventured into the aviation business and accounted for more than 10 percent of the domestic air traffic. Today, Indian aviation industry is dominated by private airlines and these include low cost carriers, who have made air travel affordable. The Government nationalized nine airline companies vide the Air Corporations Act, 1953. These government-owned airlines dominated Indian aviation industry till the mid-1990s. In April 1990, the Government adopted open-sky policy and allowed air taxi- operators to operate flights from any airport, both on a charter and a non-charter basis and to decide their own flight schedules, cargo and passenger fares. As part of its open sky policy in 1994, the Indian Government ended the monopoly of IA and AI in the air transport services. Private operators were allowed to provide air transport services. However, no foreign airline could directly or indirectly hold equity in a domestic airline company. By 1995, several private airlines had ventured into the aviation business and accounted for more than 10 percent of the domestic air traffic. Today, Indian aviation industry is dominated by private airlines and these include low cost carriers, who have made air travel affordable.

Functions of DGCA:

1. Registration of civil aircraft;
2. Formulation of standards of airworthiness for civil aircraft registered in India and grant of certificates of airworthiness to such aircraft;
3. Licensing of pilots, aircraft maintenance engineers and flight engineers, and conducting examinations and checks for that purpose;
4. Licensing of air traffic controllers;
5. Certification of aerodromes and CNS/ATM facilities;
6. Maintaining a check on the proficiency of flight crew, and also of other operational personnel such as flight dispatchers and cabin crew;
7. Granting of Air Operator's Certificates to Indian carriers and regulation of air transport services operating to/from/within/over India by Indian and foreign operators, including clearance of scheduled and non-scheduled flights of such operators;
8. Conducting investigation into incidents and serious incidents involving aircraft upto 2250 kg AUW and taking accident prevention measures including formulation of implementation of Safety Aviation Management Programmes;
9. Carrying out amendments to the Aircraft Act, the Aircraft Rules and the Civil Aviation Requirements for complying with the amendments to ICAO Annexes, and initiating proposals for amendment to any other Act or for passing a new Act in order to give effect to an international Convention or amendment to an existing Convention;
10. Coordination of ICAO matters with all agencies and sending replies to State Letters, and taking all necessary action arising out of the Universal Safety Oversight Audit Programme (USOAP) of ICAO;
11. Supervision of the institutes/clubs/schools engaged in flying training including simulator training, AME training or any other training related with aviation, with a view to ensuring a high quality of training;
12. Granting approval to aircraft maintenance, repair and manufacturing organizations and their continued oversight;
13. To act as a nodal agency for implementing Annex 9 provisions in India and for coordinating matters relating to facilitation at Indian airports including holding meetings of the National Facilitation Committee;
14. Rendering advice to the Government on matters relating to air transport including bilateral air services agreements, on ICAO matters and generally on all technical matters relating to civil aviation, and to act as an overall regulatory and developmental body for civil aviation in the country;
15. Coordination at national level for flexi-use of air space by civil and military air traffic agencies and interaction with ICAO for provision of more air routes for civil use through Indian air space;
16. Keeping a check on aircraft noise and engine emissions in accordance with ICAO Annex 16 and collaborating with the environmental authorities in this matter, if required;
17. Promoting indigenous design and manufacture of aircraft and aircraft components by acting as a catalytic agent;
18. Approving training programmes of operators for carriage of dangerous goods, issuing authorizations for carriage of dangerous goods, etc.

19. Safety Oversight of all entities approved/ certified/ licensed under the Aircraft Rules 1937.

Departments

These are classified and divided into the following:

1. Administration Directorate.
2. Aerodrome Standards Directorate.
3. Air Safety Directorate.
4. Air Transport Directorate.
5. Airworthiness Directorate.
6. Flight Standard Directorate.
7. Information & Regulation Directorate.
8. Aircraft Engineering Directorate.
9. Directorate Of Flight Crew Licensing.
10. Training Section.
11. D.G. Section.
12. Medical Section

DGCA to CAA:

The CAA has been envisaged as an autonomous regulatory body which will replace the DGCA and will meet standards set by the UN's International Civil Aviation Organisation (ICAO). The CAA will have separate departments to deal with safety, economic regulation and grievance resolution, as well as a full-fledged environment department. It will also have an independent accident investigation bureau. The Authority will also have the autonomy to recruit staff. Currently, the DGCA is understaffed and does not have any recruitment powers. The CAA will have administrative and financial powers similar to those of the American FAA. These powers will redefine the regulator's role and better equip it to face the challenges of the growing Aviation sector in the country. Employees working with DGCA will be transferred to the CAA.

The estimated cost of establishing the new Authority would be around Rs. 112 crore. The CAA would be self-financing and have a separate fund called the 'Civil Aviation Authority of India Fund' that would finance its entire expenses. It would have a Chairperson, a Director General and 7-9 members appointed by the Central Government. These members will be qualified in the fields of aviation safety, aircraft engineering, flight standard operations, aerodromes, air navigation systems and air space management.

Regulation through the Directorate General of Civil Aviation

The Ministry of Civil Aviation is that nodal ministry which is responsible for the formulation of national policies and programmes, for the development and regulation of civil aviation. The office of the Directorate General of Civil Aviation is part of this ministry, its powers defined under the Aircraft Act, which are implemented by the Ministry of Civil Aviation.

Section 5A of the Aircraft Act, 1934 empowers the Director General to issue directions, consistent with the provisions of this Act, by way of an order, so long as he feels that it is necessary to do so, in order to protect the security of India, and safety of aircrafts etc.

The Directorate General of Civil Aviation is mainly responsible for the implementation, control, and supervision of air-worthiness, standards, safety operations, and crew training in India. It is the principal regulatory body in the field of Civil Aviation, responsible for regulation of air transport services to/from/within India and for formulation and enforcement of civil air regulations, air safety and airworthiness standards. These regulatory functions are then coordinated with the International Civil Aviation Organization.^{xiv}

The DGCA, therefore, regulates the safety of aircraft operations through its powers to safeguard civil aviation against acts of unlawful interference, in addition to its safety oversight functions.

In this regard, it would be pertinent to note that this mode of aviation regulation substantially follows the American model, with the regulator being an organ of the Ministry. Thus, the ministry's ability to influence or control the manner in which the DGCA operates follows naturally. This attribute of the DGCA suffers criticism from private airline operators, who state this to be the reason that limitations are applied on the participation of private airline operators in the civil aviation sector. An oft quoted example is that of permitting operations of private airlines along international routes, where, until recently, the international operations of private airlines was restricted to SAARC nations, with the permission to fly along particular routes such as Mumbai-New York and Delhi-London being granted to private airline operators in the last year or two. While the number of flights permitted to operate along particular international routes may be limited by the aviation policy (inapplicable to *open skies* policies) that subsists between the two nations, private airline operators submit that restricting private participation along such routes illustrates the influence of the Ministry on the regulatory activity of the Directorate General of Civil Aviation.

Further, the Naresh Chandra Committee^{xv}, proposed facilitation of greater private participation in the aviation sector, in order to further growth, a move that would require limiting the degree of influence that the Ministry can exercise over the activities of the civil aviation regulator.

Prospective Regulation through an autonomous authority: Civil Aviation Authority

The proposal for the creation of a Civil Aviation Authority (CAA) formed part of the Civil Aviation policy, placed before the Ministry of Civil Aviation in April 2007^{xvi}. While the mission of the policy, as stated within it, broadly entails the maintenance of a '*competitive civil aviation environment which ensures safety and security in accordance with international standards, promotes efficient, cost-effective and orderly growth of air transport and contributes to social and economic development of the country*'^{xvii}, the part relevant to the paper would be that entitled *Regulatory Framework*, as it entails the creation of a Civil Aviation Authority, an autonomous regulatory authority entrusted with the task of prescribing and enforcing minimum standards for agencies operating within the sector.

The reasons ascribed favouring the creation of a Civil Aviation Authority, have been enumerated as '*multiplicity of airlines, airport operators (including private sector), and the possibility of oligopolistic practices*^{xviii}'; further the emphasis lies on the creation of an autonomous regulatory authority that would exist as a watchdog, with the objective of ensuring passenger safety, security and effective regulation of the air transport, for the purpose of which its duties would include prescription and enforcement of basic standards for all agencies and settle disputes relating to monopolistic practices. The policy prescribes a basic set of functions that have to be attributed to the Civil Aviation Authority, and may be enumerated as:

- set the standards for various agencies and personnel of civil aviation sector;
- issue license to these agencies and personnel;
- regulate tariff;
- ensure that these agencies and personnel continuously fulfil the standards;
- take appropriate preventive/corrective/punitive action against the agencies and personnel for violations of set standards;
- ensure that there are no unfair trade practices and market dominance through encouragement of entry and fostering of competition in accordance with Competition Policy of the Government;
- ensure level playing field for all agencies and
- study and analyse the trends in international and domestic civil aviation, project likely future scenario and publish periodical reports.

The creation of a CAA, which would operate independent of government influence, in many ways mirrors the manner in which the United Kingdom dealt with the proliferation of private entities within the civil aviation sector, where the reason for attributing an independent character to the aviation regulator of the United Kingdom was the possibility of governmental influence in the instance of continuance of the departmental norm, which would be inimical to the growth of the sector through private participation. Further, the Indian aviation industry, while growing rapidly, does suffer from the dismal state of its infrastructure^{xix}, with bureaucratic inertia preventing the timely and effective implementation of a solution. Ernst and Young highlighted these deficiencies, pointing out that the dismal state of airport infrastructure would compel airline operators, who largely operate out of the major hubs such as Mumbai and Delhi to park their aircraft overnight at nearby airports such as Pune and Lucknow, which would raise costs and inhibit the growth of the sector^{xx}. Further, the Naresh Chandra Committee^{xxi}, which related to accelerating the growth of the Indian aviation sector, focussed its recommendation on increasing market access through encouragement of privatisation, foreign investment, affordability, viability and safety, adding that while private participation ought to be encouraged, with respect to airline operation as well as airport management, an authority ought to be vested with the function of regulation to prevent monopolistic tendencies. In this regard, it would be pertinent to note that the proposal pictures the CAA as a composite body vested with regulatory functions relating to all levels of the civil aviation including airport-operators, private aircraft and flying clubs, essentially, any agency having a role in civil aviation; further its freedom from the bureaucratic structure of the ministry would permit easy access and enable opportune resolution of the deficiencies that ail the aviation segment.

Imposition of Limitations on the CAA

manner of regulation essentially regards two issues, one relating to the regulation of the rule-making power and the other the manner of regulating the exercise of discretion.

With regard to the former, its judicial reviewability, which cannot be foreclosed in any manner^{xxii}, would prevent any wanton exercise of the rule making power. Further, the statute of its creation would naturally subject the CAA to certain directives relating to policy^{xxiii}, as proposed by the Civil Aviation Policy of 2003, due to which the *vires* of rules-made may be checked on the basis of conformity to policy guidelines enunciated in the parent statute, while its conformance to constitutional principles underlies every action undertaken by the CAA as it would be created under a statute^{xxiv}, and its operation as an instrumentality of the Government undertaking the regulation of civil aviation in India, thus permitting its subjection to Part III of the Constitution by operating as an '*other authority*' for the purpose of being declared a '*state*' for the purpose of Part III^{xxv}. Thus, any administrative act, whether of exercise of its rule-making power or of discretion, would be tempered by the principles of enunciated within Part III of the constitution, and liable to be struck down by the court for contrivance of those principles.

With regard to the latter, that of regulating the manner of exercising discretion, the conformance of such discretion to the principles protected by the constitution would prevent wanton or arbitrary exercise, resulting in excess. As stated in the preceding paragraph, the CAA would naturally be subject to the principles enumerated within the constitution, and thus the manner of exercise of the discretion granted to it in furtherance of its regulatory function would have to ensure compliance with the constitution, through which the courts would be able to apply a limitation on the CAA in the exercise of its power.

With regard to immediate autonomy from the Parliament, it would be pertinent to note that the CAA seems to possess greater autonomy in the manner of performance of its functions, in the sense that unlike its English counterpart, the UKCAA, the CAA would not be subject to direction from the non-permanent executive (Ministry) of the manner of exercise of the discretion placed in it.

The progression from a ministerial departmentalised form to an autonomous agency reflects an adoption of a mode of regulation based on the English model. The state of the Indian aviation industry can be paralleled with that existent in the United Kingdom in the seventies, due to which it seems like the Civil Aviation Policy of 2000 seeks a similar solution in the creation of an autonomous body along the lines of the Civil Aviation Authority of the United Kingdom.

A movement towards involving private entities within the aviation industry has been urged to spur its growth. In furtherance of this objective, the DGCA ought to be replaced with the CAA due to the degree of autonomy posited in the latter, whereby the interests of private parties would not be subject to similar governmental interests; through the creation of a body autonomous in operation, the interests of both participants, the private and public, would be subject to equal treatment. The inclusion of private parties into the aviation sector, especially in relation to the management of airports, could solve the problem of dismal infrastructure.

The CAA in this instance, due to its autonomous character, would be in a better position than the DGCA to facilitate such inclusion.

Further, in order to prevent excess, a strict formulation with respect to functions and policy is required within the parent statute of the Civil Aviation Authority. In this regard the Civil Aviation Policy may be employed as it enumerates the functions and objectives of the Civil Aviation Authority.

In terms of progression, the American Model represents a movement towards greater centralisation or consolidation of regulatory agencies. Such progression may have been the result of the requirement of greater uniformity in standards, with the greater tendency of civil aviation turning trans-national. Within the American system of governance, the role of the federation is minimised, with individual states exercising greater authority over affairs within their territory. The emphasis on federalism, within the American structure, consequently restricts the Federal Government to affairs that are strictly national. Thus, the emergence of a diverse system of aviation regulation, consisting of numerous state centric agencies, resulted in the application of different standards, as regards aviation safety and maintenance, within the nation. In essence, extensive employ of authority within the state's territory created aviation standards that differed from one state to another. In such circumstances, in furtherance of maintaining uniformity in the formulation and application of regulatory norms, the American Model favoured greater consolidation of regulatory authorities, with greater involvement of the Federal Government through the creation of a nodal ministry.

Within the United Kingdom, the failure of the centralised model, coupled with the perception of it being an extension of the Ministry, resulted in the creation of an autonomous authority. The system of governance favoured by the United Kingdom represents a centralised model, as opposed to the federalism espoused by the American System, due to which the problem of multiplicity of standards never emerged. Unlike the American System, relatively little independent discretionary authority is vested with the governing councils of territorial divisions, such as counties. Thus, the entire administrative regime is formulated and determined by the Parliament. The movement towards greater autonomy, as regards the formulation and implementation of regulatory norms, emerged out of apprehensions that the pervasive parliamentary control would render the regulatory structure unable to keep up with the requirements of the civil aviation sector. Further, the pervasive state control naturally limited the participation of private enterprises due to the favourable stand adopted as regards the affairs of the government operated carrier.

In India, the determination of the relevant system for the carriage of aviation regulation must regard the manner in which the models of administration emerged in the United Kingdom and the United States of America. It would be pertinent to note that the exercise of authority by states in India is far more extensive than in the United Kingdom. Further, the emphasis placed on private enterprise as a means of furthering economic development would naturally require their cooperation in the formulation and determination of relevant regulatory norms. Considering these factors, it would be preferable if the proposed Civil Aviation Authority is created. The Indian experience with administrative regulation indicates that the creation of autonomous authorities furthers industry, and carries with it greater participation of the private interest. Further, the attribution of an independent character would enable it to further

accommodate private interests in the civil aviation sector. Thus, the progression from the Directorate General of Civil Aviation to the Civil Aviation must be examined as a natural, and arising out of greater diversity in entrepreneurial activity, in the sense that the aviation sector has ceased to be the sole domain of the public sector, the corollary of which would be that aviation regulation regime should similarly emphasise less pervasive state control.

II. BUREAU OF CIVIL AVIATION SAFETY STANDARDS

The Bureau of Civil Aviation Security was initially set up as a Cell in the Directorate General of Civil Aviation (DGCA) in January 1978 on the recommendation of the Pande Committee constituted in the wake of the hijacking of the Indian Airlines flight on 10th September, 1976. The role of the Cell was to coordinate, monitor, inspect and train personnel in Civil Aviation Security matters.

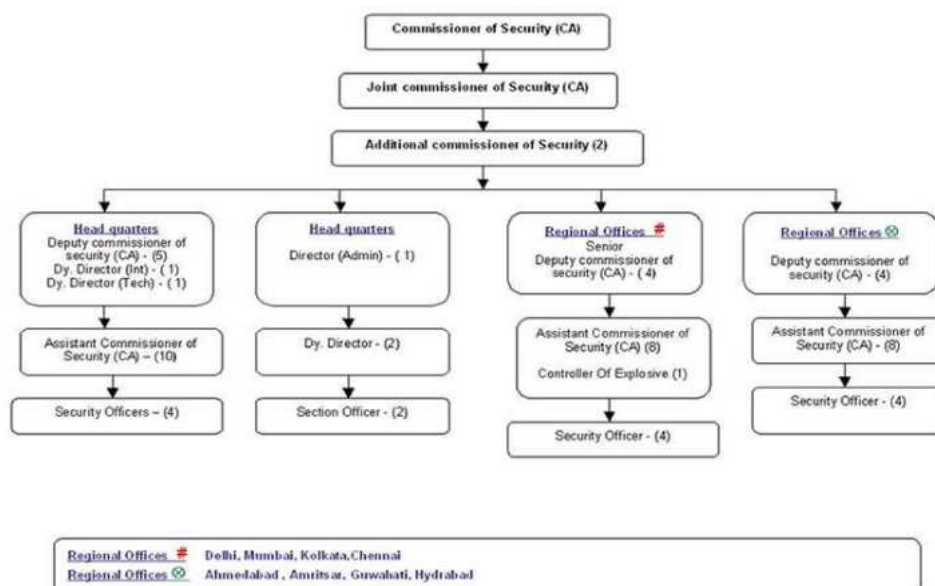
The BCAS was reorganized into an independent department on 1st April, 1987 under the Ministry of Civil Aviation as a sequel to the Kanishka Tragedy in June 1985. The main responsibility of BCAS are lay down standards and measures in respect of security of civil flights at International and domestic airports in India.

BCAS is the regulatory authority for civil aviation security in India. It is headed by an officer of the rank of Director General of Police and is designated as Commissioner of Security (Civil Aviation).

Commissioner of security (CA) is the appropriate authority for implementation of Annexure 17 to Chicago convention of International civil aviation organization (ICAO).

Commissioner of security (CA) is responsible for the development, implementation and maintenance of the National Civil Aviation Security Programme.

BCAS Hqrs is located at New Delhi. It has got four Regional Offices located at International airports i.e. Delhi, Mumbai, Kolkata and Chennai. The Regional Office is headed by an officer of the rank of Deputy Commissioner of Security (CA).



Functions of BCAS

1. Laying down Aviation Security Standards in accordance with Annex 17 to Chicago Convention of ICAO for airport operators, airlines operators, and their security agencies responsible for implementing AVSEC measures.
2. Monitoring the implementation of security rules and regulations and carrying out survey of security needs.
3. Ensure that the persons implementing security controls are appropriately trained and possess all competencies required to perform their duties.
4. Planning and coordination of Aviation security matters.
 - Conducting –
 - Surprise/Dummy checks to test professional efficiency and alertness of security staff.
 - Mock exercise to test efficacy of Contingency Plans and operational preparedness of the various agencies.

III. AIRCRAFT ACCIDENT INVESTIGATION BUREAU

The Aircraft Accident Investigation Bureau (AAIB) is a division of the Ministry of Civil Aviation which investigates aircraft accidents and incidents in India.

The agency was established by Order No. AV-15029/002/2008-CG of 26 May 2011. The "Aircraft (Investigation of Accidents and Incidents) Rules, 2012 came into effect on 5 July of that year. Previously the Directorate General of Civil Aviation (DGCA) conducted investigations and gave information to the investigations established by the Court of Inquiry and the Committee Inquiry. A separate investigative agency was established to comply with the Standards and Recommended Practices (SARPs) of the International Civil Aviation Organisation (ICAO).

Section 7 of the Aircraft Act 1934 (India) empowers the Central Government to make rules for investigation of accidents arising out of or in the course of the navigation in or over India of any aircraft, or anywhere in the world of any aircraft registered in India. It requires that a notice has to be given of any accident or incident in such manner and by such person as may be prescribed. Till now as per the Act and in conformity with Article 26 of the Convention on International Civil Aviation, the Air Safety Directorate of DGCA was carrying out these duties. This was governed by the Aircraft Rules 1937.

In accordance with the International Civil Aviation Organisation (ICAO) SARPs and to provide independence of investigation function from the regulatory function the Central Government decided to establish a Bureau independent of the DGCA India. Accordingly the Aircraft (Investigation of Accidents and Incidents) Rules 2012 were notified on 5th July 2012 through a Gazette notification. In accordance with these Rules for the purposes of carrying out investigation into accidents, serious incidents and incidents, Government of India has set up Aircraft Accident Investigation Bureau (AAIB) in the Ministry of Civil Aviation on 30th July 2012

The role of the bureau comes into play, whenever an accident and / or incident occurs to an aircraft.

Where an accident or an incident occurs to an aircraft covered under sub-rule (2) of rule 1, then the pilot-in-command of the aircraft or, if he be killed or incapacitated, the owner, the operator, the hirer or other person on whose behalf he was in command of the aircraft, or any relevant person, as the case may be, shall, as soon as is reasonably practicable but in any case not later than 24 hours after he becomes aware of the accident or the incident —

(a) send notice thereof to the Aircraft Accident Investigation Bureau and Director-General of Civil Aviation by the quickest means of communication available; and

(b) in the case of an accident occurring in India, give information to the District Magistrate and the Officer-in-charge of the nearest Police Station of the accident and of the place where it occurred.

(2) The notification shall be in plain language and contain as much of the following information as is readily available, namely:

(a) for accidents the identifying abbreviation ACCID, for incidents INCID;

(b) manufacturer, model, nationality and registration marks, and serial number of the aircraft;

(c) name of owner, operator and hirer, if any, of the aircraft;

(d) qualification of the pilot-in-command, and nationality of crew and passengers;

(e) date and time of the accident or incident;

(f) last point of departure and point of intended landing of the aircraft;

(g) position of the aircraft with reference to some easily defined geographical point and latitude and longitude;

(h) number of crew and passengers; aboard, killed and seriously injured; others, killed and seriously injured;

(i) description of the accident or incident and the extent of damage to the aircraft so far as is known;

(j) physical characteristics of the accident or incident area, as well as an indication of access difficulties or special requirements to reach the site; and

(k) presence and description of dangerous goods on board the aircraft,

but notification shall not be delayed due to the lack of complete information.

(3) If the details or, other known relevant information referred in sub-rule (2) are omitted, such information shall also be dispatched as soon as it is possible.

(4) The notification as required in sub-rule (2) shall also be submitted to the Bureau by the concerned —

(a) aerodrome operator;

(b) officer-in-charge of air traffic control unit and the watch supervisory officer of air traffic control; and

(c) regional or the sub-regional officers of the Directorate General of Civil Aviation.

(5) The Bureau under the intimation to the Central Government shall notify the facts of the accident or serious incident in the Indian territory or in the assigned oceanic air space beyond the territory of India, containing as much of the information referred to in sub-rule (2) as may be available with a minimum of delay and by the most suitable and quickest means available, to

(a) the State of Registry;

(b) the State of Operator;

(c) the State of Design;

(d) the State of Manufacture; and

(e) ICAO when the aircraft involved is of a maximum mass of over 2,250 kg or is a turbojet-powered aeroplane.

(6) The Bureau while notifying information in accordance with sub-rule (5) shall also add the following information, namely (a) an indication to what extent the investigation will be conducted by the Central Government or is proposed to be delegated by the Central Government to another State; and (b) identification of the originating authority and means to contact the investigator-incharge and the accident investigation authority of India at any time.

(7) If the State of Occurrence is not aware of a serious incident to an Indian registered aircraft or an aircraft operated by Indian operator, the Bureau shall forward a notification of such an incident to the State of Design, the State of Manufacturer and the State of Occurrence.

For the purposes of carrying out investigation into accidents, serious incidents and incidents referred to in sub-rules (1), (2) and (4) of rule 5, the Central Government shall set up a Bureau in the Ministry of Civil Aviation known as the Aircraft Accident Investigation Bureau of India and appoint such number of officers familiar with aircraft accident investigation procedures and other persons, as it deems fit from time to time.

(2) The Aircraft Accident Investigation Bureau shall function under overall supervision and control of Government of India, Ministry of Civil Aviation.

(3) The Aircraft Accident Investigation Bureau shall discharge the following functions, namely:

(a) obtaining preliminary report under rule 9 from any person or persons authorised either under sub-rule (1) of rule 9 or under sub-rule(2) of rule 7;

(b) assisting the Central Government in setting up of Committee of Inquiry and formal investigation under these rules;

- (c) to facilitate the investigation and administrative work of the Committees and Courts, whenever necessary.
- (d) processing of the reports of Courts and Committees of Inquiry received by the Central Government, which includes –
- (i) forwarding of the reports to the States for consultation under sub-rule (1) of rule 14;
 - (ii) forwarding the report made public by the Central Government under subrule (2) of rule 14 to the States as required under Annex 13;
 - (iii) forwarding the report made public by the Central Government under subrule (2) of rule 14 to ICAO if the mass of the aircraft involved in accident or incident is more than 5,700 kg;
- (e) follow-up the recommendations made by Courts and Committees of inquiry and to ensure that are implemented by the concerned agencies;
- (f) to process cases for a resolution by the Central Government of disputes between the Bureau and any agency regarding implementation of a recommendation;
- (g) to formulate safety recommendation on the basis of safety studies, including induction of new technology to enhance safety, conducted from time to time.
- (h) establish and maintain an accident and serious incident database to facilitate the Director-General of Civil Aviation in effective analysis of information on actual or potential safety deficiencies.
- (i) to process obligations of the Central Government under Annex 13 to the Convention relating to International Civil Aviation signed at Chicago on the 7th day of December, 1944 as amended from time to time; and
- (j) any other functions, which the Central Government may ask the Bureau to perform from time to time under these rules.
- (4) The Aircraft Accident Investigation Bureau may, by notification in the Official Gazette, and with the previous approval of the Central Government, make procedures, not inconsistent with the provisions of the Act to carry out the purposes of these rules and the functions referred to in sub-rule (3).
- (5) In particular, and without prejudice to the generality of the foregoing power, such procedures may provide for all or any of the following matters, namely:—
- (a) the persons required to notify the accidents and incidents;
 - (b) the notifications of accidents and serious incidents to International Civil Aviation Organisation and the States for participation in the investigation;
 - (c) the investigation of aircraft accident and incidents;

(d) the format of preliminary and reports of Committee of Inquiry and Formal Investigation conducted under these rules;

(e) the consolidation and follow-up of safety recommendations made by the Committee of Inquiry and Formal Investigation with the agencies required to implement the recommendations and require action taken reports from these agencies; and

(f) any other matter subsidiary or incidental to aircraft accident and incident investigation.

Preliminary investigation.— (1) The Bureau may authorise any person including an officer of the Bureau to conduct a preliminary investigation to an accident or incident and to submit a preliminary report to the Bureau in a specified format to assess the classification of the occurrence and the expertise needed for detailed investigation under rules 11 or 12, if considered expedient by the Central Government.

(2) The person authorised to conduct the preliminary investigation shall — (a) have powers under rule 10 of Aircraft Accident Investigator; and

(b) have access examine or otherwise deal with the aircraft as provided under sub-rule (3) of rule 7.

Powers of Aircraft Accident Investigators.— (1) For the purposes of investigation of accidents and incidents an Aircraft Accident Investigator shall have power—

(a) to require the attendance of any person, by summons under his hand, whom he thinks fit to call before him and examine for such purpose and to require answers or returns to any inquiries he thinks fit to make;

(b) to require any such person to make and to sign a declaration regarding the true nature of the statements made by him;

(c) to require and enforce the production of all books, paper, documents and articles which he may consider necessary for the investigation, and to retain any such books, papers, documents and articles until completion of the investigation;

(d) to have access to and examine any aircraft and its components involved in the accident or incident, the place where the accident or incident occurred or any other place, the entry upon and examination of which appears to the Investigator necessary for the purpose of the investigation.

Committee of Inquiry. — (1) The Central Government may, at its discretion, appoint a Committee of Inquiry composed of two or more persons to hold an inquiry into an aircraft accident or a serious incident and such a Committee shall have the same powers as an Aircraft Accident Investigator under rule 10.

(2) The Inquiry shall be held in private.

(3) The Central Government may notify in such manner as it may think fit that an inquiry is being held and every such notice shall state that any person who may desire to make representations concerning the circumstances or causes of the accident may do so in writing within the time specified in the notice.

(4) When a person other than an officer of Government is appointed as a member of the Committee of Inquiry he may be granted such fee and expenses as may be determined by the Central Government.

(5) Every person summoned by the Committee of Inquiry as a witness in accordance with these rules shall be allowed such expenses as the Central Government may from time to time determine.

(6) The Committee of Inquiry shall make a report to the Central Government in the format specified by the Bureau based on relevant standards of Annex 13.

IV. COMMISSION OF RAILWAY SAFETY (CRS)

The Commission of Railway Safety, working under the administrative control of the Ministry of Civil Aviation of the Government of India, deals with matters pertaining to safety of rail travel and train operation and is charged with certain statutory functions as laid down in the Railways Act (1989), which are of an inspectorial, investigatory & advisory nature.

The Commission functions according to certain rules viz. Statutory investigation into accidents rules framed under the Railways Act and executive instructions issued from time to time.

To exercise effective control over the construction and operation of the first railways in India, which were entrusted to private companies, Consulting Engineers were appointed under the Government of India. Later when the Government undertook the construction of railways, the Consulting Engineers were designated as Government Inspectors. In 1883, their position was statutorily recognised. Later, the Railway Inspectorate was placed under the Railway Board which was established in 1905.

Under the Indian Railway Board Act, 1905 and Notification No.801 dated 24th March, 1905 of the Department of Commerce and Industry, the Railway Board was vested with powers and functions of the Central Government under various sections of the Railway Act and was authorised to make General Rules for the operation of Railways. The Railway Board is thus the Safety Controlling Authority for the working and operation of Government and Company managed railways.

Section 181(3) of the Government of India Act of 1935 provided that functions for securing the safety, both of the travelling public and of persons operating the railways, including the holding of inquiries into the causes of accidents, should be performed by an authority independent of the Federal Railway Authority. Due to the outbreak of the war, the constitution of the Federal Railway Authority did not materialise and the Inspectorate continued to function under the Railway Board.

To avoid direct subordination of the Railway Inspectorate to the Railway Board, the Pacific (Engines with 4-6-2 configuration of wheels are called "Pacific Locos") Locomotive Committee, headed by Lt. Col. A.H.L. Mount, then Chief Inspecting Officer of the British Railways, suggested in para 210 of their report, submitted in 1939, as under:- "We understand that, under the Govt. of India Act, 1935, it is contemplated that the Inspectorate will be separated from the control of the Railway Board. This is very desirable in so far as it will

eradicate the present anomaly of the Board being the Inspecting as well as the executive Authority. We were informed that the Board fully appreciate the position, and would welcome the change, although it appears that, in practice, Government Inspectors have generally retained their freedom of judgement

The principle of separation of the Railway Inspectorate from the Railway Board was endorsed in 1940 by the Central Legislature who recommended that "Senior Government Inspectors of Railways should be placed under the Administrative control of some authority of the Govt. of India other than the Railway Board." Accordingly, the Railway Inspectorate was placed under the administrative control of the Department of "Posts and Air" in May 1941 and continuously thereafter under whichever Ministry that held the portfolio of Civil Aviation.

The erstwhile Railway Inspectorate was re-designated as the Commission of Railway Safety on 1.11.1961.

Duties

1. The duties of a Commissioner of Railway Safety as spelt out in Chapter III of the Railways Act 1989 are as under:-

- To inspect new railways with a view to determine whether they are fit to be opened for the public carriage of passengers, and to report thereon to the Central Government as required by or under this Act;
- To make such periodical or other inspections of any railway or of any rolling stock used thereon as the Central Government may direct;
- To make inquiry under this Act into the cause of any accident on a Railway; to perform such other duties as are imposed on him by this Act or any other enactment for the time being in force relating to Railways.

2. The term "such other duties" has been detailed in Sections 22 to 24 of the Act and covers the following:-

- sanctioning the opening of new railway lines after inspection on behalf of the Central Government;
- sanctioning the execution of all works, including new works, affecting the safety of running lines;
- when, after inspecting a line already in use or a rolling stock already authorised, the Commissioner is of the opinion that their continued use will be attended with danger to the travelling public, he may report his opinion to the Central government, who may then order the closure of the line or the discontinuance of the use of rolling stock; and
- to inspect such a closed line and sanction its re- opening for carriage of passengers and also report to the Central Govt.on the fitness for use of discontinued rolling stock.

3. Functional duties, including field inspections, of a Commissioner of Railway Safety, are amplified, among other technical publications, in the;

- General Rules for all open lines of railways in India including Metro Railways;

- Rules for the opening of a Railway or Section of a Railway for the public carriage of passengers;
- Indian Railways Code of practice for the Engineering department;
- Indian Railway Way, Bridge and Signal Engineering Manuals;
- Schedules of Dimensions;
- Conference Rules of the Indian Railway Conference Association;
- Statutory Investigation into Railway Accidents Rules, 1998
- Railway (Notices of and Inquiries into accidents) Rules, 1998

4. After its separation from the Railway Board in May, 1941, a post of Chief Government Inspector of Railways, later designated as Chief Commissioner of Railway Safety, was created to enable the Central Government to exercise "effective technical control".

4.1 The Chief Commissioner of Railway Safety directs the activities of the Organisation and is responsible for advising the Central Government in all matters relating to Railway Safety, recruitment of officers, postings and promotions, budget and expenditure etc. The Chief Commissioner deals principally with:-

- Matters appurtenant to Field Inspections and statutory inquiries into accidents;
- Inspection Reports of Commissioners of Railway Safety;
- Reports of statutory inquiries held into accidents by the Commissioners. After careful study he forwards his considered opinion to the Controlling Ministry and the Railway Board with such recommendations as he considers necessary;
- Railway Board's suggestions pertaining to corrections or amendments to General Rules, Rules for Opening of a Railway, Schedule of Dimensions, the P. Way, Bridge and Signal Engineering Manuals, Procedures for inquiries into accidents, Codes of Practice for Engineering Works and other publications; and
- Preparation of the Annual Report on the working of the Commission of Railway Safety and its placement in each House of Parliament.

All the Technical publications indicated in para above including orders issued by Railway Board from time to time.

4.2 Field duties of the Chief Commissioner of Railway Safety consist of inspections of sections of Railways, visits to the Railway Headquarters and Divisional Offices, Railway installations and Circle Offices. If considered necessary by him, he may himself hold inquiries into important accidents.

4.3 Some Commissioners of Railway Safety also perform duties of Commissioner of Metro Railways Safety defined in Metro Railways (Operations & Maintenance) Act 2002.

Organisational Structure -

Chief Commissioner of Railway Safety (CCRS), at Lucknow, acts as Principal Technical Advisor to Central Government in all matters with which Commissioners are concerned. There is one Deputy Commissioner of Railway Safety (General) to assist CCRS. CCRS Office, at Lucknow, is part of Ministry of Civil Aviation and is called Railway Safety wing.

It has Sr. Private Secretary (1), Section Officer (1), Assistants (4), Personal Assistant (1), UDC (2), LDC (2) and Multi Tasking Staff.

There are 9 Commissioners of Railway Safety (CRS). Commissioner's offices (called circle offices) have 9 to 11 office staff consisting of Sr. Private Secretary (1), Office Superintendent(1), Safety Assistant(1), UDC(1-2), LDC(2-4) and Multi Tasking Staff.

Metro Railway Safety circle offices have not been sanctioned upto now. Some Commissioners have been assigned functions related to Metro Railways.

One post of Deputy Commissioner of Railway Safety is sanctioned for each circle. Dy. CRS posts in Northern Eastern Circle, South Central Circle and South Eastern Circle are for Civil Engg discipline, Dy.CRS in Central Circle is from Electric Traction and Dy. CRS posts in Northern, Eastern, Northeast Frontier, Western and Southern Circle are from S&T discipline.

2.3 There is a technical wing consisting of 4 Dy. Commissioners of Railway Safety of various disciplines, in the headquarters at Lucknow for assisting CCRS and Commissioners as and when required. Office of technical wing has one Assistant Director (Official Language), Junior Hindi Translator(1), Technical Assistant (2) LDC(2), Stenographer(2), Staff Car Driver (1) and Multi-Tasking Staff (4).

Deputy Commissioners assist Commissioners in matters related to Mechanical Engineering, Electrical Engineering, Signal & Telecommunication Engineering and Transportation. Deputy Commissioners are not statutory authorities. Deputy Commissioners come from Railways on deputation basis and go back after completion of their deputation period.

AUTONOMOUS BODIES

I. INDIRA GANDHI RASHTRIYA URAN AKADEMI

Indira Gandhi Rashtriya Uran Akademi (IGRUA) is a pilot training institute located at Fursatganj Airport Raebareli, in Raebareli district of Uttar Pradesh, India. Established in 1985, it was the first such institute in India.

It is an autonomous institution and comes under the Ministry of Civil Aviation, Government of India. In August 2013 the Ministry of Civil Aviation announced that a National Aviation University would be established on the IGRUA site.

The Akademi functions under the Ministry of Civil Aviation (MoCA), Govt. of India (GOI) through its Governing Council (GC). Indira Gandhi Rashtriya Uran Akademi (IGRUA) located at Fursatganj District Raebareli Uttar Pradesh, is an autonomous body under the control of the Ministry of Civil Aviation. The Governing Council is the supreme body of the organization headed by the Secretary, Ministry of Civil Aviation.

National Civil Aviation Training Centre at Allahabad was closed in the year 1962. Task of Commercial Pilot Training fell on the shoulders of Flying Clubs. Flying Clubs were basically equipped only to handle PPL training. As no other institute existed for CPL training this became the only option available. Soon it was realized by the Airlines that the product they received from the flying clubs mostly failed to satisfy their needs. There was far too much technological, skill and knowledge gap between what they needed and what they got.

Our late Prime Minister Shri. Rajiv Gandhi, himself an airline pilot, understood this perfectly and ordered the setting up of Indira Gandhi Rashtriya Uran Akademi (IGRUA). The Government letter issued on 12 Sep 1986 authorizing the establishment of IGRUA stated:- “Creation of an appropriate infrastructure for bringing about the desired improvement in the training of pilots, which, in turn, would result in qualitative improvements in the capabilities of Commercial Pilots and enhance the safety of aircraft operations”.

It further stated “Government has approved the establishment of a Centre of Excellence in the country for the training of commercial pilots on the lines of educational institutions such as Indian Institute of Technology (IIT) and All Indian Institute of Medical Science (AIIMS) and which will be established (designated as Indira Gandhi Rashtriya Uran Akademi) at Fursatganj, District Raebareli (Uttar Pradesh)”.

IGRUA in pursuance of these directions was set up with the best single engine training aircraft (French Socata TB 20), the best multi engine (Beechcraft King Air C90A) aircraft and its associated six axis motion Simulator. The airfield also has its own nav & landing aids (ILS, VOR & DME). Such facilities remain unparalleled even today.

In the initial years, PPL holders from Flying Clubs would compete for entry into IGRUA where they would be provided institutionalised airline oriented training upto Commercial Pilots Licence (CPL) and additionally multi engine rating and instrument rating. In the recent past ab-initio to CPL courses have also started. The yearly output from IGRUA was about 20 CPLs per year – sufficient for our two national carriers Air India and Indian Airlines. Both these airlines have paid yearly grants to IGRUA in return for assured supply of quality product.

The open sky policy of 2005, and the rapid expansion of our airline industry forced the Government to have a relook at IGRUA with a view to upgrade it. The result is new acquisitions of 14 glass cockpit Diamond DA 40 single engine trainers and 2 multi engine DA 42 trainers along with their FNPT simulator devices. More infrastructure has been created and the old are upgraded. Management of IGRUA was handed over to the international training giant CAE in 2008. Today IGRUA graduates 80 CPL holders per year and will soon touch 100. IGRUA product continues to be in heavy demand with the airlines. Aviation circles consider IGRUA to be the IIT of Aviation Training. The Indian Navy and Indian Coast Guard have chosen IGRUA for a long term training collaboration. Navy sends 10 pilots for training to IGRUA every six months since June 2013. Coast Guard too has followed suit. From March 2014, they send 4 pilots for training every six months.

IGRUA is viewed as the Civil Aviation Training Hub. After due clearance of the bill by Indian Parliament, National Aviation University is under construction at IGRUA campus. An AME school is also being built. AME courses are expected to commence from 2016 -17 Academic session. Thus IGRUA has now become the Civil Aviation Training Hub.

II. AIRPORT ECONOMIC AND REGULATORY AUTHORITY

The Airports Economic Regulatory Authority (AERA) is a statutory body constituted under the Airports Economic Regulatory Authority of India Act, 2008 (27 of 2008) notified vide

Gazette Notification dated 5th December 2008. The AERA was established by the Government vide its notification no GSR 317 (E) dated 12.05.09 with its head office at Delhi.

The statutory functions of the AERA as enshrined in the Airports Economic Regulatory Authority of India Act, 2008 are as below:

- To determine the tariff for the aeronautical services taking into consideration:
- The capital expenditure incurred and timely investment in improvement of airport facilities.
- The service provided, its quality and other relevant factors.
- The cost for improving efficiency.
- Economic and viable operation of major airports.
- Revenue received from services other than the aeronautical services.
- The concession offered by the Central Government in any agreement or memorandum of understanding or otherwise.
- Any other factor which may be relevant for the purposes of this Act.
- To determine the amount of the Development Fees in respect of major airports.
- To determine the amount of the Passengers Service Fee levied under rule 88 of the Aircraft Rules, 1937 made under the Aircraft Act, 1934.
- To monitor the set Performance Standards relating to quality, continuity and reliability of service as may be specified by the Central Government or any authority authorized by it in this behalf.
- To call for such information as may be necessary to determine the tariff under clause (a).
- To perform such other functions relating to tariff, as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act.

Revolutionized by liberalization, the aviation sector in India has been marked by fast-paced change in the past few years. From being a service that few could afford, the sector has now graduated to being a fiercely competitive industry with the presence of a number of private and public airlines and several consumer-oriented offerings. The promise and the potential of the Indian aviation market are awesome. Over 135 aircraft have been added in the last two years alone. By 2010, India's fleet strength will stand at 500-550. With air travel growth estimated at 8% annually, India's aviation industry would be among the fastest growing in the world. Keeping the trend live, the Government of India entered into Air service agreements (ASA) with 100 countries till date. These bilateral agreements provide basic legal structure framework for operation of air services between two contracting parties. Thus efficient international air services make significant contribution to the Indian economy.

The Naresh Chandra Mehta committee on Indian aviation in 2003 identifies various loop holes in Indian aviation and suggests improvements. The committee recommends to set up an independent airport economic regulatory authority, to regulate the tariff and other charges at Indian airports. In the wake of Naresh Chandra Mehta committee report 2003 on Indian aviation the government of India consider its recommendations and chalk out an exhaustive plan in this regard. Meanwhile the Airport Authority Of India is the central body in charge of domestic and international airports in India and is also involved in both constructing airports on its own and partnering with the private sector for the development of new airports

terminals. However, owing to the multipronged role of this central body, there arises a conflict wherein the AAI is both a participant and regulator. Thus there was an urgent need of an independent central regulatory authority. With the recommendation of Naresh Chandra Mehta committee and other aviation experts the parliament has enacted AERA ACT 2008, which will regulate the tariff and other charges for the aeronautical services rendered at airports.

PART II: AIRCRAFT ACT 1934 AND AIRCRAFT RULES 1937

HISTORY AND DEVELOPMENT OF AVIATION LAW IN INDIA

The Beginning of Aviation in the British Era and the Early Imperial Regulations

Joseph Lynn was the first person to be credited with a successful flying experience in the Indian sub-continent. In 1877 he was the first man to fly a balloon in India at Bombay. From that humble beginning, the aviation industry developed rapidly under the colonial era and even today, several institutions and organizations created to regulate and develop aviation in that era continue to perform important roles and functions in the aviation and related sectors. The legacy of airline in India can be traced to 1910 when the young Maharaja of Patiala became the first Indian to own an airplane. In 1911, Henri Pequet flew a mechanical heavier-than-air aircraft, for the first time in India. It was credited with being the world's first Airmail and was flown from Allahabad to Naini and back; he flew a Roger Sommer biplane. After the flight the postal authorities passed the Indian Airships Act in 1911, applying to the whole of British India. The Governor General of India was given sole power to prohibit the import or export of any material for public good.

Then on 1st October 1915, a landmark in the history of aviation was achieved; the British India Government approved the setting up of a Central Flying school at Sitapur under the control of the army headquarters. As Indian pilots had already proved their mettle in the First World War, the British India administration had conceived the idea of training pilots in India for a large scale aviation scheme, they opened various flying clubs and for the first time all these flying clubs had Indian participation much to the contrary for earlier clubs maintained strictly for the British. The cities of Calcutta, Bombay, Allahabad followed and had flying clubs, which mainly had patrons from the rich classes. In 1919 there was an International Convention on Air Navigation in Paris, which British India was a signatory to, it envisaged that:

- Every State had complete and absolute sovereignty over airspace above its territory
- Nationality of an aircraft was that of the nation where it was registered
- Rules pertaining to standards of the aircraft, certification and competence of the pilots and their licensing were to be universalized and standardized.
- Right of the State to ensure safety of its people was recognised

After this convention Indian skies were opened to foreign air services and facilities were made available to them. In 1920 a regular airmail service started between Karachi and Bombay by the Royal Air Force (though it terminated) in six weeks due to high financial

losses. The convention also led the government to form the first Indian Board for Civil Aviation. The Board made a number of recommendations including proposals for establishing landing grounds and other ground facilities, appointment of a full time Director of Civil Aviation, surveys of the main trunk routes, inauguration of an air service between Calcutta and Rangoon, among others. As a part of the recommendations Lt. Col. F.C. Shelmerdine was appointed the Director of Civil Aviation in 1927 and four civil aerodromes were constructed at the districts of Calcutta, Allahabad, Karachi and Bombay under his directions in 1931. This paved the way for a setting up of the aviation industry and developing aviation in India. Subsequently, the post of Director of Civil Aviation was upgraded to the Director General of Civil Aviation and full-fledged directorate was established to regulate aviation operations in the country. The Directorate General for Civil Aviation continues to be India's apex regulator on all technical, personnel and safety related aspects of aviation although its airport management and security related functions have been handed over to separate organizations after independence.

In 1932, on October 8th the Indian Air Force was established and a week later a young and promising aviator J.R.D. Tata took off in a winged monoplane from Karachi to Bombay and launched 'Tata Airlines' which, was granted a weekly airmail service from Karachi to Madras. After the entry of private entrepreneurs with operations in various parts of the country, the government decided to introduce a fresh legislation to control and regulate aviation operations in the country. The Indian Aircraft Act was incorporated enacted in 1934 with provisions for the control of manufacture, possession, use, operation, sale, import and export of aircrafts. This was subsequently followed by the Aircraft Rules of 1937 that covered within their ambit rules related to almost every aspect of the aviation industry from safety to jurisdiction and facilities, The Aircraft Act, 1934 and Aircraft Rules of 1937 later became the fundamental components of the aviation regulatory regime of post-Independence India.

After the world war broke out, India being a British Colony joined the war and all aviation related resources were used for war purposes. Two operational companies Tata Airlines and Indian National Airways were entrusted with the operation of services for the carriage of freight, military personnel, mail and civil priority passengers. The war related operations and the new techniques developed, proved a blessing for the civil aviation sector, accelerating the development of aviation. Recognizing the importance of the aviation and its strategic importance, the British India Government formulated a blueprint for the large-scale development of civil aviation in India to form a daily network connecting various parts of the nation. Under this plan, new and large airplanes were provided on a lease basis, more air routes and airports were developed and other infrastructure was quickly put into place. Also participation in the war operations, made the emerging transport companies financially sounder, better equipped and more experienced.

After the end of the war, on December 7, 1944 the representatives of 52 states signed at Chicago, the Final Act of the International Civil Aviation Conference, commonly known as the 'Chicago Convention', British India was one of the original signatories to it. The International Civil Aviation Organization (ICAO) was formed under the convention and which has played a pivotal role the post-world war development of international civil aviation.

On 1st January 1946, civil aviation was restored to commercial status, although the aviation industry was small, consisting of only two companies Tata Airlines and Indian National Airways, it was well organized and experienced in the handling of modern aircrafts. The British India Government put Captain F.C. Tymms on special duty to prepare post war plans for the development of civil aviation in India, Following his recommendations the Government introduced the Air Transport Licensing Rules and in July 1946 set up an Air Transport Licensing Board. The Board had numerous applications for 96 routes covering the whole of India, but to the dismay of Tymms only 11 companies were granted licenses with over 51 routes to fly on. The limited number of licenses and excessive governmental controls led to a sluggish development of the aviation industry and at the time of independence, the industry except for one or two companies. The partition of British India, into two independent countries i.e. India and Pakistan, led to a further setback as there was a loss of several important air routes, aviation related infrastructure got divided and most of the planes had to be used for the purposes of evacuating refugees,

Independence, Nationalization and the Aviation Industry

After Independence, the Indian state embarked on the mission of creating a modern industrialized state and removing the sharp disparities prevalent within the country. The chosen path was 'socialism' with large public sector enterprises being created to operate in almost all major industrial spheres, extensive state regulation and large-scale nationalization of private enterprises. The importance of aviation in the overall economic development of the country, national integration and the strategic benefits were recognized quite early by the state and the government favored an early nationalization of the industry so that it could be managed in 'orderly manner'.

The proposal for nationalizing the aviation industry was first discussed in the Civil Aviation Conference on 1st February 1947 and the Government of India appointed an Air Transport Inquiry Commission in 1950 to institute an independent inquiry into the structure and working of the air transport industry. The Committee submitted a report on the same year in September and in its report it showed concern as it found that the industry suffered from over-equipment, unwieldy organization and severe competition. It suggested that (a) The number of operating companies be reduced to four; (b) excess staff should be reduced along with the number of aircrafts and fares and rates be increased and fixed at an economically sustainable level; (c) The Government should continue giving financial assistance in the form of rebate on aviation fuel; (d) non-scheduled operations be allowed provided they did not enter into unhealthy competition with regular airlines.

THE AIR CORPORATIONS ACT, 1953

The Government and the newly instituted Planning Commission of India, however, favored the creation of a single state-run corporation that would handle all the existing traffic. After much thought and deliberations, the view of the government prevailed over the recommendations of the Commission and the Air Corporation Bill was passed in Parliament in 1953. The Air Corporations Act, 1953 thus came into being.

In order to address the deteriorating financial health of India's civil aviation sector, the Government of India passed the Air Corporations Act of 1953, which nationalized all

carriers providing services within India's civil aviation industry. The government in 1950 had set an Air Traffic Enquiry Committee to look into the problems faced by the airlines. The soaring prices of aviation fuel, mounting salary bills and disproportionately large fleets took a heavy toll of the then airlines. The financial health of companies declined despite liberal Government patronage, particularly from 1949, and an upward trend in air cargo and passenger traffic. Though the Committee found no justification for nationalization of airlines, it favored their voluntary merge. So Government in the wake of deteriorating financial conditions of the Airlines decided to step in and nationalize the air transport industry and accordingly, two autonomous corporations were created on August 1, 1953. In 1953, the government nationalized the airlines via. The Air Corporations Act, 1953,¹¹ which gave birth to Indian Airlines and Air India. Indian Airlines was formed with the merger of eight domestic airlines to operate domestic services, while Air India International was to operate the overseas services.¹²

Further the Act also gave monopoly power to Indian Airlines to operate on domestic scheduled services to the exclusion of any other operator. Air India became the only Indian carrier to operate on international routes except for some routes to the neighboring countries which were given to Indian Airlines.

Under the Act the undertakings of all air companies and all those employed by them up to 30th June 1952 were transferred to the two new corporations on the same terms and conditions. A sum of 62 million rupees was paid to the existing nine companies by way of compensation. The two new corporations were created with independent duties, one i.e. Indian Airlines Corporation was formed in August 1953 after merging the eight private airlines was to operate inland services including the services to the neighboring countries while the other Air India International was meant for long international service and the other This state monopoly over airline operations would continue for the next four decades and only in the early 1990's there would be the reemergence of private operators in the aviation industry. In 1985, the government incorporated another corporation called the "Pawan Hans Corporation" for providing helicopter services on lease and rent basis.

The construction, development and management of airports had been under state control since the colonial period. In the early 60's, a high-powered committee headed by J.R.D. Tata was constituted by the Government of India, to advise the Government on the upgradation and management of existing airports and construction of new airports. Based on various recommendations that the Committee had made, the Government created the International Airports Authority of India (IAAI) through International Airports Authority Act, 1971. The Authority came into being on 2nd February 1972 with the mandate to operate and develop international airports at the four cities. After the establishment of IAAI, National Airports Authority was created in 1986 for the control and management all other airports i.e. domestic airports. In 1995, Airports Authority of India (AAI) was constituted by an Act of Parliament by merging erstwhile National Airports Authority and International Airports Authority of India. The merger brought into existence a single Organization entrusted with the

¹¹ See: section 16, 18, Air Corporation act, 1953.

¹² <http://home.airindia.in/SBCMS/Webpages/Time-line-1951-1960.aspx?MID=196>, last visited on 17th December, 2011.

responsibility of creating, upgrading, maintaining and managing Civil Aviation infrastructure both on the ground and air space in the country

Although initially nationalization of the aviation industry had proved to be a successful policy decision as Indian Airlines and Air India rapidly emerged as world-class international airlines. However, in the subsequent decades, excessive governmental control, lack of a strategic vision, cumbersome procedures characterized by the infamous ‘red-tape’ and delayed decision making led to a decline in the initial standards and efficiency of both the corporations and they were unable to meet the growing demands of the aviation market. Similarly, the airports management and development was sluggish and was far behind the actual requirements. The inefficiency caused in the aviation industry by nationalization not only hampered the growth of aviation but also severely hampered tourism, trade and commerce and employment generation.

Liberalization, Deregulation and the Emergence of a new ‘Aviation Industry’

Liberalization in general, refers to a relaxation of prevalent government restrictions, usually in the area of economic or social policy. With an impending economic collapse of the country, led the Rajiv Gandhi and Narashima Rao governments to dismantle the ‘license raj’,¹³ and introduce much-needed economic reforms in the country, which marked the beginning of the economic liberalization and the free market economy in India. Considering the importance of the viable aviation industry for economic growth, the government started examining the issue of deregulation of the aviation industry. The Planning Commission of India, which had earlier advocated nationalization, in its 1989 report, advocated a phased deregulation of the industry. In 1994, the Parliament introduced legislation to repeal the Air Corporations Act, 1953 and allow the entry of private players. Several Indian companies like Damania Airways, Archana Airlines, Jet Airways, ModiLuft (a collaboration between the Modi Group and Lufthansa), East West Airlines and Jet Airways started operations. However with high cost of aviation’s due regulations that increased the number of persons required per plane and high aviation taxes and airport charges, several of these companies found it difficult to operate in a highly competitive market leading to meltdown in the industry. And eventually only two companies survived i.e. Jet Airways and Sahara Airlines survived. Both the national carriers (Indian Airlines and Air India) suffered heavy losses and struggled in a free market scenario

The deregulation had been was supposed to be in a phased manner but after the initial steps, the reforms lost their pace. Several important measures like allowing foreign direct investment from airlines into domestic companies and the disinvestments of the national carriers were put onto to the backburner due to political opposition. Meanwhile, most airports were badly maintained and were unfit for serving the expansion in air traffic (both domestic and national). The growth momentum was lost by the mid-90’s and the Naresh Chandra Committee setup by the Ministry of Civil Aviation unequivocally stated in its report in 2004: *“India has lost out in aviation, it has missed the travel boom of the nineties, ceded natural geographic and economic advantages as the cargo and courier hub to other countries and air travel still remains confined to a tiny section of the domestic population”*.

¹³ License Raj refers to the heavy regulation and control of economic activity in India through various methods like quotas, permits, permissions.

In 2004, when a new government was formed by the United Progressive Alliance, several important and much needed reforms were quickly introduced like allowing private domestic carriers to fly on overseas air routes, the process for privatization of airports was commenced and open skies or extended bilateral agreements were signed with many countries. The entry of special low cost airlines and value carriers like Air Deccan, Kingfisher Airways and Spice Jet and the increase of the number of international airlines connecting to India have provided a renewed impetus for growth in the industry with estimated investments of \$26/\$27 billion dollars being made over the next few years.

Economic liberalization is more often than not, closely associated with the concept of privatization. Privatization or more appropriately in the Indian context, disinvestment, is the process of transferring property from public ownership to private ownership. The term could also imply the transfer of management of a service or activity from the government to the private sector. The whole gamut of privatization in the Indian aviation sector, of airlines, airport infrastructure management and the like has long been the subject of a heated debate. The privatization of existing airports and the construction of new airports by private operators have been started gradually. 100% FDI is allowed through the automatic route for Greenfield Airports in the Country. In Bangalore and Hyderabad, the government has initiated the construction of Greenfield airports through Build Own Operate and Transfer (BOOT) basis with private sector participation. The project at Bangalore will cost Rs 14 billion, while the project at Hyderabad will cost Rs 17.6 billion. In both these projects, AAI holds 26% equity and the rest 74% is held by private stakeholders. AAI has also proposed to establish a Greenfield airport in Navi Mumbai to meet the long term requirement of air traffic of the Mumbai region. A second airport for Goa, in Mopa, has also been planned. It has been estimated that Greenfield Airports in Bangalore, Hyderabad, Goa, Pune, Navi Mumbai, Nagpur and Greater Noida will cost about Rs 10,000 crores.

The existing International airports in Delhi and Mumbai are being restructured and modernized through Private sector participation. In the Joint Ventures, AAI and other Government PSUs hold 26% equity, with the balance 74% being held by the strategic partner. As per the current policy of the government, the FDI in existing airports has a sectorial cap of 49%. The development plans for Delhi and Mumbai airports envisage an investment of Rs. 5,270 crore and Rs. 6,130 crore respectively (totaling Rs.11,400 crore) during the period of 2006-07 to 2013-14 for development of these two airports. The respective state governments have formulated State Government Support Agreement to provide support to the projects in matters relating to removal of encroachments or procurement of additional land for development of airport, removal of obstruction outside the airport boundary to ensure safe and efficient air traffic movement, and to improve the surface access to the airport and to provide utilities like water, power, etc.

Further, the Prime Minister's Committee on Infrastructure has given its in-principle approval for modernization of 37 non-metro airports (including Sikkim and Arunachal Pradesh airports). The Ministry of Civil Aviation has set the target of 2008-09 for the completion of these projects. The project model would be such that all aeronautical activities at these airports would be handled by the AAI, while a public-private partnership (PPP) model would be followed for the development of non-aeronautical activities at the city side of these airports. The PPP model is likely to peg the foreign direct investment (FDI) levels at 49 per

cent with the private sector partner being allowed to pick up 74 per cent equity in the project. AAI has decided not to seek any budgetary support for the modernization process that is expected to cost between Rs 7,000 and 8,000 crore. The funds required would be garnered from internal resource mobilization by the AAI.

The Indian Civil Aviation Sector is in for a major overhaul over the next few years. In the wake of major policy changes taking place (due to a shift in the mindset of the government from considering air travel as elitist to making it available for the common man) and liberalization of air travel services, a sharp increase (5-10% per annum) in air traffic is expected.

However, key regulatory problems still exist that could lead another meltdown in the industry. Indian regulations are highly outdated and cumbersome and make aviation operations in India inefficient and expensive. For example, the operational costs of low cost airlines are 25% higher than global norms because of the unnecessary personnel required by law, outdated procedures mandated for running operations and a badly designed taxation regime.

Aviation Regulation before 1934 Act

A large part of Indian Air Law is contributed and developed by ICAO which was established by the Chicago Convention 1944. The convention was the first agreement to which presently 189 states including India are signatories. The convention established ICAO and primary basis for the regulation and development of International Airports. Its provisions are binding on all the contracting states.

The beginning of commercial air transport in India was made with the carriage of air mail on 18th February 1911. This commendable piece of pioneering enterprise on the part of the Indian postal authorities coincided with passing of the Indian Airships Act 1911. The Act was later amended as the Indian Aircraft 1911. This Act regulated in considerable detail the flight of aircraft over the Indian territory at a time when motor car was still a novelty in most part of the world. The Indian Aircraft Rules, 1920 were framed under the said Act to regulate inter alia, aerial navigation on the Indian territory.

In India the beginning of commercial air transport was made with the carriage of air-mail on 18th February, 1911. The French pilot, Henri Piquet, took off from Allahabad in a Humber biplane from the Industrial and Agricultural Exhibition Ground to Naini Junction a distance of six miles, with air-mail consisting of some 6,500 letters and postcards. Thus India has a unique distinction of having inaugurated the first air-mail flight in the world. This commendable piece of pioneering enterprise on the part of Indian postal authorities coincided with the passing of the Indian Airships Act in 1911. This act regulated in considerable detail the flight of aircraft over the Indian Territory at a time when motor car was still a novelty in most parts of the world.

The Indian Airships Act, 1911 applied to the whole of British India, including the then British Baluchistan, the Santhal Parganas and the Pargana of Spiti. Section 2(1) of the act defined airship as an machine fitted with mechanical or other means of propulsion designed to fly or float in the air without connection with the earth, and includes any part of any

machine. Section 3,4 and 5 of the act defined the powers and functions of the Governor-General in Council including those for making rules for licensing the manufacturer, possession, use sale, import and export of airships. The Indian Aircraft Rules, 1920 were framed under the said Act to regulate, *inter alia*, aerial navigation on the Indian Territory. Since the enactment of the Aircraft Act, 1911 and framing of the Indian Rules, 1920, rapid development in civil aviation and changes took place.

In 1919 an International Convention on Air Navigation was signed in Paris. This was the first international convention of its kind and the British India was a signatory to it. The convention incorporated the following basic principles:

- 1) According to Article 1 of the Convention, the contracting parties recognized that every state had complete and exclusive sovereignty over airspace above its territory.
- 2) Nationality of an aircraft was that of a nation where it was registered.
- 3) Rules as to air worthiness of aircraft, certification and competence of pilots and their licensing were to be universalized and standardized.
- 4) Right of a state to take measures to ensure safety of its people was recognized.

This necessitated general revision of the Indian Aircraft Rules, 1920. Some of the modifications required, as a matter of fact, were introduced into the Indian Aircraft Rules, 1920. However, due to inadequacy of the Indian Aircraft Act, 1911, it was not possible to complete the revision until the necessary amendment to the said act. Therefore the Indian Aircraft Act, 1934 was enacted to enlarge the rule making powers of the Governor- General in Council in order to meet the modern developments and to enable Government to give full effect to the International Convention for the Regulation of Aerial Navigation signed at Paris in 1919 and its Annexes and to provide for certain other matters on which legislation had become necessary.

THE INDIAN AIRCRAFT ACT 1911

The Indian Airship Act, 1911 applied to the whole of British India, including the then British Baluchistan, the Santhal Parganas and the Pargana of Spiti. Section 2(1) of the Act defined airship as any machine fitted with mechanical or other means of propulsion designed to fly or float in the air without connection with the earth, and includes any part of any machine. Sections 3,4 and 5 of the Act defined the powers and functions of the Governor General in Council including those for making rules for licensing the manufacture, possession, use, sale, import and export of airships. Under section 4, the Governor-General had the power to prohibit the import or export for public good. Under section 5, he had the power to cancel or suspend licenses and to acquire airships for public service.

Since the enactment of Aircraft Act, 1911 and framing of the Indian Aircraft Rules, 1920, rapid development in civil aviation took place. In 1919, an International Convention for the Regulation of Aerial Navigation were signed with the object of establishing regulations of Universal application and encouraging peaceful intercourse with nations by means of aerial navigation. India was signatory to the convention. This necessitated general revision of the Indian Aircraft Rules 1920. However, due to inadequacy of the Indian Aircraft Act 1911, it was not possible to complete the revision until the necessary amendment to the said Act. Therefore, The Indian Aircraft Act 1934 was enacted to enlarge the rule-making powers of

the Governor-General in council in order to meet the modern developments and to enable government to give full effect to the provisions of the Paris Convention 1919 and its Annexes and to provide for certain other matters on which legislation had become necessary.

Since its enactment, the Aircraft Act 1934 has been amended nearly twenty times. These amendments had arisen essentially on account of developments in aviation technology and in inadequacies observed in the provisions of the said Act. A comprehensive updating and amendment of the Aircraft Act 1934 was undertaken by Amendment Act 12 of 1972. Substantive provisions under Section 5A to empower the Director-General of Civil Aviation to issue directions in certain matters under certain circumstances and regulation of construction of building etc. in the vicinity of aerodromes to ensure the safety of the aircraft operations were some of the important amendments affected by the said Amendment Act.

The 1920s saw a lot of action on the civil aviation front in the country. Not only were rules framed, but intercontinental flights between India and Britain started. The years also saw the foundation of what is today the Ministry of Civil Aviation, the Directorate General of Civil Aviation and the Airports Authority of India. With the Indian Aircraft Rules 1920 in place, civil aviation became very important with quite a few takers.

THE AIRCRAFT ACT 1934

It provides the basic Constitutional law of aviation in India. The act created the fundamental legislative framework for manufacture, possession, use, operation, sale, import and export of aircraft in India. It was also enacted to enlarge the rule making powers of the Governor-General in Council and also to give effect to The International Convention for the Regulation of Aerial Navigation Signed at Paris in 1919. Section 4 gives powers to the central govt. to make rules to implement the Chicago Convention of 1944.

The Aircraft Act, 1934 provides for the basic constitutional law of aviation in India. It has been amended time to time but it exists today also, despite many revolutionary changes in technology and Industry. The main aim of the act is to make better provisions for the control of the manufacture, possession, use, operation, sale, import and export of aircraft. The preamble to the Act states that “An Act to make better provision for the control of the manufacture, possession, use, operation, sale, import and export of aircraft. The Act extends to whole of India and applies also

- a) to citizens of India wherever they may be, and
- b) to aircraft and to the persons on aircraft registered in India wherever they may be Section 2 of the Act defines aircraft, aerodrome, aerodrome reference point, import and export.

This act was enacted to enlarge the rule making powers of the Governor-General in Council in order to meet the modern developments and to enable Government to give full effect to the provisions of the International Convention for the regulation of Aerial Navigation signed at Paris in 1919 and its Annexes to provide for certain other matters on which legislation and become necessary.

The Central Government exercises control on the manufacture possession, use, operation, sale etc. of civil aircraft through the provisions of the Aircraft Act, 1934.

The management and operation of the domestic airport, navigation and communication facilities and air traffic control at all airports were transferred from the Government to the National Airport Authority in 1986. The National Airports Authority was merged with the International Airport Authority w.e.f. 1.4.95 to form a single entity named Airport Authorities of India. The Government opened the domestic air transport services to the private sector in 1994. With developments in technology, communication, navigation, surveillance and air traffic management are also switching over from ground based to satellite based technology in the near future. In recent times the need to lay down appropriate safeguard to ensure civil aviation security against acts of unlawful interference has also acquired vital importance.

Keeping these and various other developments in the civil aviation sector in view, the Ministry of Civil Aviation had reviewed the provisions of the Act and considered it necessary to carry out certain amendments to make it more effective and consistent with the present requirement and circumstances.

The main provisions of the act are as follows:

Section 2 of the act refers to a few definitions of aircrafts, aerodrome, aerodrome reference point, import and export.

Section 3 is titled “power of Central Government to exempt certain aircraft.” Under this the Central Government has power to exempt any aircraft or person from application of this act.

Section 4 relates to “power of the Central Government to make rules to implement the convention of 1944”.

Section 5 covers the “power of Central Government to make rules”. This is an important provision whereby the Central Government makes rules regulating manufacture, possession, use, operation, sale, import or export of aircraft, and for securing the safety of aircraft operations.

Section 6 provides for the “power of the Central Government to make rules in emergency”.

Section 7 refers to the “Power of Central Government to make rules for investigation of accidents”.

The power to detain aircraft is given under section 8 of the act. It empowers the government to detain an aircraft whose intended flight involves danger to the aircraft, or where such detention is necessary to secure compliance with the provisions of the Act or the rules made thereunder, or to implement an order from any court.

Under section 9 of the act the provisions of Merchant Shipping Act 1958 relating to wreck and salvage shall apply to aircraft over the sea as they apply to ships, and the owner of an aircraft is entitled to salvage services like the owner of the ship.

Section 10 provides for the penalties for contravention of rules made under the aircraft act.

Section 11 deals with the penalty for flying so as to cause danger and section 14 provides that all the rules made under the Act are to be published for three months before implementation.

Section 17 states that no suit shall be brought in any civil court in respect of trespass or in respect of nuisance by reason only of the flight of aircraft over any property at a height by reason only of the ordinary incidents of such flight provided the circumstances of the case is reasonable. This would give an opportunity to parliament to review the rules and if necessary reject them by a special resolution.

AIRCRAFT RULES, 1937

The Aircraft Rules, 1937 contains the bulk of rules which apply for the operation and use of Aircraft and for rules of the air relating to the public order in air space. These rules are made by the central govt.in the exercise of the powers conferred by the Aircraft Act 1934. There are 161 rules and 12 schedules in the act and it covers the general conditions of flying, general safety conditions, registrations and marking of aircraft, investigations of accidents, regulatory provisions, air transport services etc.

The bulk of rules which apply for the operation and use of Aircraft, and for rules of the air relating to the public order in air space, are contained in Aircraft Rules, 1937. These rules are made by the Central Government in exercise of the powers conferred by Aircraft Act, 1934, sections 5, 7 and sub-section (2) of section 8 of this act, and section 4 of the Indian Telegraph Act, 1885. There are 161 rules and 12 schedules in the act and it covers the general conditions of flying, general safety conditions, registrations and marking of aircraft, investigations of accidents, regulatory provisions, air transport services etc.

Some predominant rules are summarized and analyzed below:

Part I: Preliminary: this part contains rule 1 to rule 3 and which mainly deals with the application of the act and various definitions. According to sub-rule 2A of rule 3 held that powers are generally exercised by the Director-General of Civil Aviation (DGCA).

Part II deals with the general conditions of flying. It mainly provides for the conditions which must be followed before flying like no person should fly in an aircraft which is not registered and which bears no nationality mark. Rule 6 pertains to licensing of personnel.

Rule 8 refers to the carriage of arms, explosives and dangerous goods on board aircraft and provides strict conditions for their carriage when permitted.

Rule 9 pertains to security check of persons boarding aircraft at aerodromes.

Rule 10 refers to the carriage of mails and rule 17 relates to the production of licenses.

Rule 18 refers to prevention of flights in contravention of the rules.

Part III deals with the general safety conditions. This part mainly relates to the prohibition of intoxicated persons entering into an aircraft, prohibition of persons suffering from mental disorders or epilepsy,. It also lays down in its rule 24C that no person can carry on board the aircraft, animals, birds and reptiles except under a permit issued by the DGCA.

Rule 25 pertains smoking inside the aircraft.

Rule 28 lays down the minimum age for gliding and flying.

Rule 29 refers to prohibition of acts likely to imperil the safety of aircraft.

Part IV deals with registration and marking of aircraft.

Registration of an aircraft is a basic requirement under the law before an aircraft can fly. This part lays down the general conditions for registration and marking of an aircraft.

Part V regulates the licensing of personnel connected with aircraft operations and maintenance. Rule 38 to 48 make up this part.

Part X deals with the Investigation of Accidents. This Part is of general interest to lawyers and the travelling public. Investigation of accidents involves exhaustive work relating to cause of accidents. The DGCA has a special Directorate of Air Safety where experts on accident investigation keep vigil on all accidents and incidents involving civil aviation.

Part XI is mainly related to aerodromes. The regulations in this Part comprise of Rules 78 to 87. These touch upon the management aspects at aerodromes. Part XII A deals with the regulatory provisions and Part XII deals with Air Transport Services.

THE AIRCRAFT PUBLIC HEALTH RULES, 1954

These rules regulate public health in so far it affects operation by aircraft. These rules are made in exercise of power conferred by Section 8A of Aircraft Act 1934 and in supersession of the Aircraft Public Health Rules, 1946.

It has six parts. Part I is introductory and deals with definitions. Part II contains rules for aircraft arrivals. This Part has detailed procedures to be followed for yellow fever infections, plague, cholera, small pox, typhus and relapsing fever, and other infectious disease.

Part III of the Aircraft Public Health Rules, 1954 relates to aircraft departures. It has various health measures stipulated for compliance of departing aircraft and passengers. It also contains special rules relating to pilgrim aircraft.

Part IV contains special provisions relating to the carriage of dead bodies and cremated remains.

Part V has miscellaneous health provisions. And Part VI provides for offences and penalties.

THE AIRCRAFT (DEMOLITION OF OBSTRUCTIONS CAUSED BY BUILDINGS AND TREES ETC.) RULES, 1994

The Rules provides for the demolition of obstructions caused by buildings and trees etc. This rule extends to the whole of India. it consists of 8 rules. It defines “Building” as inclusion of any structure, whether permanent or temporary, erected within a specified area around an aerodrome; and “owner” to include the person having the control of the building or tree, as the case may be.

These Rules provide that whenever a notification is issued by the Central Government to inquire about the legality of any building or tree etc., the notice has to be served to the owner of that building or tree etc. Upon service of notice, the owner is required to furnish the details of his building or tree etc. to the officer-in-charge of the aerodrome, and details furnished shall be forwarded by Officer-in-charge to the Director General of Civil Aviation for verification. Upon the receipt of verification of details, the Officer-in-charge shall pass his/her final order. The person aggrieved by the order of the officer-in-charge, may appeal to the Director General of Civil Aviation within 60 days, and the order of DGCA shall be final and no further appeal shall be entertained.

THE AIRCRAFT (CARRIAGE OF DANGEROUS GOODS) RULES, 2003

The Rules provide for the provisions relating to carriage of dangerous goods by air. It extends to the whole of India, and also applies to-

- (a) aircraft registered in India or aircraft operated by an operator who has his principal place of business or permanent place of residence in India, wherever they may be;
- (b) all aircraft for the time being in or over India; and
- (c) persons operating air transport services to, from, within and over India, shippers of dangerous goods or their agents.

It defines “dangerous goods” as articles or substances which are capable of posing a risk to health, safety, property or the environment and which are listed as such in the Technical Instructions or which are classified according to the Technical Instructions; “dangerous goods accident” as an occurrence associated with and related to the transport of dangerous goods by air which results in fatal or serious injury to a person or damage to major property or environment; and “dangerous goods incident” as (i) an occurrence, other than a dangerous goods accident, associated with and related to the transport of dangerous goods by air, not necessarily occurring on board an aircraft, which results in injury to a person, property or environment, or fire, breakage, spillage, leakage of fluid or radiation or any incident occurred due to defect in packaging; and (ii) an incident occurred due to the transport of dangerous goods which seriously jeopardizes the aircraft or its occupants.

The Rules provide that no operator shall carry any dangerous goods by aircrafts, unless it has been certified by the aeronautical authority of the State of the operator. It shall be the responsibility of the operator carrying the dangerous goods in case of any accident or incident.

IMPORTANT CASES

1. *Federation of Indian Airlines and others v Union of India and others* 2011

Facts: In this case the petitioner has challenged the Validity of Airports Authority of India (General Management, Entry for Ground Handling Services) Regulations, 2007 and circulars thereunder. It was averred that a circular dated 2.6.2010 prevents / prohibits the airlines to provide ground handling services where there is no passenger interface. It is contended that the said circular could not have been issued by the said authority in the absence of an amendment of the ground handling Regulations 2007 as there is a complete dichotomy between the circular and the 2007 Regulations in the field. The petitioners urged that the

circulars are absolutely arbitrary, unreasonable, discriminatory and, hence, offend Article 14 of the Constitution of India; that the circulars / regulations violate the individual airlines' and their shareholders' fundamental right to practice any profession or to carry on any occupation, trade or business as enshrined under Article 19(1)(g) of the Constitution of India and do not meet the test of reasonableness enshrined under Article 19(6) of the Constitution of India. It is further contended that the impugned circulars / Regulations virtually make it impossible for the petitioners to undertake their licensed activities at the six airports out of many as a consequence of which they would have to abandon their own operations in the said six airports and eventually only restrict their operation to the remaining airports resulting in tremendous and immensurable decrease in their business activity. Hence this application

Issues: Is the Airports Authority of India (General Management, Entry for Ground Handling Services) Regulations, 2007 and circulars thereunder ultravires the constitution?

Judgment: Held, Rule 134 did not vest any right on airline operator for any ground handling service. Clause 3.2.6 provided minimum requirement for grant of permit to airline operator. DGCA who had been conferred power under Section 42 had framed Regulations. However, Civil Aviation Requirements only laid down condition for fixing eligibility criteria, that did not vest any kind of inalienable right with Petitioners. Regulations had given more emphasis on security impact. Merely because an eligibility criteria had been fixed, that did not mean same could not be changed. Eligibility criteria for grant of permit of ground handling facilities were laid down. It was obligatory on part of airline operator to provide ground handling facility, if authority so directed. When condition had been altered, that by no stretch of imagination, would vitiate Regulations issued under Section 42 on foundation that it violated Rule 134 of Rules. Hence, no justification in such a stand and the application was dismissed.

2. Paramount Airways Private Limited v Union of India and Others 2010

Facts: The challenge in this petition is to an order dated 4th December 2009 passed by the Office of the Director General of Civil Aviation ('DGCA'), Government of India under Rule 30(6)(iv) of the Aircraft Rules, 1937 treating as cancelled the lease agreement between the lessors/owners i.e. M/s. GE Capital Aviation Services Ltd. ('GE') and M/s. Celestial Aviation Trading 71 Ltd. ('Celestial') (Respondents 5 and 6 respectively) and the Petitioner (as lessee) and consequently cancelling with effect from 4th December 2009 the certificate of registration of three aircraft taken on lease by the Petitioner. By the impugned order, the Petitioner was asked to submit the original certificates of registration to the Director of Airworthiness, Office of the Civil Aviation Department at Chennai.

Issue: Whether, order of suspension of Permit could be interfered

Judgment: Held, Petitioner had entered into agreement with one Airlines and with one Leasing Corporation for lease of three numbers of aircrafts. However, Respondents refuted it on ground that it was not as per requirement and aircrafts of Airlines had been leased out to Government. Thus, it revealed that agreement in respect of Leasing Corporation was only in budding stage. Moreover, credible material had not been placed to show that there was immediate possibility of purchase of aircrafts and there would be increase of fleet strength as per requirement. Therefore, it could not interfere with order of suspension of Scheduled

Operator's Permit though, order of suspension was temporary in nature. Therefore, if Petitioner was able to satisfy requirements, Respondents should look into and pass appropriate orders in accordance with law — Petition dismissed.

3. *Society for Welfare of Indian Pilots, Represented by its President v Union of India and others* Madras High Court 2010

Facts: Petitioner complaint that experience requirement, relating to medical fitness for foreign pilots flying under "FATA" were lower than that prescribed for Indian Pilots.

Judgment: Held, perusal of Rule 39C of Aircraft Rules, 1937 stated that during validity of "FATA", it should be responsibility of operators to ensure that foreign pilots possess valid Class1 medical fitness assessment from license issuing authority of contracting State and from DGCA, India to ensure that medical fitness was in accordance with Rule and validity of such certificate should be as per Rule 39C. Thus, it was clear that assessment of medical fitness of foreign pilots was not solely based on assessment by license issuing authority of other State, but by complying with requirements prescribed by DGCA, India. Therefore, Court found no error in manner in which, medical fitness assessment had been prescribed in Draft Civil Aviation Requirement. Hence, it would be open to Petitioner to place all their objections before competent authority for its consideration. Petition disposed of.

MODULE III:

DOMESTIC

IMPLEMENTATION

OF AIR

SAFETY AND

SECURITY

REGULATIONS IN

INDIA

Introduction- What is aviation safety and why is it important?

Aviation safety is the concern of the whole world. Its importance is unanimously recognized. As mankind enters the third millennium, concern over aviation safety is stronger than ever. Such concern relates to the public perception of aviation safety, which is shaped essentially by news reports of aircraft accidents and other tragic events. The media tend to spotlight and give more headline coverage to fatal accidents or incidents involving aviation than to accidents involving other modes of transportation.

- Susceptibility to inherent risks of flight, the use of force, and, more dangerously, terrorist acts. From time to time, when major aviation-related accidents or tragic events take place, the whole world is shaken. Flight is inherently a risky venture, carried out in a hostile environment at great speed.
- Obviously, accidents in civil aviation raise much more public anxiety than other transportation accidents.
- The vital role of civil aviation also makes it an attractive target for terrorists. The industry may have successfully carried billions of passengers and their baggage, but it takes only one hijacker or one of the billion pieces of baggage containing an explosive to shake the public confidence in air travel, to undermine its global accessibility and consequently, to produce catastrophic effects on economic development directly or indirectly driven by air transport.
- Enhancing safety is important because civil aviation not only has to deal with natural or inherent hazards of flights, such as technical failures or human errors, but also has to deal with the threat of premeditated, organized and sophisticated attacks by terrorists. All of these factors have further elevated aviation safety from a national community concern to the concern of the global community. It is hardly surprising, therefore, that the ICAO Assembly has time and again confirmed that “the primary objective of ICAO continues to be that of ensuring the safety of international civil aviation.

Historical Development of Aviation Safety Regulations

The history of aviation is the history of improving safety. From a legal perspective, the starting point of safety regulations could be traced back to the period of the infancy of aviation. The earliest legislation on record focused more on aircraft impact on the ground, rather than safety on board.

5 months after the first circuit flight took place on 21 November 1783 on board a balloon invented by Mongolfier brothers, the first aerial regulation was promulgated on 23 April 1784. In this regulation, the Paris police introduced a law forbidding balloons to fly without a special license. Although this regulation may have been promulgated due to the concern that aircraft could present safety implications on the subjacent ground, it also introduced the concept of licensing for aviation, which is still applicable today. In 1819, France enacted a law which required that man-flight balloons be equipped with parachutes, thus extending the scope of its law-making activities by covering not only safety on the ground but also safety on board aircraft.

It was soon unanimously realized that government regulation of aviation was necessary in order to ensure public safety. However, the diversity of national regulations almost immediately became

apparent, which led to inconvenience as soon as aircraft crossed the boundary lines of States. A movement for international codification started.

The year 1910 witnessed the first international air law conference, which marked the serious attempt to provide a global regulatory regime for civil aviation. The conference did not end with the adoption of a convention because the participating States could not agree on whether they should offer equal treatment to foreign and national aircraft with respect to the freedom of over flight. Nevertheless, the contribution of the conference to the future of safety regulation should not be underestimated. With the exception of Articles 19 and 20 in the draft convention dealing with admission of air navigation in foreign territory, which were never completed, 41 Articles were excellently crafted and were truly remarkable for their foresight. Many important safety related issues, such as the nationality and registration of aircraft, airworthiness and personnel licensing, were covered by these provisions, which were inherited in both substantive content and drafting style by the 1919 Paris Convention and the 1944 Chicago Convention. The draft convention also contained three annexes dealing respectively with nationality and registration marks of aircraft, characteristics of aircraft relating to airworthiness and the rules of air traffic. The conference also adopted statements to declare a number of important principles, which, *inter alia*, affirmed that rules of the air in free airspace should be established by international agreements. Indeed, the conference had established a basic framework for the regulation of aviation safety, which paved the way for future development in this respect.

By authorizing non-military airships to fly over the territory of the other party on the basis of reciprocity, the agreement affirmed the safety rules that an airship must be provided with a certificate of airworthiness and the pilots must be licensed by the competent authority of one party. It was stipulated that this agreement would apply provisionally “pending the conclusion of an agreement on the subject between a greater numbers of States”.

Due to the First World War, the contemplated agreement “between a greater number of States” did not come into existence until 13 October 1919, when the *Convention on the Regulation of Aerial Navigation* was signed in Paris. The Paris Convention, which was part of the Versailles Peace Treaty, represented the first successful multilateral endeavour to set up a global regulatory regime for aviation.²³ In addition to the declaration that every State has complete and exclusive sovereignty over the airspace above its territory, the Convention established an international legal framework to ensure the safety of international civil aviation through the following provisions:

- common rules for aircraft registration in order to determine its nationality and the related jurisdiction of the State of registration (Chapter 2);
- regulations for certificates of airworthiness of civil aircraft and mutual recognition of such certificates by contracting States (Chapter 3);
- international rules of the air, including international rules for signals, lights and the prevention of collisions, as well as the undertaking by States to enforce them (Article 24);
- application to aircraft of the principles of maritime law governing salvage (Article 23).

Eight Annexes to the Convention were developed to implement the provisions mentioned above. Other subjects relating to aviation safety, such as aeronautical maps and ground markings, log books, as well as collection and dissemination of meteorological information, were also covered. The Annexes formed an integral part of the Convention. Their amendments, while adopted by ICAN, were binding on all member States. This structure displayed the lack of flexibility and proved to be one of the

weaknesses of the framework established by the Convention.

The Paris Convention also established an International Commission for Air Navigation (ICAN), which comprised representatives of States parties to the Convention. Over the years, ICAN established itself as a focal point for government and industry co-ordination and as a recognized aviation authority among international organizations with an interest in air navigation. On its own initiative, ICAN convened or sponsored many conferences and meetings relating to the safety of air navigation.²⁴

The safety framework laid down by the Paris Convention was subsequently inherited by the 1944 Chicago Convention with modifications. The latter remains valid today with its much more flexible system of Annexes, which has overcome the weakness of its predecessor. Another weakness of the Paris Convention is that it did not achieve universal acceptance, which is a desirable goal from the point of view of aviation safety. While 32 States eventually ratified or acceded to the Convention,²⁵ two major powers, the United States and the Soviet Union, never became parties. Furthermore, two groups of States decided to conclude respectively the *Ibero-American Convention Relating to Air Navigation* (Madrid, 1926) and the *Pan-American Convention on Commercial Aviation* (Habana, 1928), thereby creating further disunity to the system of the Paris Convention.

On 12 October 1929, an important convention in the sphere of private international air law, namely, the *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, was concluded in Warsaw. This Convention, which primarily deals with the contractual liability of air carriers, has been the subject of long-standing and intensive discussion in the aviation community. Numerous attempts have been made to amend or modernize this Convention. By imposing a presumption of fault on the carrier in the case of an accident causing death or injury to a passenger, the Convention has placed a heavy responsibility on the carrier to do its utmost to protect the safety of the passengers. Since the pilots and engineers have to testify before the court that they have taken all necessary measures to prevent the accident, this will lead them to exercise more care in their work, and to discover and cure the mechanical defects and human errors. Consequently, the safety record of the carrier will be improved.

In 1994 the Chicago Conference successfully ended with the adoption of the *Convention on International Civil Aviation*. While there were different views at the Chicago Conference with respect to the issues of transit and traffic rights for international air transport, there was no controversy on the safety issue. It had been the intention of the United States, one of the main architects of the Chicago Convention, to consider the need for a world organization to handle such matters as safety standards and other technical matters as well as economic problems such as competitive subsidies and rates. At least the first part of this vision, namely, safety standards and other technical matters, has been realized, since the activities of ICAO during the past 60 years have been focused on safety-related matters.

Concurrent with developments under the Chicago Convention, bilateral air service agreements have also been flourishing since the end of the Second World War. While these agreements have been primarily used to resolve “economic problems such as competitive subsidies and rates”, they have also been used, particularly in more recent years, to regulate safety matters, including aviation security.

Another important phenomenon which has emerged since the Second World War has been the

strengthening of regional arrangements in the aviation community. While regional conferences existed as early as 1918, permanent regional institutions are of a more recent origin. Some of these organizations undertake overall responsibility on civil aviation matters in close coordination with, and receiving assistance from, ICAO, such as the European Civil Aviation Conference (ECAC) established in 1954,³⁵ the Arab Civil Aviation Council (ACAC, now called the Arab Civil Aviation Commission) established in 1967,³⁶ the African Civil Aviation Commission (AFCAC) established in 1969, and the Latin-American Civil Aviation Commission (LACAC) established in 1973.

Some organizations have specialized mandates, such as EUROCONTROL established in 1960 by the International Convention for the Safety of Air Navigation, ASECNA established by an agreement in 1959 which was replaced in 1974. COCESNA (Central American Corporation for Air Navigation Services) established in 1961 by the Convention for the Establishment of the Central American Air Navigation Services Corporation, and the Joint Aviation Authorities (JAA) which originated in the early 1970s.³⁷ The latter has been gradually phased out and will be completely replaced in 2009 by the European Aviation Safety Agency (EASA), which is “the centrepiece of the European Union’s strategy for aviation safety.” As a result of these initiatives, safety regulation at the regional level has become more institutionalized and forms an important and integral part of the global efforts to promote aviation safety.

Chicago Convention and Aviation Safety

In view of its paramount importance, aviation safety has been the *raison d’être* of ICAO. Under the Chicago Convention, in line with the principle that every State has complete and exclusive sovereignty over the airspace above its territory, each contracting State is responsible for safety oversight within its territory. The same also applies to the aircraft registered therein. It should be noted, however, that the principle of complete and exclusive sovereignty, can be attributed to the Paris Convention of 1919.

The Chicago Conference as well as the Convention concluded thereat would have been unnecessary if the goal of the Conference had been limited to the reaffirmation of the principle of sovereignty. In fact, the Conference had greater aspirations and higher aims arising from the interest of the international community, namely, to ensure that “international civil aviation may be developed in a safe and orderly manner”.

As per Article 37 of Chicago Convention, ICAO is to adopt and amend from time to time, as may be necessary, international standards and recommended practices dealing with Communication Systems, airports, air traffic control, Licensing of operating personnel, Air worthiness of aircraft, exchange of meteorological information, aircraft in distress and investigation of accidents. Any infraction of the convention and any failure to carry out recommendation or determination of the council of ICAO, is reported to contracting states as per Article 54 of the convention. Adoption and amendments in the form of annexes is as per Article 90 of convention.

With respect to safety regulation, the vision of Chicago in 1944 has proven to be successful by laying down the fundamental safety regulation. Safety considerations permeate the whole Convention. In addition to the Preamble and Article 44, there are numerous other provisions which are designed to enhance aviation safety. One notable example is Article 3, paragraph d), which provides that the contracting States undertake, when issuing regulations for their State aircraft, that they will have due

regard for the safety of navigation of civil aircraft.

One important feature of the framework under the Chicago Convention is the emphasis on uniformity of standards, which will enhance aviation safety. An innovative system was wisely designed by the drafters of the Convention, under which international standards could be adopted by the ICAO Council, and become applicable to all member States, unless they notify ICAO that they could not comply with them. This system, which aims at uniformity while permitting certain flexibility, has overcome the weakness of the Paris Convention and proven to be a very valuable asset of ICAO.

One of the mandatory functions of the ICAO Council relating to safety is the adoption and amendment of the Annexes to the Chicago Convention, which contain inter-national standards and recommended practices. The Annexes are constantly reviewed and amended to keep pace with new development and advanced technology.

Safety Oversight Responsibility

Safety oversight may be defined as “a function by means of which States ensure effective implementation of the safety-related Standards and Recommended Practices (SARPs) and associated procedures contained in the Annexes to the *Convention on International Civil Aviation* and related ICAO documents”.

In accordance with the principle of State sovereignty, a fundamental premise has been established that safety oversight responsibility rests with the contracting States to the Chicago Convention. In its ***Resolution A29-13 of 1992***, the ICAO Assembly reaffirmed the widely held position that each “individual State’s responsibility for safety oversight is one of the tenets of the Convention”.

The basis for the exercise of this responsibility by States is twofold: the nationality/registration or flag jurisdiction of a State over the aircraft concerned; and, territorial jurisdiction of the relevant State. In addition to the foregoing mandatory duties regarding nationality and registration of the aircraft, the State of registry is also subject to a number of permissive safety-related functions. For instance, the State of registry may provide assistance to an aircraft in distress which is on its registry, and participate in the inquiry of accidents in which such aircraft is involved. Furthermore, although not expressly stipulated in the Chicago Convention, the State of registry is also competent to exercise jurisdiction over offences and acts committed on board aircraft registered in such State.

Safety oversight responsibility is not limited to the initial certification and licensing of aircraft and crew but also includes further action to ensure the continuous airworthiness of the aircraft and continuous competence of the crew. Without a genuine connection to the aircraft and its crew, it would not be possible to carry out this follow-up function. In fact, when ICAO conducts a safety oversight audit in any of its member States, one of most important areas of concern is to verify whether the audited State has the capability to carry out the safety oversight function mentioned above. In the event of a negative finding, a recommendation to rectify the situation will be given to the State, failing which the deficiency (which is considered significant) will be reported to other member States. One situation that may trigger a negative finding is a scenario in which a State has an excessive number of large-trans-port aircraft on its registry, which are well beyond its capability for safety oversight.

In summary, while the aircraft registered in a member State of ICAO do not have to be owned by nationals of that State, there ought to be a “genuine link” between the aircraft and the State of registry in the form of close super-vision or oversight by the State of registry over such aircraft, in the vital interest of aviation safety.

When a State of registry finds itself unable to discharge adequately the functions and duties assumed under the Chicago Convention, certain mechanisms exist for the transfer of such duties and functions to other States, or probably to an international organization. At the time the Chicago Convention was negotiated, its architects had envisaged the possibility of two or more contracting States establishing joint air transport operating organizations or international operating agencies, or pooling their air services on any routes or in any regions.

The responsibility to exercise safety oversight does not only rest with the State of registry and the State of the operator of aircraft, but, to a certain extent, also with the State in whose territory the aircraft operates. For instance, under Article 12 of the Chicago Convention, a contracting State undertakes the same responsibility as the State of the registry to ensure that every aircraft flying over or manoeuvring within its territory shall comply with the rules and regulations relating to the flight and manoeuvre of aircraft there in force. Article 25 requires each contracting State to provide such measures of assistance to aircraft in distress in its territory as it may find practicable. Article 26 imposes an obligation upon a contracting State to investigate an accident involving an aircraft of another contracting State which occurs in its territory if such an accident involves death or serious injury, or indicates serious technical defects in the aircraft or air navigation facilities. In many cases, the State in which the accident occurs has to incur certain expenditures in conducting the investigation even if the accident does not have a significant impact on it. The acceptance of this obligation is another significant indicator that aviation safety is a matter which goes beyond the concern of only one State and requires international cooperation.

Under Article 16, each contracting State has the right, without unreasonable delay, to search aircraft of other contracting States upon landing or departure, and to inspect the certificates and other documents prescribed by the Convention. While this provision does not impose an obligation on the part of the searching State, it has been invoked as a legal basis to support the acts of certain States to strengthen safety measures. In 2001, the ICAO Council adopted a resolution recommending a model clause on aviation safety to be included in agreements on air services, which specifically mentions the applicability of Article 16. The scope of the search provided for under the recommended model clause extends beyond the list of documents required under Article 33 of the Convention. That article exclusively addresses aircraft certificates of airworthiness and flight crew certificates of competency and licenses, whereas the model clause covers other additional documents such as air operator certificates. In a 2007 resolution of the ICAO Assembly, Article 16 was again referred to, and member States were reminded of the need for surveillance of all aircraft operations, including foreign aircraft within their territory, and for appropriate action to be taken when necessary to preserve safety.

Moreover, Article 28, paragraph 1 of the Chicago Convention stipulates that each contracting State undertakes, so far as it may find practicable, to provide, in its territory, airports, radio services, meteorological services, and other air navigation facilities to facilitate international air navigation in accordance with the standards and practices recommended or established from time to time pursuant to this Convention.

The undertakings provided in Article 28 are obviously vital for ensuring the safety of air navigation. On the other hand, a number of commentators have noted the escape-valve nature of the phrase “so far as it may find practicable” included in this article.⁴⁶ It has been pointed out, for instance, that “the obligations undertaken by the contracting States are subject to limitations and safeguards which make it impossible for a State to be compelled to take action against its will”. Indeed, the existence of the escape-valve is one of the features of the Chicago Convention and its effect needs to be evaluated.⁴⁸ As far as Article 28 is concerned, experience has shown that ICAO may, through its institutional regimes, reduce or minimize the negative impact of this escape-valve.

In practice, ICAO and its member States implement Article 28 through regional air navigation plans. The plans are ICAO documents established by the Council, which set forth in detail the facilities, services and procedures required for international air navigation within specified regions. Such plans constitute recommendations for States to follow in programming the provision of their air navigation facilities and services, with the assurance that facilities and services furnished in accordance with the plan will, together with those of other States, form an integrated system adequate for the foreseeable future.

In their material scope, the plans describe the required facilities and services in the fields of aerodromes, air information services, air traffic services, communications, meteorology, and search and rescue. In their geographical scope, the plans are usually related to one or more ICAO air navigation regions. Traditionally, a regional air navigation plan was prepared or amended by a regional air navigation conference, subject to the approval of the ICAO Council.

Critical Elements of the Safety Oversight System

According to ICAO practice, member States need to consider the critical elements for safety oversight in their efforts to establish and implement an effective safety oversight system. Essentially, critical elements are the safety defence tools of a safety oversight system which are required for the effective implementation of safety-related policies and associated procedures. Eight critical elements have been identified: primary aviation legislation; specific operating regulations; the civil aviation authority’s structure and safety over-sight functions; technical guidance; qualified technical personnel; licensing and certification obligations; continued surveillance obligations; and, resolution of safety issues.

Primary aviation legislation is understood as a national legislative enactment which is often known as “civil aviation code” or “civil aviation act”. It is normally adopted by a legislative branch of a contracting State, such as the parliament or its equivalent, and it differs from secondary legislation or regulations promulgated by the executive branch of a government. The Chicago Convention does not specifically require a contracting State to promulgate “primary aviation legislation”. It follows from the principle of sovereignty that a State is free to enact aviation law in whatever form it prefers, provided that the enactment is compatible with its international obligations under the Chicago Convention and other applicable rules of international law. The requirement of “primary aviation legislation” as a critical element could thus be regarded as a new requirement created or initiated by ICAO.

Specific operating regulations normally refer to legal instruments which specify and implement the

requirements emanating from the primary aviation legislation, and provide for standardized operational procedures, equipment and infrastructure, in conformity with the Annexes to the Chicago Convention. Regulations should be sufficiently comprehensive, detailed, and current with respect to changes in technology and the operating environment to ensure that satisfactory compliance will result in an acceptable level of safety.

The civil aviation authority's structure and safety oversight functions contemplate the establishment of a civil aviation authority or its equivalent, which will be assigned with the responsibilities inherent in safety oversight. The size and internal organizational structure of the civil aviation authority are to be internally determined by each State, based on its aviation activities, but the audits carried by ICAO will normally enquire whether it has appropriate and adequate technical and financial resources to effectively discharge the responsibilities assumed by the State.

As one of the critical elements of the safety oversight system, technical guidance requires a contracting State to provide technical guidance material, tools and safety-critical information, as applicable, to the technical personnel to enable them to perform their safety oversight functions. It also includes the provision of technical guidance by the oversight authority to the aviation industry.

Qualified technical personnel means the establishment of minimum know-ledge and experience requirements for the technical personnel performing safety oversight functions, and the provision of appropriate training to maintain and enhance their competence at the desired level. The training should include initial and recurrent training.

Licensing and certification obligations relate to the implementation of processes and procedures to ensure that personnel and organizations performing an aviation activity meet the established requirements before they are allowed to exercise the privileges of a licence or certificate.

Continued surveillance obligations require a contracting State to put in place a system, such as inspections and audits, to proactively ensure that aviation licence or certificate holders continue to meet the established requirements.

Resolution of safety issues means that a member State is required to use a documented process to take appropriate corrective actions, up to and including enforcement measures, to resolve identified safety issues.

Critical elements of a safety oversight system encompass the whole spectrum of civil aviation activities, including areas such as aerodromes, air traffic control, communications, personnel licensing, flight operations, airworthiness of aircraft, accident/incident investigation, and transportation of dangerous goods by air. Effective implementation of these critical elements is regarded as a good indication of a State's capability for safety oversight.

Technical Regulations under ICAO

Establishing the safety oversight responsibility of the member States of ICAO represents only one of many steps in the building of a robust safety system for air navigation. A considerable number of provisions of the Chicago Convention expressly oblige contracting States to fulfill their various

responsibilities: “in accordance with the procedure which may be recommended” by ICAO;

“in accordance with the standards and practices recommended or established from time to time, pursuant to this Convention”; or, “in such form as may be prescribed from time to time pursuant to this convention”.

It is obvious from the foregoing that the Chicago Convention mandates ICAO to establish certain benchmarks or yardsticks against which State performance of those obligations can be measured. International standards and recommended practices (SARPs) are the primary mechanisms used by ICAO for this purpose. In addition to SARPs, ICAO also develops Procedures for Air Navigation Services (PANS), Regional Supplemental Procedures (SUPPS), regional air navigation plans, and related manuals, circulars and guidance. Together, all these documents constitute a comprehensive technical safety code for civil aviation. By joining ICAO, States undertake to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in all matters in which such uniformity will facilitate and improve air navigation

Subject Matters Addressed by SARPs

SARPs adopted by the ICAO Council in accordance with the provisions of Chapter VI of the Chicago Convention are, “for convenience”, designated as Annexes to the Convention. To date, eighteen annexes have been adopted. The scope of their multi-disciplinary content extends beyond the comprehension of any single profession.

Personnel Licensing (Annex 1)

Annex 1 to the Chicago Convention contains not only SARPs for the licensing of flight crew members (i.e., pilots, flight engineers, flight navigators, and flight radiotelephone operators), but also SARPs relating to the licensing of air traffic controllers, aeronautical station operators, maintenance technicians and flight dispatchers. The SARPs describe the competence, skills, fitness and other requirements for such personnel.

Since pilots and other air and ground personnel are indispensable for the conduct of international air transport, continued maintenance of their competence, skills and fitness remain essential for the safe operation of aircraft.

Rules of the Air (Annex 2)

Like any mode of traffic on the surface, air traffic requires traffic rules to ensure safety. Annex 2 to the Chicago Convention contains a set of inter-nationally agreed rules of the air. They consist of general rules, visual flight rules (VFR), and instrument flight rules (IFR). Flight under VFR is permitted only under certain prescribed conditions. Most aircraft engaged in commercial operations fly by IFR at all times.

Under the Annex, a flight plan must be filed with air traffic services units for all flights that will cross international borders and for most other flights that are engaged in commercial services. The flight plan provides information on the aircraft’s identity and equipment, the point and time of departure, the

route and altitude to be flown, the destination and estimated time of arrival, and the alternate airport to be used should landing at the destination be impossible. The flight plan must also specify whether the flight will be carried out under VFR or IFR. However, regardless of the type of flight plan filed, the pilot is ultimately responsible for avoiding collisions when in visual flight conditions, in accordance with the “see-and-avoid” principle. Flights operating under IFR are either kept sufficiently separated by air traffic control units or provided with collision hazard information. Annex 2 also contains rules relating to interception of civil aircraft.

Airworthiness of Aircraft (Annex 8)

Annex 8 prescribes the minimum airworthiness standards which form the basis for mutual recognition by contracting States of a certificate of airworthiness under Article 33 of the Chicago Convention. Some of the provisions of Annex 8 are very specific. For instance, paragraph 1.2 of Chapter 1 provides that an aeroplane shall have not less than two power-units. Some provisions are general and provide only the objective sought to be achieved, e.g., “Crashworthiness shall be taken into account in the design of aeroplanes to improve the probability of occupant survival”. It is therefore recognized and accepted that those ICAO airworthiness standards containing broad provisions need to be supplemented by national codes of airworthiness to form the basis for the certification of individual.

Each State is thus obliged either to establish its own comprehensive and detailed airworthiness code or to select and implement a comprehensive and detailed code established by another contracting State or a group of contracting States. To assist its member States in the implementation of Annex 8, ICAO has published the *Airworthiness Manual* (Doc 9760).

A notable feature of Annex 8 is that it imposes obligations on the State of registry to develop or adopt requirements and procedures to ensure the continuing airworthiness of the aircraft during its service life, including requirements to ensure that the aircraft continues to comply with the appropriate airworthiness requirements after modification, repair or installation of a replacement part. It further lays down requirements for the exchange of mandatory continuing airworthiness information between the State of design and the State of registry of the aircraft.¹⁰⁴ These obligations naturally require the State of registry to maintain a close link with the aircraft and consequently impose constraints on the State of registry, thereby reducing the possibility of “flags of convenience”.

Operation of Aircraft (Annex 6)

Annex 6 contains the minimum standards applicable to the international operation of aircraft. It consists of three parts dealing respectively with commercial air transport, general aviation, and helicopters. One of its purposes is to contribute to the safety of international air navigation by providing criteria for safe operating practice. Unlike Annexes 1, 2 and 8, which separately address the quality and licensing of personnel, the rules of the air, and the airworthiness of aircraft, Annex 6 provides regulations which address the interface between the personnel, the aircraft and the rules in real time and space. It provides criteria as to how qualified personnel, governed by certain rules, must control aircraft in given situations.

Annex 6 spells out the responsibility of States in supervising their operators. Appendix 5 to the Annex specifies eight critical elements of safety oversight of air operators. Paragraph 4.2.2 requires each operator to provide an operation manual, which must address matters such as the responsibility of the

flight crew, the maximum limits of flight time and flight duty periods, and the list of equipment on board aircraft.

Given the importance of human performance in the operation of aircraft, Annex 6 provides that from 1 January 2009, States shall, as part of their safety programme, require that operators implement a safety management system acceptable to the State of the operator. In simple language, a safety management system takes a proactive approach to anticipate and address safety issues before they materialize and lead to incidents or accidents. Instead of using simple enforcement and disciplinary measures, the new approach encourages States to develop the ability to identify safety issues and deal effectively with accidents and incidents so that valuable lessons learned therefrom can be applied to improve overall safety and efficiency.

Annex 17: Air Safety

ii. With regard to international standards & recommended practices on Security, Annexure 17 has been developed by ICAO. This is in force since 22.3.74 and embodies provisions on the following:

- a. Potential hazards at airports.
- b. New security equipments
- c. Carriage of weapons
- d. Pilot in command
- e. Pre-flight checks
- f. Safety on board of passengers
- g. Security control of baggage.
- h. Exchange of information by contracting states for safe guarding international civil aviation against acts of unlawful interference.

Other Annexes

In addition to the Annexes identified above, there are other Annexes which, to varying degrees, provide safety regulations for air navigation. Some Annexes deal with the facilities and services to be provided by contracting States, such as meteorological services (Annex 3), aeronautical telecommunications (Annex 10), air traffic services (Annex 11), aerodromes (Annex 14), and aeronautical information services (Annex 15). Some others aim at the establishment of uniform common systems, such as aeronautical charts (Annex 4), units of measurement (Annex 5), and registration marks (Annex 7). Some Annexes provide for measures and procedures in the event of distress (Annex 12 – Search and Rescue), or accidents (Annex 13 – Aircraft Accident Investigation). Some address matters relating to transport of passengers and goods (Annex 9– Facilitation, Annex 18 – The Safe Transport of Dangerous Goods by Air). Finally, Annex 16 addresses matters of environmental protection, and Annex 17 covers aviation security.

Auditing of State Compliance with Technical Regulations

The technical regulations formulated by ICAO will be useful only when they are implemented. In order to verify the status of the implementation of these regulations, ICAO has established two audit programmes, one is the Universal Safety Oversight Audit Programme and another is the Universal Security Audit Programme.

Universal Safety Oversight Audit Programme

During the first half-century of its existence, ICAO focused mainly on the adoption and amendment of

SARPs and related regulatory material, leaving the implementation of these technical regulations wholly in the hands of its member States. ICAO also expected that its member States would file notifications pursuant to Article 38 of the Chicago Convention, if they could not comply with the international standards. However over the years, only a relatively small number of States communicated with ICAO to indicate whether or not they were able to comply with ICAO standards.

In some cases, certain developing countries did not even have adequate expertise fully to appreciate the contents of the Annexes, let alone the capability to determine whether there were differences to be filed with ICAO. Consequently, there was no reliable information concerning the implementation of the standards. This situation gave rise to a major safety concern.

The alarm finally sounded in 1997, during a Conference on a Global Strategy for Safety Oversight, attended by Directors General of Civil Aviation of ICAO member States (DGCA Conference). The Conference recommended, *inter alia*, that regular, mandatory, systematic and harmonized safety audits be introduced, and that greater transparency and increased disclosure be implemented. Based on these recommendations, the ICAO Assembly established a Universal Safety Oversight Audit Programme (USOAP) during its 32nd Session in 1998, and directed the Council to bring it into effect as from 1 January 1999.

The objective of the programme is to promote global aviation safety through auditing member States on a regular basis to determine their capability for safety oversight. The audits are carried out essentially by way of assessing the effective implementation of the critical elements of a safety oversight system and the status of States' implementation of safety-relevant ICAO SARPs, associated procedures, guidance material and safety-related practices.

The audits are conducted by audit teams composed of ICAO officials and sometimes including experts seconded by regional aviation organizations or contracting States other than the audited State. Before an audit takes place, a memorandum of understanding is signed between ICAO and the audited State, in which the latter agrees to the conduct of a safety oversight audit by an ICAO audit team. The memorandum also sets out other terms and conditions relating to the audit.

In addition to the review of documents and records, the audit team performs on-site activities in the audited State. All the eight critical elements of a safety oversight system identified above are covered.

Upon completion of the audit, an interim report containing all the audit findings and recommendations is transmitted to the audited State, on the basis of which the State is required to prepare a corrective action plan.

Then, the Final Safety Oversight Audit Report is issued, which is similar to the interim report, but includes an analysis of the corrective action plan submitted, comments, and information on any progress made by the audited State on the implementation of the corrective action plan.

During the first cycle of audits, States were audited on the basis of their implementation of the SARPs contained in Annexes 1, 6, and 8 only. Subsequently, the scope of the audit programme was further expanded to include the safety-related provisions contained in all safety-related Annexes. One hundred and eighty one member States were audited during the first circle, seven were not. In early 2006, the

ICAO Secretariat reported that significant progress had been achieved in the implementation of State corrective action plans. At the global level, the lack of effective implementation of the critical elements of a safety oversight system had declined from an average of 32.6 per cent when all initial audits were completed, to an average of 17.5 per cent when the follow-up audits of 162 contracting States were completed. Moreover, ICAO was able to obtain first-hand information from its member States regarding their compliance with standards. Even the most developed aviation nations found out during the audit process that there were some differences between their national regulations and ICAO standards, which had not been filed with ICAO.

Universal Aviation Security Audit Programme

Immediately after the notorious events of September 11, 2001, the 33rd Session of the ICAO Assembly adopted Resolution 33-1, which, *inter alia*, directed the Council and Secretary General to consider an ICAO Universal Security Oversight Audit Programme. Pursuant to this resolution, a High-level, Ministerial Conference on Aviation Security held in February 2002 recommended that ICAO should establish a comprehensive programme of universal, regular, mandatory, systematic and harmonized aviation security audits, with implementation beginning in 2003, based on a final work plan established by the Council. The audit programme was included in the Aviation Security Plan of Action adopted by the Council, and was subsequently designated as the Universal Aviation Security Audit Programme (USAP).

The USAP represents an important initiative in ICAO's strategy for strengthening aviation security worldwide and for attaining the commitment of member States in a collaborative effort to establish a global aviation security system. The objective of the USAP is to promote global aviation security through the auditing of States on a regular basis to assist States in their efforts to fulfil their aviation security responsibilities. The audits identify deficiencies in each State's aviation security system, and provide recommendations for their mitigation or resolution.

Generally, USAP audits follow the methodology of the safety oversight audits, but two fundamental differences should be noted. First, security audits are conducted at the national and airport levels concerning the concerned State's compliance with Annex 17 and other aviation security related provisions contained in other Annexes.

During the first cycle, it was considered insufficient to audit States only with respect to their security "oversight" arrangements. It was felt that *in situ* installations and equipment, namely, those located at the major airports of each member State, should also be included in the audits. As a result, the term "oversight" does not appear as part of the name of the audit programme although it was originally suggested by Assembly Resolution A33-1.

Secondly, USAP audits strictly comply with the principle of confidentiality. The sensitive nature of security information is such that the principle of confidentiality is of the utmost importance to the USAP. Unlike safety issues, the unauthorized disclosure of any security vulnerability of a State could have an adverse effect on security within the State concerned. Consequently, all USAP reports receive a security classification; they are subject to rigorous physical controls; and, no State other than the audited State is provided with any information contained therein, unless otherwise agreed to on a bilateral basis. The only information made available to any other party apart from ICAO staff on a

‘need to know’ basis, is the name of the State and the airport(s) audited.

In spite of the foregoing, it should be noted that in 2007, the 36th Session of the ICAO Assembly decided to introduce a policy of a “limited level of transparency” for the security audits.¹⁹² The purpose of the policy is to balance the desirability for information sharing among member States and the need to prevent the sensitive information from going to the wrong hand. Specific implementing measures for this policy still need to be developed. There is also a tendency that rather than limiting security audits to particular Annexes, they will be based on “critical elements” criteria, similar to those used in the conduct of safety oversight audits.

Legal Issues Arising from ICAO Audits

The two ICAO audit programmes described in the foregoing paragraphs are considered as having set a milestone in the effort towards establishing a new and effective air safety regime for international civil aviation. Much has been written about these programmes, but there is still the need to analyse their legal basis, as well as their value in the theory and practice of international law.

The Principle of Consent and the Mandatory Nature of Audits

Both audit programmes of ICAO are designed and intended to be implemented as “regular, mandatory, systematic and harmonized” audits. These terms were first used in the 1997 recommendations of the DGCA Conference¹⁹⁵ and they appeared again in the recommendations of the High-Level, Ministerial Conference on Aviation Security in 2002.¹⁹⁶ The first Conference did not provide any standardized definitions for these terms. It somehow appears from the record of deliberations during and after the Conference that in using the terms “regular” and “systematic” participants envisaged “a long-term programme which would go well beyond the three- and six-year cycles”. Accordingly, the audit programme should not be “a one-time evaluation of all Contracting States”. Further, the *Safety Oversight Audit Manual* published by ICAO provides that ICAO safety oversight audits will be conducted in a systematic, consistent and objective manner. Standardization and uniformity in the scope, depth and quality of audits will be assured through an initial and refresher training of all auditors, the provision of guidance material, and the implementation of an audit quality control system within the Universal Safety Oversight Audit Programme. Moreover, during deliberations in the first Conference, the term “harmonised” or “harmonization” was used together with standardization to refer to an approach which would “instill confidence in the safety oversight system, provide safeguards against its abuse, and preclude any possibility of discrimination.”

The most controversial term, which has been the basis of much debate and which is also the focus of the present inquiry, is the term “mandatory”. Originally, ICAO’s safety oversight programme was designated as a Safety Oversight Assessment Programme. Approved by the Council in June 1995 and endorsed by the 31st Session of the Assembly in the same year, this Programme was a voluntary assessment of a State’s implementation of the ICAO SARPs, and assessment-related reports were provided only to the assessed States. Other contracting States were provided with a summary report on differences identified by the assessment team. The audits could be carried out upon the initiative of ICAO, but always with the audited State’s consent, as the principle of sovereignty had to be fully respected. It was suggested that an Assembly resolution approving the audit program, supplemented by bilateral expressions of consent, would provide a proper legal basis for such a programme.²⁰⁰

If the Safety Oversight Audit Programme is based on the consent of the audited States, how could it be branded as “mandatory”? In fact, the original agenda item under which this matter was discussed at the 1997 DGCA Conference was “regular safety oversight audits”. The term “mandatory” did not appear in the agenda.

During the Conference, the deliberations concerning the mandatory nature of audits related mostly to the issue of full disclosure of audit information. Some States were ready to accept full disclosure but only on the condition that the programme would become harmonized and systematic, and would involve all contracting States. Thus, the programme as envisaged would no longer be based on purely voluntary participation. Based on the tenor of views expressed at the Conference, the Chairman summarized that “delegates were in favour of regular, systematic and mandatory safety audits”, and that “special emphasis had been given to the need for a harmonized approach to safety oversight and for training for aviation safety inspectors”. This was the basis for the Conference’s recommendation of “regular, mandatory, systematic and harmonised safety oversight audits”, which the Assembly unanimously endorsed through Resolution A32-11.

Accordingly, in order to ensure that audited States consent to the conduct of ICAO audits, more than 180 bilateral memoranda of understanding have been concluded, all based on the single model approved by the Council. Most States accepted the standard text prepared by ICAO, whereas some requested certain amendments. The unwritten but firm policy of ICAO has been not to deviate substantially from the model, in order to safeguard uniformity.

Confidentiality and Transparency

Confidentiality was regarded as a cornerstone in the voluntary safety oversight assessment programme introduced in 1996. The model memorandum of understanding used at that time provided in paragraph 10 that “safety over-sight interim and final reports will be confidential”. Access to information relating to the assessment was restricted to persons within the ICAO Secretariat on a need-to-know basis. The same paragraph of the memorandum of understanding provided, however, that a summary of the final report would be made available to States through ICAO, upon request.

Confidentiality of audit information was one of the core issues debated during the 1997 DGCA Conference. The majority emphasized that, *vis-à-vis* access to information, the interests of the travelling public was the paramount consideration in addressing the subject of confidentiality. While the sovereignty of individual States and their legitimate right to fair treatment should continue to be respected, as much information as possible should be made publicly available on safety deficiencies. On the other hand, it was felt that the audit programme needed to move incrementally from the stage of full confidentiality and voluntary subscription to one of mandatory assessment with full disclosure.

Consequently, it was recommended that greater transparency and increased disclosure be implemented by way of expanding upon the information in the summary reports. In the standard memorandum of understanding for the first cycle of the audits, the clause concerning confidentiality was therefore maintained.

When ICAO introduced the comprehensive approach to safety oversight audits covering all safety-

related provisions in the Annexes, greater transparency was promoted. In 2004, the 35th Session of the Assembly recognized the fact that transparency and sharing of safety information are fundamental tenets of a safe air transport system. This marked the beginning of the era in which ICAO would make available the full reports of comprehensive audits to its member States.

Implications for International Law and Practice

ICAO's successful implementation of safety oversight audits for the past 11 years and of security audits for the last 7 years presents a number of implications for the theory and practice of international law as traditionally understood. In particular, it provokes new thinking with respect to the relationship between a United Nations Specialized Agency responsible for civil aviation and its members who are sovereign States. The Chicago Convention, which includes the constitution of ICAO, is founded on the principle of complete and exclusive sovereignty of States. This principle generally implies that a State has supreme authority in its territory. When the concept of safety audits was introduced and debated in the Council, which was then composed of 33 States, ten members of the Council, representing different regions, different legal systems and different schools of thought, jointly expressed the following view.

The primary role of ICAO, as established in the Chicago Convention, is the adoption and amendment of SARPs. The Convention does not, in any way, give the Organization an executive function in ensuring compliance by States with the SARPs; the filing of differences is the explicit responsibility of the States. The development of a more robust safety oversight programme must respect these basic competencies. Nevertheless, despite all the scepticism and controversy, it is now an undeniable fact that ICAO is exercising certain powers relating to safety and security audits, and there has been no recorded instance in which such audits have been refused by a contracting State.

Compliance of Safety Standards and Recommended Practices in India

The following are the key steps taken by India towards its responsibility as provided for in the SARPs.

- a. D.G.C.A (Directorate General of Civil Aviation) is the Regulatory Body in the field of Civil Aviation primarily dealing with safety issues. D.G.C.A takes all necessary action arising out of Universal Safety audit programme (USOAP) of ICAO.
- b. Air safety Directorate in India coordinates regional air safety offices with Air safety Headquarters.
- c. Air worthiness directorate in India ensures effective implementation of safety related standards and recommended practices contained in ICAO annexes.
- d. Large part of Air Law in India is contributed and developed by ICAO. National aviation laws are interlinked with international air law.
- e. Aviation security clause is put in all bilateral air services agreements in pursuance to resolution dated. 25.06.1986. of ICAO.
- f. International convention lead to three acts in India viz Tokyo convention Act 1975, Anti hijacking Act 1982 and Suppression of unlawful Acts against safety of Civil aviation Act 1982.
- g. Section 5A was added in 1972 to Aircraft Act, 1934 thereby authorizing DGCA to issue directions with regard to various matters viz Aerodromes, maintenance of aircraft, air routes, & equipments to be carried for safety in the aircraft. Non-compliance of the directions could lead to 6 months rigorous imprisonment and / or fine up to Rs. 10 Lacs. In the interest of public

safety, central Govt could issue orders under section 6 of the Act.

- h. As part of India's commitment to safety, IATA and its members developed IATA operational safety Audit (IOSA), the first global standard for airline operational safety management.
- i. The DGCA has set up standing Aviation Regulatory Advisory Panel (ARAP) for the review of current regulations in light of best international practices and globally harmonized standards to keep the regulations current and dynamic.

Powers of DGCA under Aircraft Act 1934 and Rules 1937 for Air Safety

DGCA claims that the appropriate legislative framework for safety management has been implemented in India in accordance with ICAO SARPs. This legal structure assigns responsibilities and gives the appropriate authority to the DGCA to implement the applicable standards and recommended practices. The Director-General is accountable for the effective implementation of these responsibilities and authority.

The management of aviation safety is carried out through a comprehensive regulatory framework with the Aircraft Act, 1934, as the primary aviation legislation, the Aircraft Rules, 1937, and the Aircraft (Carriage of Dangerous Goods) Rules, 2003. Also, in form of the operating regulations, through the CARs, Aeronautical Information Circular (AIC) and Aeronautical Information Publication (AIP).

The Central Government has also promulgated Rule 29C of the Aircraft Rules, 1937, regarding "Adoption of the Convention and Annexes" and states that the Director-General may lay down standards and procedures not inconsistent with the Aircraft Act, 1934, and the rules made thereunder to carry out the Convention and any Annex thereto. The Aircraft Rules, 1937 and CARs are the operating regulations in the field of civil aviation in India.

Notwithstanding the above, the Rules provide DGCA powers to grant certificates, licences, and approvals for operations in civil aviation. The CARs provide the detailed requirements to be met that form a means of compliance with ICAO SARPs that is consistent with the legislation in force. Although CARs provide the comprehensive requirements, there is a need to promulgate adequate information which may not be appropriate for inclusion in the CARs. Such information and guidance material for compliance with Rules and regulations is included in Advisory Circulars (Acs).

The DGCA is responsible for the safety regulation of the civil aviation industry and is recognised in the Aircraft Act and the Aircraft Rules as regulatory authority for civil aviation.

The Director-General has special powers vested under Section 5A of the Act to issue directions. Section 4A of the Aircraft Act empowers the Director-General or any other officer specially empowered in this behalf by the Central Government to perform the safety oversight functions in respect of matters specified in the Act or the rules made thereunder.

The Aircraft Rules, 1937, provide a number of functions to DGCA relating to the issue of licenses, certificates, approvals and permits.

The standards that applicants are expected to meet in order to be granted a license, certificate, approval or permission are contained in regulations termed as the Civil Aviation Requirements (CARs) issued

by DGCA under Rule 133A. Rule 29C of the Aircraft Rules, 1937, provides the power to the Director-General to lay down standards and procedures to carry out the Convention and any Annex thereto.

The Aircraft Rules also empowers persons authorised by DGCA to enter, inspect and search any aircraft or any aviation facility, including air navigation services, and also inspect any personnel, document and records for the purpose of securing compliance with any of the rules or the provisions of the Aircraft Act, 1934.

Accident Investigation

Part X and X-A of the Aircraft Rules, 1937, provide for investigation of accidents and incidents respectively. The accidents are investigated by Inspector of Accidents, Committee of Inquiry or 'Court'. While the Director-General appoints the Inspector of Accident, the Committee or the Court is appointed by the Central Government. Director-General, when due to seriousness of the incident considers it expedient, may appoint an Inquiry Officer to investigate an incident.

The Accident Report is submitted to the Director-General in case of investigation by an Inspector of Accident or an Inquiry Officer. The aircraft rules require that the report of Inspector of Accident or Inquiry Officer shall be forwarded to the Central Government by the Director-General with such comments as he may think fit to make.

The Committee of Inquiry/ Court submit the report to the Central Government. In all cases of accident and incident investigations, the aircraft rules provides that only the Central Government may, at its discretion, make the whole or part of any such report public in such manner as it may consider fit, thereby ensuring the process of accident.

DGCA is vested with the powers to take administrative action under rules 19, 39A, 61, 83, 133B, 155A etc. of the Aircraft Rules, 1937. Nevertheless, judicial action may be required in cases where the violations are not covered by the provisions relating to administrative action or the violations are of such a serious nature as to warrant judicial action.

The Enforcement Policy and Procedures Manual provide details and guidance to DGCA Officers/Inspectors about the statutory provisions to be complied with by the industry and the procedure to be followed for their enforcement. In this connection, it is vital to keep in mind the difference between compliance and enforcement.

Compliance consists of all regulations and safety standards being met. When compliance exists, there is no need for enforcement. Enforcement is the action necessary when compliance is not present. Enforcement requires legal or administrative action.

Responsibility of Search and Rescue in Aircraft Accidents: AAI (2008 amd).

Civil Military Corporation

In India, the model of side-by-side operations is being used as the airspace is demarcated between the civil and military authorities and the Air Traffic Services are provided separately by the civil and military authorities in their respective airspaces. The military authorities have been exclusively using

the airspace specially allocated to them for carrying out their own flying activities.

In the flexible use of airspace, the airspace available with both military and civil users is effectively utilized on sharing basis to gain optimum usage thereby enhancing its capacity and derive economic benefits to flights operating within a nation's airspace. In this model a co-ordination procedure between the civil and the military authorities is required for sharing of the airspace for meeting the operational requirement of the military as well as demand of the civil aircraft operation.

India further came up with a State Safety Programme in 2010

The SSP is based on comprehensive analysis of the State's aviation system, safety policies and risk management, safety assurance and promotion. Safety oversight of DGCA is now focused on areas of significant safety concerns or higher safety risks. Thus, SSP provides the means to combine prescriptive and performance-based approaches to safety rulemaking, policy development and oversight by DGCA India.

In order to manage the SSP and ensure implementation of requirements of Safety Management Systems (SMS) by stakeholders, a State Safety Programme and Safety Management Systems (SSP/SMS) Division has been established in DGCA. A regulatory framework after introduction of SSP in DGCA and SMS amongst stakeholders has been established.

ICAO Standards explicitly require that States establish an ALoS as a means to verify satisfactory performance of the SSP and service providers' Safety Management Systems (SMS). ICAO describes an SSP as "an integrated set of regulations and activities aimed at improving safety." The requirement for an SSP recognises that States as well as service providers have safety responsibilities and provides a framework within which service providers are required to establish SMS.

Key aspects of the Policy are discussed here:

State Safety Policy

Employing ICAO standards and recommended practices, as minimum international standards and recommended practices, Directorate General of Civil Aviation (DGCA) will ensure the highest level of safety in the Indian aviation system. Mindful of India's State Safety Programme (SSP), DGCA will maintain an integrated set of regulations and activities aimed at enhancing aviation safety.

DGCA will implement proactive and as far as possible predictive strategies encouraging all stakeholders/ service providers to understand the benefits of a safety culture, which should be based on an inclusive reporting culture. DGCA will foster and assist stakeholders in developing comprehensive Safety Management Systems (SMS) and will develop preventive safety strategies for the aviation system in an environment of a "just culture".

DGCA commits to:

- Develop and embed a safety culture across all aviation industries that recognizes the importance and value of effective aviation safety management and acknowledges at all times that safety is paramount;
- Support the management of safety in India through an effective safety reporting and communication system;

- Develop general rulemaking and specific operational policies that build upon safety management principles;
- Ensure that the DGCA financial and human resources are sufficient for implementation, establishment and maintenance of SSP and that personnel have the proper skills and are trained for discharging their responsibilities, both safety related and otherwise. That these personnel are specialists in their functional areas and competent in safety regulation of operators and service providers;
- Clearly define for all regulatory staff, their responsibilities and accountabilities for the implementation, establishment and maintenance of SSP and its performance;
- Conduct both performance-based and compliance-oriented activities, supported by analyses and prioritized resource allocation based on safety risks levels (proactively targeting regulatory attention on known areas of high risk);
- Ensure that acceptable levels of safety for aviation operations within the State are being set, measured and achieved, and expressed in terms of safety performance indicators and safety performance targets;
- Continually improve the SSP and safety performance;
- Interact effectively with service providers in the resolution of safety concerns;
- Ensure that operators and service providers establish and maintain the Safety Management System (SMS) in their operation;
- Establish provisions for the protection of safety data, collection and processing systems, so that people are encouraged to provide essential safety-related information on hazards, and there is a continuous flow and exchange of safety management data between DGCA and service providers; and
- Promulgate an enforcement policy that ensures that no information derived from any safety data, collection and processing systems, established under the SMS will be used as the basis for enforcement action, except in the case of gross negligence or wilful deviation; and
- Achieve the highest levels of safety standards and performance in aviation operations.

This policy must be understood, implemented and observed by all staff involved in activities related to the State Safety Programme.

SSP Steering Committee

India has set up the SSP Steering Committee with the composition as per Appendix 3 and with the purpose of:

Monitoring of SSP and Safety Policy, and review or feedback/advice as required
 Responsibility for promotion of SSP in applicable service providers,
 Supporting resolution of issues related to SSP.

In order to manage the SSP and ensure implementation of requirements of SMS by stakeholders, India has established a SSP/SMS Division which is attached to the Air Safety Directorate. The SSP/SMS Division is under overall Chairmanship of the Director General and for carrying out its functions/responsibilities is headed by Joint Director-General in-charge of Air Safety.

The SSP/SMS Division has the following functions and responsibilities:

- To assist Steering Committee in the preparation and implementation of SSP,

- ii. Coordination, monitoring and review of implementation of SSP,
- iii. Coordination, monitoring and review of implementation of SMS,
- iv. Any other work relating to SSP/SMS as assigned by Director General and Steering Committee.

Safety Risk Management Process

DGCA is using the Safety Risk Management process to determine what action shall be taken to help mitigate those risks. The process results in a set of actions provided by the DGCA. Safety improvements cannot be delivered without DGCA continuing engagement with all sectors of aviation industry. DGCA is currently working on further improvements to the Safety Risk Management process

The DGCA has released a series of SMS CARs, setting out operational regulations and implementation policies for the applicable service providers to implement their SMS as part of their certification process.

Purpose	Reference
To require commercial air transport (aeroplanes) operators including maintenance organisations to implement a safety management system acceptable to the DGCA	CAR Section 2 Series 'O' Part II - Operational of Commercial Air Transport - Aeroplanes
To require commercial air transport (helicopters) operators including maintenance organisations to implement a safety management system acceptable to the DGCA	CAR Section 2 Series 'O' Part IV - Operational of Commercial Air Transport - Helicopters
To require air traffic service providers to implement a safety management system acceptable to the DGCA	CAR Section 9 Series 'E' Part I - Air Traffic Services
To lay down the minimum acceptable requirements for the establishment of an SMS in an applicable service provider, with detailed requirements including the hazard identification process and safety risk management	CAR Section 1 Series 'C' Part I Establishment of a Safety Management System (known as CAR SMS)

The CAR SMS lays down the safety-related processes, procedures and activities for the establishment of an SMS acceptable to the DGCA, and should be consulted by the applicable service providers as the key reference in understanding the requirements of the DGCA. Specifically, it lays out the following phased approach for the development and acceptance of service providers' SMS.

State Acceptable Level of Safety

The State ALoS represents the State's expressed target for the level of aviation safety in India. It takes into account the existing level of safety risk and the public expectations in setting realistic and measurable goals for safety risk management. The State ALoS will be established by the DGCA, and is the responsibility of the Director-General. It will include as a minimum a series of safety indicators

and targets focusing on high level outcomes such as accidents and serious incidents. The indicators used and their quantitative target are known as the “safety measurement”.

Once the ALoS is established, this will then be used to drive a topdown safety performance target setting for all aviation organisations in India. This will be a reference by which the service providers and DGCA can assess the ongoing safety performance, and initiate corrective actions as required. The quantitative targets (applied to safety indicators) will be agreed between the DGCA and the applicable service provider. The targeted safety performance will be scaled as appropriate dependent on the complexity of operations and availability of resource at the applicable service provider.

The safety indicators (i.e. parameters that characterise the level of safety in the system) will be developed to be measurable and reviewable on an ongoing basis. Collected data from occurrence reporting and safety maturity surveys will be used to determine quantitative measurement against the indicators.

State Safety Assurance

DGCA safety oversight function is a fundamental component of safety assurance in aviation in India.

DGCA's safety oversight has two primary elements:

- a. Ensuring Compliance with Regulations and
- b. Efficient oversight of service providers' SMS, including resource allocation and performance monitoring.

DGCA would set up an Internal Audit and Quality Assurance Division to audit aviation safety regulations in relation to the ICAO's eight Critical Elements of a safety oversight system. The division would carry out regular internal quality assurance audits and internal technical audits to provide assurance on corporate governance to the DGCA.

Appropriate systems including the voluntary reporting system exist for reporting of aircraft accident and incidents, bird strikes and air proximity incidents. All stakeholders are required to provide the information of any occurrence.

Mandatory Occurrence Reporting System (MORS)

The main objective of MORS is to contribute to the improvement of air safety by ensuring that relevant information on safety is reported, investigated if required and findings and recommendations disseminated to the concerned stakeholders, with the sole objective of prevention of similar occurrences.

All occurrences (accidents and incidents) under Part X and Part X-A of the Aircraft Rules, 1937 are required to be notified to DGCA.

Investigation of the serious incidents is independently carried out by an Inquiry Officer while investigation of accidents is carried out either by an Inspector of Accidents, Committee of Inquiry or 'Court'.

The investigation of incidents other than serious incidents and accidents is carried out either by the Regional Air Safety Offices or the Permanent Investigation Board of the Operator in association with the Regional Air Safety Office as per laid down procedures.

The online Accident Incident Reporting System (AIRS) of DGCA which requires operators/ individuals to report any occurrence through this programme. The programme allows Regional Air

Safety Offices to process and segregate the data, qualifying the occurrences as incidents for investigation purposes. The system provides analysis and generation of reports at DGCA headquarters using any combination of the available fields.

The information obtained through MORS is analysed in the BFAS meeting. As part of the DGCA's Safety Risk Management process, BFAS takes decisions for further action and immediate preventive action.

Voluntary Reporting System

Under this system, anyone who witnesses or is involved or has knowledge of an occurrence, hazard or situation which he or she believes poses potential threat to flight safety may report the same. It encompasses basic principles of provision of confidentiality & possibility of feedback by providing how reports should be submitted to the DGCA office. The system provides assurance that no punitive action will be taken on such voluntary reporting made unless infringement relates to unlawful/criminal/deliberate gross negligent unsafe actions.

Mandatory Bird Strikes Report

Under mandatory bird strike reporting system, a pilot flying in Indian airspace who believes his aircraft has collided with bird(s) are required to inform DGCA. For this purpose a National Bird Control Committee under the chairmanship of MoCA Secy has been established.

Aircraft Proximity Incident Report

An aircraft proximity incident report is required to be made to DGCA whenever a pilot or Air Traffic Controller considers that the distance between aircraft as well as their relative positions and speed have been such that the safety of the aircraft involved was or may have been compromised.

In the interest of enhancing flight safety, AIRPROX reports are assessed and investigated based on the degree of risk involved.

State Safety Promotion

- Internal training, communication and dissemination of safety information
- External training, communication and dissemination of safety information

Prohibition of the Use of Weapons against Civil Aircraft in Flight

Historically, the greatest risk posed by military activities to civil aviation has been demonstrated by occurrences of civil aircraft being shot down deliberately or by mistake, causing numerous fatalities. For example, on 27 July 1955, an aircraft of El Al Israeli Airlines Ltd. entered into Bulgarian airspace and was shot down, causing the death of all 58 persons on board. On 21 February 1973, a Boeing 727 belonging to Libyan Arab Airlines was shot down by Israeli air forces over the Israeli-occupied Sinai Peninsula, resulting in the death of 110 persons. On 31 August/1 September 1983, a Boeing 747 of Korean Air-lines (Flight 007) deviated from its planned route into the airspace of the Soviet Union and was shot down by the latter, killing 269 persons on board. On 10 October 1998, a Boeing 727 aircraft of Congo Airlines was shot down, resulting in the loss of 41 lives.

Article 3 bis and Customary International Law

As early as 1955, the General Assembly of the United Nations was aware of incidents involving attacks on civil aircraft innocently deviating from fixed plans in the vicinity of, or across, international frontiers. Realizing that the problem is “a matter of general international concern”, the General Assembly adopted a resolution calling upon all States to take the necessary measures to avoid such

incidents and inviting the attention of the appropriate inter-national organizations to this matter.⁶ In response to this resolution, ICAO commenced its own study of this issue. According to a working paper presented by the Secretary General in 1956, national laws of several States contained provisions that aircraft would be intercepted and shot down without warning, or “may be fired upon”, or would be subject to danger or “sanction in an attempt to bring them to the real course”, if they had not obtained air traffic control clearance, had deviated from corridors, or had entered a prohibited area. Some States believed it was contrary to international law to shoot down a civil, unarmed aircraft under any circumstances, while others denied the existence of this principle.⁷ Discussions on this issue dominated ICAO for a long time and, after the destruction of Korean Airlines Flight 007 in 1983, culminated in the adoption Article 3 *bis* of the Chicago Convention in 1984, which reads as follows:

Article 3 bis

a) The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.

b) The contracting States recognize that every State, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention; it may also give such aircraft any other instructions to put an end to such violations. For this purpose, the contracting States may resort to any appropriate means consistent with relevant rules of international law, including the relevant provisions of this Convention, specifically paragraph *a)* of this Article. Each contracting State agrees to publish its regulations in force regarding the interception of civil aircraft.

c) Every civil aircraft shall comply with an order given in conformity with paragraph *b)* of this Article. To this end each contracting State shall establish all necessary provisions in its national laws or regulations to make such compliance mandatory for any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State. Each contracting State shall make any violation of such applicable laws or regulations punishable by severe penalties and shall submit the case to its competent authorities in accordance with its laws or regulations.

d) Each contracting State shall take appropriate measures to prohibit the deliberate use of any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State for any purpose inconsistent with the aims of this Convention. This provision shall not affect paragraph *a)* or derogate from paragraph *b)* and *c)* of this Article.⁸

Since the adoption of the Chicago Convention, there have been only two substantive amendments to it, one is Article 83 *bis*, which has been discussed in Chapter 2, and the other is Article 3 *bis*. In view of the lengthy and burdensome process for amending the

constitution of ICAO,¹⁰ these two successful amendments must be considered to represent the strong commitment of the member States of ICAO to the matters covered therein. Article 83 *bis* was adopted to ensure the effective exercise of the important safety oversight function; whereas Article 3 *bis* was adopted in response to the worldwide appeal for the prohibition of the use of weapons against civil aircraft in flight.

Coordination Of Potentially Hazardous Activities To Civil Aircraft

From time to time, States conduct certain activities such as missile firings, rocket launches and satellite recovery in or over the high seas. Sometimes, the activities are directly carried out underneath or very close to busy air lanes, creating a potential hazard to civil aircraft and requiring the re-routing of traffic or even temporary closing of vital airspace. Lack of coordination for these activities with the relevant air traffic services authorities may have an impact on aviation safety. In view of this, the ICAO Council introduced into Annex 11 to the Chicago Convention certain provisions concerning coordination of these activities, which became effective on 4 March 1981. The current Annex 11 contains the following standards in paragraph 2.17:

2.17.1 The arrangements for activities potentially hazardous to civil aircraft, whether over the territory of a State or over the high seas, shall be coordinated with the appropriate air traffic services authorities. The coordination shall be effected early enough to permit timely promulgation of information regarding the activities in accordance with the provisions of Annex 15. 2.17.2 The objective of the coordination shall be to achieve the best arrangements which will avoid hazards to civil aircraft and minimize interference with the normal operations of such aircraft.

Since then, ICAO has consistently applied these standards when it is aware of potentially hazardous activities. The purpose of the coordination is to determine the site, time period and airspace reservations needed for the activities and to enable the States providing air traffic services to carry out their obligations of issuing Notices to Airmen (NOTAMs). The ICAO Secretariat has also developed the *Manual Concerning Safety Measures Relating to Military Activities Potentially Hazardous to Civil Aircraft Operations* (Doc 9554) to provide guidance for coordination.

Conventions on Unlawful Interference or Hijacking

Hijacking and International Conventions

The Tokyo Convention of 1963 refers to any offence committed or act done by a person on board any aircraft registered in a contracting state while the aircraft is in flight or on the surface of the high seas or of any other area outside the territory of such state. Convention also mentions acts of interference, seizure of or other wrongful exercise of control of an aircraft, implying its concern over hijacking.

The Hague Convention of 1970 in Article 1 identifies any person who, on board an aircraft in flight, unlawfully by force or threat or by any other form of intimidation seizes or takes

control of such aircraft, or even attempts to perform such an act, as an offender. Anyone who aids such an act is an accomplice and is included in the category of the former.

The Montreal Convention of 1971 also fails to define in specific terms the offence of hijacking, although it circumvents barriers placed by Article 1 of the Hague Convention. For instance it encircles instances where an offender need not be physically present in an aircraft; it includes instances where an aircraft is immobile while its doors are open; and it even draws into its net any person who disseminates false information which could endanger an aircraft in flight.

Then came the Beijing Convention of 2010. The Beijing Convention modernized the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971 and its Supplementary Protocol of 1988 by criminalizing the act of using civil aircraft as weapons, and the act of using dangerous materials to attack aircraft or other targets. The unlawful transport of biological, chemical and nuclear weapons and their related material has been made punishable. Cyber-attacks on air navigation facilities will also trigger criminal responsibility. Along with Beijing Convention was adopted the Beijing Protocol updated the Hague Convention by expanding its coverage against the different forms of aircraft hijackings. Both instruments specifically cover the criminal liability of directors and organizers of an offence under the treaties. Making a threat to commit an offence under the treaties may be criminally accountable when the circumstances indicate that the threat is credible. Under certain conditions, agreement or contribution to an offence, whether such an offence is actually committed or not, may be punishable. The two instruments also update provisions to promote cooperation between States in combating unlawful acts directed against civil aviation while emphasizing human rights and fair treatment of suspects. It came into force in 2012 and India is not a party to the convention.

These international conventions on hijacking also make it obligatory on the part of the member countries of the ICAO to take co-ordinated steps to prevent hijacking and help others in apprehending the culprits if the offence takes place in their land. According to the Montreal Convention, if the offender is found in the territory of a member state and if it does not extradite them, it has to submit the case to its competent authorities for the purpose of prosecution. The international conventions make it obligatory for member countries to arrest and extradite the hijackers. When some states assist the terrorists, either for ideological or whatever reasons, the enforcement becomes difficult. In the recent hijacking case, it has been clearly established that the hijackers have roots in Pakistan, which indirectly helped them hijack the aircraft. Being a signatory to the conventions, Pakistan cannot act contrary to its obligations. India can legitimately bring pressure to ban all international flights to Pakistan for not only giving tacit help to the hijackers but also for not extraditing them to India.

Besides the international conventions, all the member countries are governed by the rules and regulations of the Council of the ICAO. If any of the countries does not honour the obligations, the ICAO has the power to disqualify the country from flying. The conventions also provide for taking up the matter with the International Court of Justice (ICJ). In this case, if it is established that the hijackers have entered Pakistan and that Pakistan is not willing to prosecute them or agreeing for any arbitration, India could raise formal dispute with the ICJ.

The U.N. has neither moved resolutions nor condemned the hijacking in the Kandahar crisis. International pressure on Taliban was also not forthcoming. As a result, Taliban did everything possible for the hijackers to get away with their demands. To tackle this sort of problem, the proposed International Criminal Court will have powers to try hijackers, irrespective of the countries to which they belong. This will help in effectively dealing with international terrorism to some extent.

Hijacking Incidents in India:

The story of hijacking of Indian aircraft started way back in the early 1970s. The first hijacking in India, as well as in Asia, took place when the Indian Airlines Fokker Friendship was hijacked by two Jammu & Kashmir National Liberation Front (JKNLF) members on 30 January 1971. It was diverted to Lahore, as it was about to land in Srinagar, with 28 passengers and four crew members on board. The passengers and crew were released, but the aircraft was blown up. Airline security became a major issue in the 1980's, especially after the bombing of the Air India Boeing 747 Kanishka and the loss of 329 lives over the Atlantic Ocean. Since the first hijacking 12 Indian aircraft have been hijacked, in which five were forced to land in Amritsar as permission to land in Lahore was not granted. Five more of these hijacked planes actually landed in Lahore, which seems to be a favourite destination of hijackers of Indian Airlines aircraft. These hijackings have confused governments and exposed an indifferent judiciary, and there has not been a policy on how to handle this kind of situation.

The hijacking of the Indian Airlines IC-814 aircraft by Islamic fundamentalists on 24 December 1999 from Kathmandu to New Delhi ended at Kandahar airport in southern Afghanistan on 31 December 1999, with the release by the hijackers of 158 passengers and crew held hostage. This hijacking is the thirteenth such incident in India since 1971 and has generated enormous interest and comment.

Given its high-profile operation, the airline hijacking is not just a threat to passengers, but as the recent event showed the country's security concern as well. Despite losing thousands of lives to terrorism and facing a record number of hijackings, security at Indian airports is often visibly lacking and the attitude of the authorities ranges from apathy to indifference. India's civil aviation security agency, the Bureau of Civil Aviation Security (BCAS), has earlier suggested several proposals to the Ministry of Civil Aviation for having a separate agency for airport security, but could not make a headway because of the financial implications involved. Several studies by the Bureau of Civil Aviation Security state that policemen have not been trained properly, lacked motivation, do not have requisite powers of observation and are devoid of sufficient knowledge about laws pertaining to civil aviation.

DGCA AND AIR SAFETY REGULATIONS

The Directorate General of Civil Aviation (DGCA) is the Regulatory Authority in the field of Civil Aviation in India. It is responsible for regulation of air transport services to/from/within India and for enforcement of Civil Air Regulations, Air Safety and Airworthiness Standards. It also co-ordinates all regulatory functions with International Civil Aviation Organization.

Air Safety Directorate at DGCA (Hqrs) is headed by Director Air Safety. Director Air Safety/ DDG (Air Safety) reports directly to the DG for all safety related functions. For other matters including administration of the directorate reporting is through JDG (Air Safety).

The functions of the Air Safety Directorate are as under:-

1. Investigation of Civil Registered Aircraft Incidents:
 - 1.1 Under Rule 13 of Aircraft (Investigation of Accidents and Incidents) Rules 2012 the serious incidents to aircraft with AUW up to 2250kg and to aircrafts other than turbojet engine aircrafts are investigated by the inquiry officer from Air Safety Directorate. Notification of the occurrence is forwarded to the concerned State i.e State of Manufacture, State of Design, State of registry, State of Operator in accordance with the Aircraft Rules 2012 and ICAO Annex 13. Draft report is forwarded for the comments to states that participated in the investigation. After the completion of the inquiry and acceptance of the report by the central government it is put on the website of the DGCA and forwarded to concerned states in accordance with ICAO Annex 13.
 - 1.2 A significant occurrence is intimated to the MOCA, in addition if on the basis of the initial notification/preliminary investigation an occurrence falls in the category of serious incident/accident, it is intimated to AAIB.
 - 1.3 Under Rule 13 of Aircraft (Investigation of Accidents and Incidents) Rules 2012 the incidents are investigated by the inquiry officer from Air Safety Directorate.
 - 1.4 Incidents other than serious incidents are investigated by Permanent Investigation board of the Airlines under supervision of officer of the Regional Air Safety Offices.
2. Accident/Incident Prevention work: In addition to investigation work, Air Safety Directorate shall perform the following Accident/ Incident prevention programme:-
 - 2.1 To carry out the Regulatory audit of airlines/operators.
 - 2.2 To carry out surveillance inspection of airlines/operators e.g., preflight medical check of crew, ramp inspection, load and trim check, FDTL etc.
 - 2.3 To issue Civil Aviation Requirements, Air Safety Circulars, publication of annual accident summary etc.
 - 2.4 To carry out spot checks, night inspection of airlines/operators and any aviation related agencies.
 - 2.5 To monitor implementation of recommendations made by various courts, committees pertinent to DGCA.
 - 2.6 To monitor action taken reports on Regulatory audits carried out on airlines and aviation agencies.
 - 2.7 To maintain the occurrence data and analysis of the data.
 - 2.8 To coordinate implementation of measures to prevent Wildlife (bird/ animal) Strikes to aircraft at all airports. Coordinate for organizing NBCC meetings.

- 2.9 To coordinate with the ICAO and other aviation agencies concerning safety.
- 2.10 To coordinate with the Ministry of Civil Aviation on various Technical issues including parliament matters.
- 2.11 To organize safety seminars/training courses.
3. SSP and SMS implementation work: SSP/SMS Division has been formed in DGCA, Safety Accountabilities and responsibilities have been incorporated in SSP India document which is also placed on DGCA website. Functions and responsibility of Air Safety Directorate are as follows:
 - 3.1 Coordinate the functioning of SSP/SMS division.
 - 3.2 Carryout all the activities on behalf of the DGCA for the Implementation of SSP
 - 3.3 Coordinate for organizing Steering Committee meeting.
 - 3.4 Acceptance of SMS Manual, Phase wise implementation of SMS and SPI's of the operators in coordination with other Directorates
 - 3.5 Oversight of the implementation of the SMS by the operators.
 - 3.6 To issue Civil Aviation Requirements and SSP/SMS Division circulars
 - 3.7 Acceptance of FSDS Manual of Operators.
4. Approval of Flight Safety Organisation and Personnel:
 - 4.1 Approval of Flight safety manual.
 - 4.2 Approval of Flight Safety Organisation.
 - 4.3 Approval of Chief and Deputy Chief of Flight Safety of the organization.
5. Any other work assigned by the Director General.
6. Regional Air Safety Offices: Air Safety offices are located at Delhi, Mumbai, Hyderabad, Kolkata and Chennai. The Delhi, Mumbai, Kolkata and Chennai offices are headed by Director Air Safety and Hyderabad office is headed by Controller of Air Safety. All regional heads of Air Safety report directly to Director Air Safety Hqrs/DDG (Air Safety). A Regional Head of Air Safety Office is responsible for effective functioning of his office. He should distribute the works pertaining to his office among his officers based on their qualification, knowledge, experience, training and expertise in the specific areas etc. Regional Air Safety offices shall perform following functions:
 - To carry out the investigation of incidents occurring to operators/airlines in their region.
 - To provide support in preliminary Investigation of accidents/ Serious Incident by the AAIB to the extent requested by the AAIB to DGCA HQ.
 - To carry out the investigation of Ground incidents.
 - To carry out the investigation of Air Miss/Air Prox/ATC violations.
 - Participate in the Airport operational area inspection, Airport security meeting, Airfield Environment Management Committee, Regional operator Committee meetings.
 - Monitoring of incidents of operators/airlines.
 - CVR/DFDR monitoring.
 - ATC Tape monitoring.
 - To carry out the airport inspections (Surveillance/ Audit).
 - To carry out surveillance inspection of airlines/operators e.g., preflight medical check of crew, ramp inspection, load and trim check, FDTL etc.
 - To carry out night inspections and spot checks.
 - To participate in the regulatory audit of airlines/operators.

- To report all occurrences in their region. - To submit Safety data on routine basis.
7. Coordination of Regional Air Safety Offices with Air Safety Directorate (HQ).
- Regional Offices shall coordinate with Air Safety Directorate (HQ) on all safety matters and report all occurrences to DAS/DDG (Air Safety) on daily basis by telephone/fax/E-Mail. In addition they will report all occurrences to AAIB by mail on daily basis.
 - To forward headquarter every month the surveillance /accident prevention work carried out.
 - Coordination meeting between regional Air Safety offices and Air Safety Directorate (HQ) will be held periodically. During this meeting all the technical and financial/administrative issues will be discussed pertaining to their region.

NATIONAL AVIATION SAFETY PLAN, 2018 -22

DGCA India introduced the first State Safety Plan in the year 2015 by conducting an array of meetings and discussions with the stakeholders and assessing the worldwide safety priorities. The effectiveness of the State Safety Plan was evaluated and published in the Annual Safety Review 2016 and 2017, which provided basis for the development of the National State Safety Plan for 2018-2022.

Being among one of the first countries in the world to have a State Safety Programme (SSP) consistent with ICAO requirements, India's National Aviation Safety Plan (NASP) incorporates the Safety Enhancement initiatives (SEI) contained in RASG-APAC and is in line with ICAO's GASP.

The National Aviation Safety Plan (NASP) sets out a continuous improvement strategy, which helps to achieve objectives of the State through implementation of effective safety oversight and State Safety Programme.

NASP recognizes that it is important for everyone in aviation to work closely and in a collaborative manner to identify safety risks and ensure that the most appropriate practices and technologies are adopted to address and reduce these risks.

National Aviation Safety Plan (2018-2022)

The National Aviation Safety Plan 2018-2022 is an outcome of some of the activities described in the State Safety programme (SSP), experience gained in the implementation of State Safety Plan 2015-2017, evaluation of the performance of the safety priorities and work undertaken by the stakeholders in implementation and maintenance of their Safety Management System (SMS). It also incorporates the Global Safety Priorities contained in the Global Aviation Safety Plan (GASP) and the Regional Safety Plan of (RASG-APAC).

It has been developed in partnership with the service providers and sets out the States' Acceptable Level of Safety performance in terms of aspiration goal of "No Fatal Accident" in commercial air transport aeroplane and helicopter operations including off-shore helicopter operations, effective implementation of ICAO safety related SARPs and safety priorities, objectives, safety performance indicators.

To meet the objectives and targets, it incorporates action plan with the sole aim of further improving safety across the civil aviation industry. The action plan also incorporates the Safety Enhancement Initiatives (SEI) contained in RASG-APAC, which is in line with ICAO GASP.

Key Safety Priorities

- Airborne conflict
- Controlled flight into terrain
- Runway excursions and overruns
- Wildlife and bird strikes
- Loss of control in flight
- Runway Incursion and ramp safety
- Deficient maintenance
- Aviation Procedures & Documentation

Key features of the Plan include:

- **State Safety Priorities:** These priorities include: (i) airborne conflict, (ii) runway excursions and overruns, (iii) wildlife and bird strikes, (iv) loss of control in flight, and (v) deficient maintenance. Each State Safety Priority will have safety objectives, proposed desired safety outcomes, safety action plan and a number of Safety Performance Indicators.
- **Safety objectives:** Objectives include reducing: (i) the risk of airborne conflict, (ii) the number of runway excursions, (iii) the number of wildlife (on ground) and bird strikes, (iv) the number of ground collisions between aircrafts, and between aircrafts and vehicles. Indicators for each objective include the number of incidents, warnings issued, errors, etc.
- **Targets:** The desired safety outcome is to reduce number of reported events for each indicator by 3% every year. The targets are fixed for first two years (2018 and 2019). In the subsequent years (2020, 2021 & 2022), targets will be fixed based on the performance of the previous year.
- **State safety risk controls:** In addition to safety priorities, key state safety risk controls also must be measured and improved. The focus of safety priorities for 2018-22 will include: (i) effective state safety oversight, (ii) implementation of service providers' Safety Management System, (iii) addressing safety concerns raised by International Civil Aviation Organisation and implementing their provisions, and (iv) safe operations of Remotely Piloted Aircraft Systems (commonly known as drones).

AVIATION SECURITY REGULATIONS IN INDIA

India's national civil aviation security regulations are based on the Annex 17 of the Chicago Convention 1944. Under the Annex 17, the contracting states shall ensure the security of international passengers through well trained officers, supporting facilities, safeguard of airport and ground facilities at all international airports, and effective implementation of

national civil aviation training programmes. A national civil aviation exercise was introduced in India after the passage of the Tokyo Convention Act 1975. Later, the Anti Hijacking Act, and the Suppression of Unlawful Acts Against Safety of Civil Aviation Act were passed in 1982. The latter two Acts were amended in 1994.

Under the Indian Constitution 1950, the subject "civil aviation" comes in the Union List. Thus, any criminal activity unlawful interference against civil aviation occurring anywhere in India is the Union Government's responsibility. Article 253 of the Constitution empowers Parliament to make any law for the whole or any part of the territory of India for implementing treaties, international agreements, and conventions. It enables the Government of India to implement all international obligations and commitments. Following the Commonwealth practice, treaties are not required to be ratified by Parliament. They are not self-executory, however. Parliamentary legislation will be necessary to implement provisions of a treaty within the country. Indeed, Parliament has passed legislation to implement international treaties and conventions. Section 4 of the Aircraft Act 1934 also empowers the Union Government to make rules to implement the provisions of the Chicago Convention 1944.

TOKYO CONVENTION ACT 1975

The Tokyo Convention Act 1975 was passed by the Indian Parliament as the Act 20 of 1975 and came into force on 1 January 1976. This Act was passed to give effect to the Convention on Offences and Certain Other Acts Committed on Board Aircraft, adopted in Tokyo on 14 December 1963.

The Act comprises four chapters: preliminary, definitions, offences and miscellaneous. Section 2 of the Act defines important terms like aircraft, appropriate authority, commander, convention country, Indian registered aircraft, military aircraft, operator, pilot in command, the Tokyo Convention, and aircraft in flight. Chapter III of the Act elaborating on "offences" is the core subject of the Tokyo Convention as implemented in India. The "offences" covered in this chapter are (a) the application of criminal law to aircraft; (b) provisions of the Extradition Act 1962; (c) the powers of an aircraft commander; (d) jurisdiction; (e) provisions of evidence in connection with aircraft; and (f) provisions of documentary evidence.

Section 3(1) of the Act states: "Any act or omission taking place on board an Indian registered aircraft while in flight elsewhere than in or over India which, if taking place in India, [sic] would constitute an offence under any law in force in India...." Section 4 of the Act, facilitating the application of the Indian Extradition Act 1962, provides: "...any aircraft registered in a convention country shall, at any time while that aircraft is in flight, be deemed to be within the jurisdiction of that country, whether or not it is for the time being also within the jurisdiction of any other country." The Act reflects the recognition of the jurisdictional claim of the state of aircraft registration.

Section 5 of the Act deals elaborately with the powers of the commander of an aircraft, including the safety of the aircraft, or persons, or property on board the aircraft, or the good order and discipline on board the aircraft. Moreover, the same section empowers the aircraft commander to disembark or deliver a person. Section 6 of the Act is conferred with the

jurisdiction in respect of piracy committed on the high seas. Section 10 of the Act confers on the Central Government the power to certify which countries are the contracting parties to the Tokyo Convention.

ANTI-HIJACKING ACT 1982

The Anti-Hijacking Act of 1982 was passed by the Indian Parliament to give effect to the Convention for the Suppression of Unlawful Seizure of Aircraft adopted in the Hague on 16 December 1970.

The Act has three chapters: preliminary, hijacking and connected offences; and miscellaneous. Section 2 of the Act defines aircraft, aircraft registered in India convention country, the Hague Convention, and military aircraft. Section 3 of the Act, dealing with hijacking, says: "Whoever on board an aircraft in flight, unlawfully, by force or threat of force or by any other form of intimidation, seizes or exercises control of that aircraft, commits the offence of hijacking of such aircraft." Para 2 of section 3 of the Act covers attempt to commit or abatement of hijacking.

The punishment for hijacking under section 4 of the Act is stated thus: "Whoever commits the offence of hijacking shall be punished with imprisonment for life and shall also be liable to fine." Section 5 of the Act clarifies that such acts are punishable under the Indian Law if these acts have been committed in India. The question of jurisdiction is elaborated by Section 6 of the Act: An Indian court shall take cognisance of an offence of hijacking or related act of violence committed outside India only under the following five circumstances:

- a. such offence is committed on board an aircraft registered in India;
- b. such offence is committed on board a dry leased aircraft, the lessee having his principal place of business in India, or where he has no such place of business his permanent residence is in India;
- c. the alleged offender is a citizen of India;
- d. the alleged offender is on board the aircraft in question when it lands in India; or
- e. the alleged offender is found in India.

The miscellaneous provisions of the Act include those relating to extradition, the certification of convention parties by the Union Government, the notification of an act registered in a convention country, the securing of previous sanction for prosecution, and the protection of an action taken in good faith.

Under section 5A of the Anti-Hijacking Amendment Act 1994, the Union Government may, by notification in the official gazette, confer on any officer of the Central Government the powers of arrest, investigation and prosecution exercisable by a police officer under the code of criminal procedure (CPC) 1973. The insertion of new Sections 6A, 6B and 6C provides for the specification of designated courts by state governments for speedy trial and disposal thereof and shift the burden of proof on the accused in specified circumstances. Furthermore, the inclusion of Section 7A has made the grant of bail more stringent.

ANTI HIJACKING ACT, 2016

The government believed that The Anti-Hijacking Act, 1982 was not comprehensive enough to deal with modern-day hijack techniques, did not penalize individuals who made false hijack threats, and had weak penalties that did not serve as sufficient deterrent to potential hijackers. The Act repeals and replaces The Anti-Hijacking Act, 1982. Like its predecessor, the new Anti-Hijacking Act gives effect to the provisions of The Convention for the Suppression of Unlawful Seizure of Aircraft which India ratified on November 12, 1982. However, it also implements the convention's Protocol Supplementary, which India signed on September 10, 2010.

Responding to advances in technology, the Anti Hijacking Act now includes technological intervention and intimidation within the definition of 'hijacking', and provides for the death penalty in instances where hostages or the crew have suffered death. Further, the Anti-Hijacking Act expands the scope of criminal liability to include any person who not only commits, but also threatens to commit the crime of hijacking, and persons who knowingly assist an offender to evade investigation, prosecution or punishment.

New provisions

The aim of the act is to broaden the scope of the term 'hijacking' by including in its definition even the making of a threat to commit an offence of hijacking. It is now also an offence to unlawfully and intentionally cause any person to receive a threat under circumstances that indicate that the threat is credible.

Additionally, the amended definition includes within its scope those who organise or direct others to commit the offence and also holds such individuals guilty of abetment of hijacking.

Another notable feature of the new legislation is universal jurisdiction, which includes inter-alia, if the hijacker is Indian, or if the hijacked aircraft is registered in India or if any foreign registered aircraft lands in India with the alleged offender still on board or when the aircraft is hijacked anywhere in the world and an Indian citizen is on board.

The act goes a step forward by even defining the term 'in service'. An aircraft is considered in service from the beginning of the pre-flight preparation by ground personnel or by the crew for a specific flight until 24 hours after landing. Further, in case of a forced landing, the flight is deemed to continue in service until the competent authorities take over responsibility of the aircraft, and for the persons and property on board.

Penalties

From a punishment perspective, the act prescribes the death penalty where the offence results in the death of a hostage or security personnel, and life imprisonment in all other cases. It also provides for capital punishment against conspirators and abductors of any of the acts of hijacking, so that all those involved, directly or indirectly, are brought to book. For the first time, the act provides for the confiscation of moveable and immoveable property of a person convicted under its purview.

Another notable inclusion relates to a designated court to provide a speedy trial for offences relating to hijacking. The accused shall be tried by a sessions court that is notified to be a designated court by the concerned state government. This court shall, as far as practicable, hold the trial on a day-to-day basis.

Shortcomings

While a great improvement to the existing legislation, which was last amended in 1994, the act has some shortcomings. The term 'aircraft' is identified as any aircraft, whether or not it is registered in India. But it excludes an aircraft that is used in customs or police service, which should have been included.

It would have helped if there was also a provision to cover 'hoax calls' with proportionate punishment. Hoax calls create panic, resulting in serious complications for passengers. They also cause a nightmare for security agencies who end up wasting resources and time to verify the authenticity of the call.

Moreover, even the terms 'hostage' and 'security personnel' have not been defined in the act. The act, as stated above, only prescribes a punishment with death where the offence of hijacking results in the death of a hostage or security personnel. In the case of an intervention, especially an armed intervention by security personnel, there is a possibility of the death of other persons and consequential punishment needs to be prescribed.

The act also does not protect ground staff and security personnel at the airport. While an aircraft is on the ground or is being prepared for departure, a prospective hijacker may commit an act of violence against the ground personnel. In its current form, the act defines the punishment for acts of violence connected with hijacking and covers only violence against passengers or airline crew. It therefore overlooks violence against ground staff or security personnel, which is equally necessary.

The act should also have considered providing extra-territorial status or immunity from jurisdiction for the benefit of the passengers and the crew in the state to which an aircraft may be hijacked. This type of rule, which should also apply to all cases of unscheduled landings in a foreign country, is urgently needed, particularly in the event of the unlawful seizure of an aircraft.

SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF CIVIL AVIATION ACT 1982

This Act was passed by the Indian Parliament to give effect to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, adopted in Montreal on 23 September 1971. This Act also carries identical provisions with the Anti-Hijacking Act, except for Sections 2(2) 3 and 4. Section 2 of the Montreal Convention Act, identical with Section 2 of the Anti Hijacking Act, embodies the definitions of aircraft, aircraft registered in India, convention country, military aircraft, and the Montreal Convention.

Chapter II of Section 3 of the Montreal Convention Act incorporates, in identical terms, the offences enumerated in Article 1(1) (A), (B), (C) and (D) of the Montreal Convention, and

also attempts to commit them as well as their abetment as offences under the Act, and prescribes for each of these offences a punishment of life imprisonment and simultaneous liability to fine. Section 4 of the Act incorporates the offence of destruction, damage to and interference with the operation of air navigation facilities "as offences" under the Act, and prescribes a punishment of imprisonment for life and simultaneous liability to fine.

The Suppression of Unlawful Acts against Safety of Civil Aviation (Amendment) Act 1994 inserts a new Section 3A, which spells out offences at airports. It says whoever at any airport unlawfully and intentionally, using any device substance or weapon

- a. commits an act of violence which is likely to cause grievous hurt, or death of any person; or
- b. destroys or seriously damages any aircraft or facility at an airport, or disrupts any service at the airport, endangering or threatening to endanger safety at that airport shall be punished with imprisonment for life and shall also be liable to fine.

Whoever attempts, it adds, to commit, or abet the commission of, any offence under sub section (1) shall also be deemed to have committed such offence and shall be punished as provided for such offence.

The other provisions of the Montreal Convention Act, including the Suppression of Unlawful Acts against Safety of Civil Aviation (Amendment) Act 1994, are identical with those of the Anti-Hijacking Act, and the above analysis of the Anti-Hijacking Act and its amendment apply here *mutatis mutandis*.

Conclusion: While air transport safety is impressive and has a very high profile, public perception of aviation safety is shaped by media reports on aircraft accidents and aircraft hijackings. Air transport's high profile operations also make it a prime target for terrorism. New forms of terrorism are continually emerging, and security will continue to be an issue of the highest priority for governments, air carriers, manufacturers and service providers alike. Internal and international security are major areas of importance in the prevention and control of hijacking. Quite apart from the growing need for the establishment of a separate international anti-terrorist squad at global level, there is a visible need for states to adopt more stringent security measures against possible offenders. There should be more awareness of the threats at the airports through the checking of passports, travel documents etc. under more sophisticated electronic surveillance.

The solution lies in the uniform application of the ICAO's Standards and Recommended Practises (SARPs) around the world and an unprecedented level of global co-operation in all aspects of civil aviation safety and security. The issue of safety and security is not a national or regional issue. It is a global issue. As we know civil aviation is a perfect example of globalisation. While the ICAO and other international organisations are actively contributing to the worldwide improvements in aviation safety and security, it is ultimately for the individual countries to realise that airports within their boundaries cannot be allowed to remain the weaklinks on the routes used by terrorists. There has to be more active international co-operation to overcome this problem.

On the domestic front, India should adopt and implement the International Standards and Recommended Practices of the Chicago Convention of 1944 from time to time. The

implementation of the ICAO's CNS/ATM technology in India is also another issue concerned with the safety and security regulations in India. In the long term, however, the country needs to evolve a more coherent policy to tackle blackmail by terrorists who want to achieve their political ends through violence. A new action plan needs to be evolved to defend property, including aircraft, that is vulnerable to terrorist attacks. Airline staff and people manning key installations need to be given training to handle hijacking.

Future of Air Safety in India – Emerging Concerns

- i. Since safety of air navigation is and will remain the overriding priority for travelling public, operators, States and international organizations, States have to agree with ICAO in further advanced international safety standards.
- ii. Compliance with standards has to be strictly audited by ICAO mechanism and / or by international regional organizations.
- ii. Investigations into accidents should lead to effective corrections of any faults in Technology, procedures or human conduct.
- iv. Continuing vigilance to check unlawful acts against safety of aviation is unavoidable.
- v. Good order on board is essential to prevent unruly passengers causing danger to safety of flight.
- vi. International & national legal steps need to be taken to keep aviation drug free by enforcing pre employment, periodic, post accident and random testing of aviation personnel.
- vii. More conventions are needed to bring decline in incidents of unlawful acts against aviation.
- viii. Safety management courses need to be introduced, where ever not existing at present.

Emerging Concerns

Privatization, Globalization and Safety Concerns: Following the process of deregulation, privatization and liberalization in the last two decades of the 20th century, the mainstream airlines, and indeed other aviation infrastructures such as airports and air traffic services, are operating more and more on the basis of commercial principles. While the preliminary data indicate that safety is not negatively affected by this trend, it does present new implications for safety.⁶¹ Firstly, the privatization or corporatization process has raised an issue regarding the effective supervision and control by States with respect to safety requirements. Instead of operating airlines, airports and air traffic services directly and implementing safety standards on its own, a State will need to implement the safety requirements indirectly through private or corporatized entities. This will involve a transition from managing operational activities to assuming regulatory control and supervision.

Given the pressure of market forces, which requires the aviation industry to produce “more with less” in order to remain economically viable, it is important to ensure that safety requirements will not be compromised by the consideration for profit. Secondly, liberalization has been accompanied by the burgeoning of airline alliances, code-sharing and franchising, as well as the outsourcing of such activities as aircraft repair and maintenance, flight operations and crew administration, and ground

handling. An Austrian airline may operate code-share flights with a Belgian carrier to Canada, while the aircraft is leased from a company in Denmark, which is in turn controlled by a trustee in Estonia. The aircraft may be operated by a pilot from France, subject to regular maintenance in Germany, beneficially owned by the nationals of Hungary and registered in Ireland.

Consequently, it will be difficult to confine the regulatory framework within the boundaries of a single country. Harmonization of national regulations or formulation of international regulations becomes all the more necessary. Competition in the market also requires airlines to be cost-efficient, thereby calling for simplification and unification of certain regulatory procedures.

The globalization process is also accelerated by the development of new technology, such as satellite-based navigation systems. As we all know, aircraft could not fly safely without air traffic services. Provision of such services is organized on the basis of flight information regions assigned by ICAO, which are more or less aligned with national boundaries. Therefore, traditionally, air traffic services, including air navigation aids by radar, are provided on a national basis. The introduction of the satellite-based systems will make it possible to provide service coverage which far exceeds national boundaries. Consequently, “the full implementation of an integrated global satellite-based navigation system is bound to infringe on States’ sovereignty”. For the purposes of achieving efficiency and economy, States will be inclined to display certain flexibility in the exercise of sovereign rights by jointly providing air traffic services with neighbouring countries.

Terrorists Attacks

Last but not least, the catastrophic effects of terrorist attacks and other acts of unlawful interference against civil aviation could not be confined to a territory or to citizens of a particular country. Combat against terrorism has been globalized. Preventive measures must be as globally uniform as possible.

Code Sharing and Alliances: Questions of Liability in case Security Lapse

The drafters of the Chicago Convention did not address the issue concerning the transfer of functions and duties from the State of the registry to the State of the operator, since the need for such a transfer was not apparent at the time. As modern aviation technology developed, aircraft have become larger, more sophisticated and more expensive, thereby giving rise to the need for international financing. Gradually, the practice of leasing, charter or inter-change of aircraft has become popular. Very often, a special purpose entity registers an aircraft in one State only for financing purposes, but the aircraft so registered is operated by another entity in a different State, and probably has never landed in the State of registry. Under such circumstances, the State of registry may experience difficulties in ensuring compliance with safety standards since it has practically lost any control it might have had over the aircraft. A major difficulty may arise particularly with the supervision of maintenance requirements and therefore the State of registry may not find itself in a good position to renew the certificate of airworthiness when required.

To cope with this new situation, Article 83 *bis* of the Chicago Convention was adopted under the auspices of ICAO, and it came into force on 20 June 1997 with respect to the States which have ratified it. Under this new article, notwithstanding the provisions of Articles 12, 30, 31 and 32(a), when an aircraft registered in a contracting State is operated pursuant to an agreement for the lease,

charter or interchange of the aircraft or any similar arrangement by an operator who has his principal place of business or, if he has no such place of business, his permanent residence in another contracting State, the State of registry may, by agreement with such other State, transfer to it all or part of its functions and duties under Articles 12, 30, 31 and 32(a) in respect of that aircraft. The State of registry shall be relieved of responsibility in respect of the functions and duties transferred.

February 2014: U.S. authorities have downgraded India's aviation safety rating, citing a lack of safety oversight, meaning Indian carriers cannot increase flights to the United States and face extra checks for existing ones. The FAA has determined that India at this time is not in compliance with the international standards for aviation safety oversight. India joins countries such as Indonesia, the Philippines and Bangladesh that have a Category 2 rating. As of November 22, the FAA kept 81 of the 96 countries reviewed in Category 1. Airlines from countries rated Category 2 can continue operations at current levels under "heightened FAA surveillance" but cannot expand or change services to the United States, as per rules of the FAA's International Aviation Safety Assessments programme. The FAA, which periodically reviews air safety preparedness of different countries, audited the Indian aviation regulator in September and December last year and had raised issues including lack of adequate number of flight inspection safety officers and training of officers who certify a plane is airworthy.

MODULE IV:

AVIATION

LIABILITY IN

INDIA

CIVIL AND CRIMINAL LIABILITY IN INDIA

Law prescribes consequences for its breach. We call such consequences liabilities to emphasise the element of force behind them. Liability is the bond of necessity that exists between the wrong-doer and the remedy of the wrong. This remedy of the wrong is enforced by the supreme will of the State through the organised physical force of the State. There are many ways in which law compels a person to do an act which it is his duty to do or where it is not possible to do; it compels him to pay damages or compensation.

The severest form of legal liability is punishment; it is the consequence which a man has to suffer for committing a criminal wrong. A criminal wrong or an offence is an act or omission punishable at law. By law we mean law for the time being in force.

There are civil statutes which contain penal provisions, a breach of which is no less an offence than the breach of a criminal statute. Some crimes are crimes not because they are punishable, but they are punishable because they are crimes, because they are done with an evil and mischievous intention.

Crime and punishment are relative terms. There are certain faults which do not have guilty mind behind them but which the law makes punishable to make people cautious and careful about them. A person may be held guilty of negligence although he did not foresee the risk of harm. He may be unjustifiably ignorant of some circumstances that increased the risk. In other words negligence means the absence of such care as it is the legal duty to use in any particular circumstance. It must, however, be noted that the test of responsibility for, negligence is not the same in criminal proceedings as in civil proceedings.

In civil proceedings, no question of mens rea arises, and the test of the defendant's liability to make compensation is whether he did or omitted to do something which in the circumstances would not have been done or omitted by a reasonable man if by this standard his conduct was negligent, the fact that he acted to the best of his own judgment is no defence.

In criminal proceedings, on the other hand, the liability of the accused to punishment depends upon the existence of mens rea. To attract the penal provision for negligence it must be shown that the person was guilty of a very high degree of culpable negligence. Under the Indian Penal Code there are thirteen sections (Sections 279, 280, 283, 284, 285, 286, 287, 288, 289, 304-A, 336, 337 and 338) which deal with case of criminal negligence.

A crime is an offence, i.e., an act or omission punishable at law, which involves a guilty mind as one of its essential elements. There are different kinds of punishment ranging from death to warning, but unless a punishment in any form is inflicted for a wrong, it will not amount to an offence or a criminal wrong.

Fine resembles damages in that the wrong-doer pays a certain amount of money in both but it differs from damages in that it is a form of punishment which damages are not. If law awards punishment for a wrong such law is known as Criminal or Penal and if it provides any other remedy it is known as Civil law. Traffic in human being or forced labour are offences today while slave trade and slave labour were legally permitted not long ago. We view them with a

certain measure of moral adherence today and look upon them as crimes of a very low kind. This conversion of a legal act into a crime is the result of a change in outlook. What is an offence or a crime is relative to prevailing ethics, juristic concepts and notions. Crime is not a static quality nor can it be considered in absolute terms. There is actually no such thing as a crime by itself. The Indian Penal Code defines offences and describes penalties. It prescribes a number of criminal wrongs and prescribes their corresponding liabilities. It applies equally to all persons in India who may be guilty for an act or omission contrary to its provisions (Section 2). The chief points of difference between a civil wrong and a crime may be noted down as under:

- (1) Civil wrongs need only indemnification or compensation or payment of loss by the person who has done the wrong whereas crime is a wrong done which needs punishment to the wrong-doer by way of his reformation or to set a deterrent example so that it may not be repeated in future.
- (2) The nature of the two wrongs being different the intention or ill-motive, is a consideration in cases of criminal wrongs but it is not relevant in adjudication of civil wrongs.
- (3) Criminal wrongs are grave as they affect the public in general and as such they need greater indulgence but the cases of civil wrongs are private wrongs effecting only some individuals.
- (4) Since both the wrongs are different in their spheres, the tribunals, procedure and burden of proof, also differ. In criminal wrongs burden of proof is generally on the prosecution but no such rule is laid down in respect of civil wrongs.
- (5) So far compounding is concerned, a civil wrong can be compounded by the parties at any stage without seeking permission from the State or the Court but with regard to criminal wrongs the position is otherwise. Some wrongs cannot be compromised whereas some of them can be compromised with the permission of the Court and some of the criminal wrongs can be compounded freely.

In spite of these differences the same wrong may in certain circumstances amount to a civil wrong and in certain circumstances it may be a crime or it may also be both as for example, defamation, public nuisance etc. It all depends upon the circumstances attending to the wrong.

There are international laws in existence that provide a world-wide system of standards and rules for air travel and in particular, common rules regarding minimum liability limits for the carriage of passengers, cargo and baggage in the event of death, injury, damage, delay or loss. These laws were first agreed and introduced worldwide in 1929 and in some parts of the world; those liability limits set down in the 1929 legislation remain in place today. The first international law introduced is known as the Warsaw Convention (1929).

Over the years, there have been a number of changes to and reviews of the original Warsaw Convention, including increases in the monetary liability limits. These subsequent amendments together with the original Warsaw Convention are known collectively as the

"Warsaw System". While the Warsaw Convention as amended brought about a certain degree of uniformity, i.e., similar monetary limits were in place in a number of countries, there was a realization in the 1990s that the liability limits were still too low by present-day standards. In addition, the laws governing airline liability had become fragmented and very confusing as some countries had not introduced all the various amendments to the original laws. This means that even today, depending on where the accident or incident takes place, liability limits can be higher or lower than in other countries.

The Warsaw Convention (1929) was adopted at a time when commercial aviation was in its infancy. Over the years, the expansion of air transport created a need to harmonize certain rules relating to international carriage by air and to establish a regime of civil liability for air carriers. Under the auspices of the ICAO (International Civil Aviation Organisation) the leading players in air transport met in Montreal. The Convention's most important contributions are as follows:

- The principle of the air carrier's unlimited civil liability in the event of bodily injury;
- The principle of making advance payments to meet immediate needs;
- The possibility for the victim or the persons entitled to compensation to bring suits before the courts in the passenger's principal place of residence;
- An increase in the air carrier's liability limits in the event of delay;
- Modernization of transport documents (electronic airway bills and tickets);
- Clarification of the rules on the respective liability of the contractual carrier and the actual carrier;
- Generalised institution of the obligation for air carriers to maintain adequate insurance;
- Introduction of the so-called 'regional' clause allowing economic integration organisations such as the European Union to accede to the new Convention.

The Montreal convention of 1999 moves the international community past the patchwork system of liability stemming from the original Warsaw convention and establishes a comprehensive liability regime for air carriers engaged in international carriage. The convention provides much needed limit on liability for delay and sets forth clear limits on liability for lost or damaged baggage cargo. In addition the Montreal convention simplifies documentation requirements by embracing electronic tickets air waybills, which should eliminate litigation regarding the adequacy of travel documents. One of the most significant aspects of Montreal convention is the new liability limit for passengers injury or death. Under the new liability regime, air carrier will be held absolutely liable for the first 100,000 SDR of damages, even if the damage was caused by third party, so long as the injury producing event meets the conditions for liability under Article 17 and was not contributed to by the passengers.

It is interesting to note that India recently became 91st country to have ratified the Montreal Convention 1999 which does away with the archaic system of "compensating by weight" and adopts the more progressive, more consumer friendly and internationally recognized "compensate by passenger" system in cases of delayed, lost, damaged or destructed baggage.

Under Article 253, entries 13 and 14 of Union List as provided under Constitution of India, Parliament is competent to make a law for implementing “any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.” Quickly enough, the Carriage by Air (Amendment) Act, 2009, which incorporates the provisions of this Convention, came into force from 1 July, 2009. Under the Third Schedule to the Act, the liability of the carrier (airline) in case of destruction, loss, damage or delay can go up to 1000 Special Drawing Rights (SDRs) for each passenger and in case the passenger has made special declaration of higher value at the time of check-in then the liability can go up to such declared sum. SDRs are a currency conversion measure available on the website of International Monetary Fund, where 1 SDR values around Rs. 75. Hence, the airlines’ liability stands up to Rs. 75,000 per passenger for lost baggage if the values of items lost are within this limit and are allowed to be carried by law, say non-alcoholic, legitimate items, etc.

The new law also states that any provision tending to relieve the airlines of liability or to fix a lower limit than that which is laid down in statutory rules shall be null and void. In terms of rule 22, a court in addition to these limits can provide litigation costs and other expenses including interest. It is also interesting to note that this is applicable to airlines irrespective of nationality of aircraft provided the airline has a presence in India.

Therefore, gone are the days when airlines could escape their obligations under the pretext of their kilo-based iron-clad legally drafted policy compensating 20 US dollars for a kilo or by including some other hidden conditions. By bringing such an amendment, Parliament of India has not only brought Indian carriage law in line with international regime but has also imposed a sort of strict liability on airlines while dealing with customers belongings which they entrust to airlines with a duty to care.

Hopefully, the new law would act as a breather for harassed passengers from various tactics of airlines trying to bring compensation to the absolutely insignificant sum.

CARRIAGE BY AIR ACT, 1972

The civil aviation industry in India is one of the fastest growing industries in India. With the growing busy schedule of the daily life, people continuously look for and adopt any means to save time and energy. The tremendous growth in the civil aviation industry in India is a product of such need to save time and energy and has become a very convenient mode of travel. Aviation is one of the few areas which developed very early prior to the independence. India is perhaps one of the most progressive countries as far as the development in the civil and general aviation is concerned. Civil Aviation industry in India has grown and as a matter of fact is continuing to grow at such a fast pace that it has been recently predicted to become the third largest aviation market by 2020¹⁴.

India has a huge aviation industry and every year the civil aviation in India carries an unimaginable load of passengers, luggage and cargo. Civil Aviation Minister in a recent event has commented on the tremendous heights the civil aviation has achieved and projected

¹⁴Ministry of Civil Aviation Report, ‘*Strategic Plan 2010-2015*’, p.2.

India it to be the third largest aviation market by 2020¹⁵. It is projected that the centre of gravity in the aviation industry will be shifting to the Asia-Pacific region in the coming years. Civil Aviation is currently one of the key factors in a country's economic growth and infrastructure. Civil Aviation is a key infrastructure sector that facilitates the growth of business, trade and tourism, with significant multiplier effects across the economy¹⁶.

Air transport has definitely been a key factor in India's growth in international trade in recent decades. It is now one of the reliable and faster modes of transport services which move passengers and goods, luggage or cargo from one place to another. Increased air connectivity enables manufacturing enterprises to exploit the speed and reliability of air transport to ship components across firms that are based in different and distant locations thereby minimizing the inventory cost. Role of air transport is crucial for the development of Tourism industry¹⁷.

Thus, the economic foot-print of the Civil Aviation sector which reflects the value addition and the direct and indirect employment created by activities of the sector appear to be much deeper and wider in terms of its multiplier effect¹⁸. Scheduled airlines in India contribute to over 50% of the gross income of the Civil Aviation sector in India¹⁹. Apart from Scheduled operations, India has also witnessed a significant growth in the non-scheduled operations and the same has increased by four folds now. Total no of passengers carried by domestic airlines in the month of January – May 2013 is 259.98 lakhs²⁰.

Such huge is the ambit and significance of the civil aviation in India. It carries such a huge number of passenger and cargo on a daily basis. Therefore it was very essential to provide for a legal regime within which this accountability can be fixed and this led to the enactment of Carriage by Air Act 1972.

Overview of the Act

India in pursuance of its international commitments under the Warsaw Convention 1929²¹ and the amended Warsaw Convention of 1955²² enacted the Carriage by Air Act 1972 and incorporated the provision of these two conventions by incorporating a first and second schedule which provides for these rules under the respective convention. Thereafter when India ratified the Montreal Convention in 2009²³, it immediately incorporated the provisions of the same in the third schedule. The current chapter presents a brief overview of the Carriage by Air Act 1972 with special emphasis on the third schedule.

¹⁵IATA, *Special Report on Putting the pieces Together*, October 2012, available at <http://www.iata.org/publications/airlines-international/october-2012/Pages/india.aspx>

¹⁶Ministry of Civil Aviation, National Transport Development Policy Committee, *Report of Working Group on Civil Aviation Sector*, June 2012, available at http://civilaviation.gov.in/cs/groups/public/documents/document/moca_001680.pdf

¹⁷*Ibid.*

¹⁸*Id.*

¹⁹*Id.*

²⁰Passengers Carried By Scheduled Domestic Airlines, DGCA Statistics available at <http://dgca.nic.in/reports/pass-ind.htm>

²¹*Supra* Note 2

²²*Supra* Note 3

²³*Supra* Note 4

To begin with, the Preamble of the legislation clearly defines the purpose and the mandate of the said legislation which was to give effect to the international commitments of India under the Warsaw Convention²⁴, amended Warsaw Convention²⁵ and subsequently the Montreal Convention²⁶. Hence the sole objective of the enactment was to fulfil India's international obligations existing under the above mentioned conventions.

However the most important operative part of the legislation has been covered under Section 3, 4 and 4A of the Carriage by Air Act 1972. Carriage by Air Act 1972 extends the provisions of the rules contained in the first schedule, second and third schedule to have the force of law in India with respect to any carriage by air to which the rules apply, irrespective of the nationality of the aircraft performing the carriage²⁷. Further the legislation also excludes the application of all the laws which may be contained either in Fatal Accidents Act 1855 or any other law for the time being in force which can be utilized for the purposes of calculation of the compensation for the death of passenger²⁸. Therefore by virtue of application of this provision, in case of death of any passenger, any other law which would or could have governed the amount of compensation in such cases of death would no longer be applicable and the provisions contained in the first and second schedule which may be applicable as the case may be, shall be applied for the purposes of calculating such compensation. Therefore in effect no other cause of action shall lie under any other law for the calculation of the amount of liability under any law.

The rules contained in the Carriage by air act 1972 are prima facie applicable to only international carriage by air. However the Central Government by notification in the official gazette can extend these rules contained in these schedules to non-international carriage as well. In pursuance of the said power, the Central Government has extended the provisions of the first²⁹ and the second schedule³⁰ to non-international carriage by air. However the Central Government has not extended the provisions of the third schedule to non-international carriage till date.

With respect to Documentation requirements the first schedule lays down certain documentation requirements with respect to contents of the passenger tickets³¹ which were reduced considerably in the second schedule³². However with the advent of the third schedule, drastic changes were brought about in the third schedule where the documentation requirement were merely confined to the two things i.e. an indication with regards to the places of departure and destination³³ and where the places of departure and destination are within the territory of a single State Party, one or more agreed stopping places being within the territory of another State, an indication of at least one of such stopping places³⁴. Due to

²⁴*Supra* Note 2

²⁵*Supra* Note 3

²⁶*Supra* Note 4

²⁷ Carriage by Air Act 1972, Section 3, 4 and 4A

²⁸*Ibid.*, Section 5

²⁹ Notification of the Official Gazette No. 186 E, dated March 30, 1973

³⁰ Notification of the Official Gazette No. 186 E as amended by SO 1885, dated July 5, 1980

³¹ Carriage by Air Act 1972, First Schedule, Rule 3

³² Carriage by Air Act 1972, Second Schedule, Rule 3

³³ Carriage by Air Act 1972, Third Schedule Rule 3 (a)

³⁴ Carriage by Air Act 1972, Third Schedule, Rule 3 (b)

technological development it is no longer required under the tickets needs to be personally delivered. The tickets can be delivered in any other means which can save and retain the information so considered³⁵. Similarly the passenger shall also be handed over a baggage identification tag for each piece of checked in baggage³⁶. The third schedule has also reduced the documentation requirements with respect to the carriage of cargo and holds that the cargo receipt or the airway bill should contain an indication of the places of departure and destination, agreed stopping places and an indication of the weight of the consignment.

Another important aspect of the legislation is the liability for Death and Compensation. Like the previous legislations on the air carrier liability, the carrier shall be liable for damages sustained in the event of death or wounding of a passenger if the accident which caused the damage so sustained took place on board or during embarking and disembarking. Therefore the Rule 17 of all the three schedules gives the passengers, his estate or heirs a cause of action against a carrier for bodily injury caused by an accident while on board or during embarking or disembarking.

Further the first and the second schedule makes the carrier liable for any damage sustained in the event of destruction or loss of or damage to, any checked baggage and goods or cargo, if the occurrence which caused the damage so sustained took place during transportation by air. This provision essentially provides a cause of action against the carrier for any event that causes loss or damage to cargo, baggage and goods which have been checked with the airline. It raises a presumption of liability of the carrier for destruction, loss or damage to goods or checked luggage. The third schedule separately deals with goods and cargo³⁷ and makes a separate provision for checked in and unchecked baggage³⁸. It for the first time recognised the liability of the carrier for unchecked baggage.

With the objective of balancing the protection of rights of both the passengers as well as the air carriers certain defences were introduced in the first schedule and which was later modified in the second and third schedule. On a cursory glance at the entire legislation, one would notice the three separate sets of defences for the carriers to contest their claim for compensation under the Act. These defences kept on changing with the technological developments and change in the underlying principle of liability in the third schedule. Under the third schedule, a common defence which the carrier could raise for resisting any claim for compensation under the Act is the defence of contributory negligence. Where the carrier proves that the damage was caused by or contributed to by the negligence of the injured person, the court may in accordance with the provisions of its own law exonerate the carrier either wholly or partly from his liability. This is one common defence which is applicable to all the cases of personnel injury, death, damage or loss of goods and delay of passenger and goods. The defence of contributory negligence is an all or nothing defence.

However, in the cases of death or personnel injury under Rule 17, the carrier is entitled, for any claim beyond 100, 000 SDR, to raise the defence that the damage that has been alleged to have been occurred was not due to negligence or other wrongful act or omission of the carrier

³⁵Carriage by Air Act 1972, Third Schedule, Rule 3 (2)

³⁶Carriage by Air Act 1972, Third Schedule, Rule 3 (3)

³⁷Carriage by Air Act 1972, Third Schedule, Rule 18

³⁸*Ibid.*, Third Schedule, Rule 17(2)

or its servants or agents or such damage was solely due to negligence or other wrongful act or omission of the third party³⁹.

In case of loss or damage or destruction to cargo, a carrier is entitled to raise one of the four defences available with the carrier i.e.

- There was an inherent defect, quality or vice of that cargo
- Act of War and Armed Conflict
- That the defective packing of that cargo performed by a person other than the carrier or its servants or agents.
- The loss was due to an act of war or armed conflict and lastly the loss was due to an act of public authority carried out in connection with the entry, exit or transit of the cargo⁴⁰.

As far as the damage or loss or destruction or checked baggage is concerned, the carrier is entitled to claim the defence that the baggage in question suffered a damage due to an inherent defect, quality or vice of the baggage⁴¹

The first and the second schedule puts a limit on the maximum amount of compensation which the carrier would be liable to pay. As per the first schedule, this amount was 125, 000⁴² francs which was increased upto 250, 000 francs in the second schedule⁴³. This was however subjected to the successful establishment of the defence. The third schedule brings path breaking changes with regards to the limits on the liability and lays down that for any damages arising under Rule 17 (1) not exceeding 100, 000 SDR for each passenger the carrier shall not be able to exclude or limit its liability⁴⁴. But for claims arising beyond 100, 000 SDR, the carrier may have certain defences⁴⁵. The repercussions and interpretation of this provision is discussed in the subsequent chapters. For loss, destruction or damage sustained with respect to baggage, the liability of the carrier shall be limited to the extent of 1, 000 SDR for each passenger unless the passenger during the time of check in had made a special declaration with regards to the value of the contents in which case, the carrier shall be entitled to pay a compensation to the extent of the declared sum⁴⁶. For loss, destruction or damage sustained with respect to cargo, the liability of the carrier shall be limited to the extent of a sum of 17 SDR per kilogram unless the consignor at the time of handing over the consignment or the cargo has made a special declaration with regards to the value of the contents in which case, the carrier shall be entitled to pay a compensation to the extent of the declared sum⁴⁷.

³⁹ *Ibid.*, Rule 21(1)

⁴⁰ *Id.*, Rule 18(2)

⁴¹ *Id.*, Rule 17 (2)

⁴² Carriage by Air Act 1972, First Schedule, Rule 22

⁴³ Carriage by Air Act 1972, Second Schedule, Rule 22

⁴⁴ Carriage by Air Act 1972, Third Schedule, Rule 21(1)

⁴⁵ *Ibid.* Rule 21 (2)

⁴⁶ *Id.*, Rule 22 (2)

⁴⁷ *Id.*, Rule 22 (3)

A novel concept of Advance Payment was also introduced under the Montreal Convention⁴⁸ according to which in the cases of aircraft accidents which result in death or personnel injury to the passengers, the carrier shall, if so required by its national law, make advance payment to the natural person or persons who are entitled claim compensation in order to meet the immediate economic needs of such persons⁴⁹. However the provision also clarifies that payment shall not constitute as recognition of liability and may be offset against any amounts subsequently paid as damages by the carrier.

For the matters of jurisdiction a claimant or the heirs of the deceased passengers must bring an action for damages suffered under Rule 17, 18 and 19 of the first and the second schedules, in the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his 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 destination⁵⁰. Under the third schedule, keeping with the purpose of being a consumer centric legislation, the third schedule provides an additional jurisdiction for the purposes of bringing an action against the carrier for damages suffered in the cases of death or personnel injury. Rule 33 of the third schedule entitles a claimant to bring a suit against the carrier in a place where in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement⁵¹. In the third schedule, the consignor is entitled to enter into arbitration agreement under any of the five jurisdictions specified under Rule 33⁵². A limitation period of two years has also been prescribed⁵³.

Critique of the Third Schedule

Many of these criticisms have not arisen till date in the Indian context but that is primarily because the third schedule has been recently acceded to and till date there is just one case which has arisen under the third schedule.

Not Applicable to Internal Carriage by Air

The Government of India upon acceding to the Montreal Convention 1999, in pursuance of its international obligation extended the provision of the same in the domestic legal system by incorporation into the third schedule. However mere incorporation does not ipso facto extends the provision of the third schedule to internal or domestic carriage by air. The government has to issue a notification in the official gazette for the same, thereby announcing the extension of the provision to domestic carriage⁵⁴. However there has been no such

⁴⁸*Supra* Note 4

⁴⁹*Supra* Note 45, Rule 28

⁵⁰Carriage by Air Act 1972, first and the second schedule, Rule 28

⁵¹Carriage by Air Act 1972, Third Schedule, Rule 33 (1)

⁵²*Ibid.*, Third Schedule, Rule 34

⁵³Carriage by Air Act 1972, Third Schedule, Rule 35

⁵⁴Carriage by Air Act 1972, Section 8

notification till date in the official gazette extending the provision of the third schedule to domestic carriage by air. Consequently, the domestic carriage in India is governed by the first and the second schedule of the Carriage by Air Act 1972 whereas on the other hand the international carriage is governed by the third schedule of the Carriage by Air Act 1972. This leads to an unjustified and inequitable discrimination between passengers of international carriage and passengers of domestic carriage. Such discrimination can be explained with the help of an illustration. For instance international flight is operating from Dubai to Kolkata with a stopover at New Delhi. Unfortunately, the aircraft crashes with passengers and crew on board during the time it was travelling from New Delhi to Kolkata. The international passengers who are travelling from Dubai to Kolkata will be governed by the rules of the third schedule, whereas the domestic passengers who are traveling from New Delhi to Kolkata will be governed by the rules of the second schedule. As a result the carrier's liability with respect to international passenger is unlimited whereas its liability with respect to domestic passengers is limited to the extent of limits prescribed under the second schedule. Similarly different types of defences are available to the carriers at the time when they contest the claim for compensation made by international passengers and domestic passengers and given the vast difference in the nature of the defences available to the carrier under the first and the second schedule on one hand and the third schedule on the other, it would be comparatively easier for the carrier to escape its liability in the cases of compensation made by the domestic passenger in comparison to the international passengers. Apart from these two instances of unjustified discrimination which the non-application of the third schedule to domestic carriage results in, all the benefits brought about by the application of the third schedule doesn't apply to passengers of domestic carriage. Such discrimination is completely unreasonable and unjustified and puts the passengers of domestic carriage at an unfair disadvantage. There is also a misconception that the internal carriage by air is still regulated by the third schedule even in the judiciary. In the Mangalore air crash case⁵⁵, the Single Bench of the Madras High Court has opined that the domestic carriage by India is governed by the third schedule⁵⁶. However this mistake was recently adverted with the passing of Carriage by Air (Amendment) Act 2015 which included the Montreal Convention of 1999 within the realm of the said legislation in the form of the Third Schedule.

Documentation Requirement

As pointed out previously, the third schedule drastically reduces the documentation requirement with respect to both passenger tickets as well as the airway bills primarily due to the fact that the detailed information with regards to the passenger tickets or baggage tickets or airway bill can now be stored electronically and the same has been recognised as a legally valid. It also makes provision for any future means which can be used to store and deliver such information. However as explained in the previous point, the Government of India has not extended the provision of the third schedule to the domestic carriage by air and the same is thus governed by the first and the second schedule of the Carriage by Air Act 1972. Despite this, the air carrier in practice have adopted the rules laid down in the third schedule with regards to the documentation requirements as far as the passenger tickets and airway bill are concerned under domestic carriage is concerned. While issuing passenger tickets or the

⁵⁵National Aviation Company Of India Limited v. S.Abdul Salam, WA.No. 1197 of 2011

⁵⁶*Ibid.*, paragraph 7

airway bills, the air carrier follow the rules laid down in the third schedule in regards to the documentation and content requirements, irrespective of the fact that domestic carriage till date is governed by the first and the second schedule. Unfortunately such a practice has not been challenged till date. However this mistake was recently adverted with the passing of Carriage by Air (Amendment) Act 2015 which included the Montreal Convention of 1999 within the realm of the said legislation in the form of the Third Schedule.

Liability for Passenger's Death or Personnel Injury

A dispute or debate with respect to the interpretation of the provision which provides for compensation for death or personnel injury of a passenger came into a controversial limelight in the very first case it was applied. The provision for compensation merely states that the damages that arise out of death of a passenger or personnel injury to a passenger which is caused to a passenger due to any accident which is caused either on board or during embarking or disembarking, not exceeding 100, 000 SDR for each passenger, the carrier shall not be able to exclude or limit its liability⁵⁷. But for claims of damages beyond 100, 000 SDR, carrier has certain defences⁵⁸. In *National Aviation Company of India Limited v. S. Abdul Salam*⁵⁹ case, this provision was subjected to two reasonably valid but conflicting grounds of interpretation which has led to a wide debate as to the correct interpretation of the provision. According to the first arguments which was made by the claimants and affirmed by the Single Bench of the Madras High Court was that Rule 21 (1) provides for an unlimited extent of liability and that in the event of death or personnel injury suffered by a passenger due to any accident occurred when the passenger was on board the carrier is strictly liable to pay a minimum amount of 100, 000 SDR to the claimants and in case the nature of damages is established to be beyond 100, 000 SDR, then the carrier shall be liable to pay any additional amount which is so established to be beyond in excess of 100, 000 SDR. However this argument suffers from a number of controversial interpretations. Firstly, if the drafters intended to provide for a strict liability of minimum of 100, 000 SDR then that would in effect make a carrier liable to pay 100, 000 SDRs in the case of death as well as in the case of personnel injury, however minor that might be. Therefore again in effect, the legislators, going by this interpretation intended to equate the damages suffered in the event of death of a passenger with the damages suffered by a passenger due to personnel injury received by that passenger in any accident which takes place on board or during embarkation or disembarkation. Practically speaking in such cases, the carrier shall be liable to pay 100, 000 SDRs to the heirs of the deceased passengers and the same liability shall apply for those passengers who suffer a minor injury like a small scratch. Hence this interpretation has been criticized on the grounds that equating the damages suffered in the event of death of a passenger and damages suffered by a passenger due to personnel injury is not justifiable and would in effect create unimaginable amount of financial burden on the carrier and the carrier might go bankrupt in no time.

A stronger argument has been put for by the National Aviation Company of India Limited which was confirmed by the Division Bench of the Madras High Court in this case. They primarily contended that the provision indeed removes any limit on the liability in the event

⁵⁷*Supra* Note 40

⁵⁸*Ibid.*

⁵⁹*Supra* Note 42

of death or personnel injury which a passenger suffers in any accident which takes place on board the aircraft or during embarking or disembarking. However it does not provide a strict liability of minimum 100, 000 SDR. Had this been the intention of the drafters then they would not have made a provision for advance payment because in the event of any accident the carrier would have been liable to pay a minimum of 100, 000SDR irrespective of the actual amount of damages suffered. There would not have been any justification behind providing for an advance payment had the carrier was by default liable to pay a minimum of 100, 000 SDRs. Had that been the case, then the carrier should ideally pay 100, 000 SDR as soon as the accident occurs and thereafter go in for litigation if the claimants claim any amount over and above this 100, 000 SDRs. But according to the carriers, this cannot be a correct interpretation of this provision. The very existence of a separate provision for advance payment with no express mention with respect to a minimum amount of advance payment indicates that the drafters did not intend that there should be a minimum compensation of 100, 000 SDRs in the event of death or personnel injury which a passenger suffers in any accident which takes place on board the aircraft or during embarking or disembarking. The provision unlike the first and the second schedule, indeed removes the limit prescribed on the liability of the carrier, but the carrier is only liable to pay to the extent of the actual damages which are established to have been suffered. Further they also substantiated their contention by pointing out that Rule 21 nowhere uses the term minimum or maximum amount of liability unlike Rule 22 which actually prescribes a limit on the carrier's liability for loss, destruction or damage to goods or baggage or any damage suffered in the event of delay. Therefore the provision does not provide for any minimum or maximum amount of liability. The carrier is liable to pay only the actual damages suffered which can be proved by the claimant. Rule 21 merely puts an embargo on the right of the carrier to claim certain defences.

However there is no final conclusion to this controversial interpretation. The plaintiffs have appealed to the decision of the Division Bench and the appeal is currently pending before the Supreme Court of India. The plaintiffs modified their arguments contending that the carrier is liable to pay a minimum of 100, 000 SDR in the event of death of a passenger. However as far as the personnel injury is concerned, the carrier is liable to pay only till the extent of actual damages suffered. Unless the Supreme Court comes with a final verdict on the matter, this provision will remain to be one of the most controversial aspects of the third schedule.

Advance Payment

As discussed above, the provision for advance payment provides that, in the cases of aircraft accidents which result in death or personnel injury to the passengers, the carrier shall, if so required by its national law, make advanced payment without to the natural person or persons who are entitled claim compensation in order to meet the immediate economic needs of such persons⁶⁰. Indeed it is a novel concept passed with the intention to providing the dependents of the deceased passengers or the injured passenger with some immediate economic relief, nevertheless the provision is so loosely worded that it has the potential to be misused. The very first problem with the provision of advance payment is that there are no guidelines indicating the factors on the basis of which the so called advance payment has to be made. As

⁶⁰Carriage by Air Act 1972, Third Schedule, Rule 28

a result, the carrier may choose to be guided by any factors they deem right. This was seen in the Mangalore air crash case, wherein the National Aviation Company of India Limited, the defendants made the advance payment on the basis of economic loss, age and income of the passengers, the extent of damages suffered, etc. These factors are usually considered under the tort law for the purposes of determining the amount of compensation to be paid to the heirs of a deceased person. As a result, the amount of advance payment varied from Rs 5, 00, 000/- to 10, 00, 000/-. One of the issues in the case was whether such factors can be considered for the purposes of determining the amount of compensation. Though the Single Bench held in negative, but the Division Bench of the Madras High Court accepted these factors as proper factors to be considered. However the matter at present is pending before the Supreme Court. Nevertheless, unless certain factors are identified on the basis of which this advance payment can be made, the carrier can rely on any factor existing under other laws for the purposes of calculating the amount of compensation, or may even develop some guidelines on the basis of which such advance payment has to be made.

The rule of advance payment not only fails to provide for concrete or indicative guidelines for the purposes of making advance payment, it also fails to provide for a minimum amount of advance payment. Consequently, the carriers in the event of any aircraft accident may pay a small meagre amount as advance payment and thereafter prefer to contest the claim for final compensation in the court. A pertinent point to note here is that the carriers are financially sound and can bear the burden of contesting the claims in the courts of India for years together. However it cannot be denied that the not all the passengers would have the equivalent financial capacity to contest a claim for compensation for such a long time. The carrier in pursuance of its obligation may pay a small meagre amount as advance payment and thereafter go on contesting the claim in the court. Many at times, such meagre amount of advance payment may not be sufficient enough to meet the immediate economic needs of the heirs of the deceased passenger or the injured passenger. Hence the entire bonafide objective behind the provision has the potential to be defeated at the hands of the carrier.

Another argument which has been widely made with regards to the interpretation of the provision is that the provision clearly states that the advance payment has to be made, if required by the national law, in the cases of aircraft accidents. There has been an international debate on the interpretation of the term 'aircraft accident'⁶¹. Many argue that the term 'aircraft accident' has been deliberately included to mean and have a restrictive application i.e. the carrier is not entitled to pay advance payment for each and every case of accident where in a passenger dies or suffers any injury either on board or during embarking or disembarking⁶². The term 'accident' under Rule 28 is preceded by the word 'aircraft' and hence the scholars argue that a serious nature of accident was contemplated by the drafters when they provided for advance payment. Nevertheless, even these arguments are very vague and unsupported. The interpretation of the term aircraft accident becomes all the more difficult due to the absence of any provision defining the meaning or explaining the scope of

⁶¹Pablo Mendes De Leon and Werner Eyskens, *The Montreal Convention: Analysis of Some Aspects of the Attempted Modernization And Consolidation Of The Warsaw System*, 66 J. Air L. & Com. 1155 2000-2001, See also Idorenyin Edet Amana, *The Montreal Convention of 1999: Problems And Prospects*, Unpublished LLM Dissertation, Institute of Air and Space Law, McGill University, March 2002, (Last Visited September 2, 2013), See also, Elmar Guemala, MONTREAL CONVENTION,

⁶²*Ibid.*

the same. Hence the provision of advance payment suffers from the vice of being very loosely worded and carries the potential of being misused.

Burden of Proof for Establishing Damage due to Delay has reduced

Under the first and the second schedule in order to avoid damages claimed by the carrier, the burden is on the carrier to show that the carrier had taken all necessary measures to reduce or avoid the damage⁶³. However under the third schedule, the carrier for the purposes of contesting the claim, the carrier has to establish that he has taken all reasonable steps to avoid the accident which caused the delay⁶⁴. Hence the burden of proof has reduced and the carrier has all the more scope to escape his liability. Therefore provisions like these takes away the benefit intended to be accorded to consumer protection legislation.

Reduction of the Severity of Sanction for Non-Compliance with Documentation Requirement

With regards to the carriage of cargo, the first and second schedule has enormous requirements as far as the documentation was concerned⁶⁵. If the carrier fails to comply with any of the conditions and subsequently any accident or event occurs wherein the cargo is damaged, lost or destroyed, then the carrier shall be liable and the limits prescribed shall not be applicable⁶⁶. Hence if the carrier did not comply with the documentation requirement with respect to cargo and thereafter if the consignor suffers any damage due to damage loss or destruction of the cargo, then the carrier could not have been able to take the benefit of the limits prescribed on the liability and would have been liable to an unlimited extent. However under the third schedule, this severity has been taken off. The documentation requirement has been drastically reduced and so is the sanction ensuring the compliance with these requirements. Under the third schedule, a carrier in the cases of failure to comply with the provisions of documentation with respect to cargo or rather cargo receipts or airway bills and in the event of any loss, destruction or damage to the cargo, the carrier shall be liable but subject to the limit prescribed in the schedule⁶⁷ i.e. to the extent of 17 SDRs per kilogram⁶⁸. Therefore the third schedule in effect takes away the severity of sanction which existed under the first and the second schedule which ensured that the carrier take special attention and care in complying with the documentation requirements with respect to the cargo. This might even lead to problems for deciding compensation. For instance the carrier fails to record the weight of the consignment or cargo and subsequently a part of the consignment is destroyed. Unless the carrier maintains a proper and legally acceptable record of the weight of the consignment, there would not be conclusive means to determine the same. In such cases the question or rather debate with regards to the quantum of compensation which the carrier is entitled to pay may arise.

⁶³Carriage by Air Act 1972, First and Second Schedule, Rule 20 (1)

⁶⁴Carriage by Air Act 1972, Third Schedule, Rule 19

⁶⁵Carriage by Air Act 1972, First and Second Schedule, Rule 4 to 8

⁶⁶*Ibid.* Rule 9

⁶⁷*Supra* Note 52, Rule 9

⁶⁸*Ibid.*, Rule 22(3)

Jurisdiction

The first and the second schedule incorporated the four jurisdictions as the appropriate forums where the a claimant can bring an action for the damage suffered on account of death of a passenger, personnel injury to a passenger, loss, destruction or damage to goods and luggage or delay. These jurisdictions are the courts having jurisdiction where the carrier is ordinarily resident, or has his 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 destination⁶⁹. With the advent of the third schedule, a fifth jurisdiction was incorporated keeping in mind the objective of the giving a better protection to the users of the air carrier services. Hence the passengers or the heirs of the deceased passengers were given the option of filing a claim for compensation in either of the four or five jurisdiction respectively. However according to the current practice adopted by the carriers, the entire beneficial purpose behind providing numerous jurisdictions has been defeated. In the present times, the carriers very categorically include an ***exclusive jurisdiction clause*** as a part of its terms and conditions. Such clauses restrict the forum to one of the four or five above mentioned jurisdictions, as the case may be, where a claimant can bring an action for the purposes of claiming damages or compensation for the damage suffered under the Carriage by Air Act 1972. Though such exclusive jurisdiction clauses are often challenged before the courts but its validity has been upheld by the courts in numerous judgements. In *Interglobe Aviation Limited v. N Satchidanand*⁷⁰ the Supreme Court relying upon an precedent⁷¹ observed that so long as the parties to a contract do not oust the jurisdiction of all the courts which would otherwise have a jurisdiction to decide the cause of action under the law, it cannot be said that the parties have by their contract ousted the jurisdiction of the court by agreeing to submit their dispute to only one or few of the competent jurisdiction. However if on the other hand the parties agree to submit their dispute to a jurisdiction which would not otherwise be a proper jurisdiction to decide the dispute arising out of contract, then such clause must be declared void as being against public policy⁷². The court in the present case also observed that the exclusive jurisdiction clause is a standard clause which is made applicable to all the contracts of carriage irrespective of the place where the cause of action arose⁷³. Such exclusive jurisdiction clause is further supported by the fact that there is nothing in the three schedules which would otherwise prohibit the carrier from restricting the application of the multiple jurisdictions for the purposes of entertaining a case for compensation. Hence the carriers have commonly adopted this practice of depriving the consumers of the benefit of having the multiple jurisdictions as their options and ultimately defeating the objective behind providing numerous jurisdictions.

Another grey area with respect to the jurisdiction which remains unresolved till date is with respect to the determination of jurisdiction in the cases of online booking. Such a problem may arise in those cases where the exclusive jurisdiction clause is not included as a part of the terms and conditions of a contract of carriage. Practically speaking amongst all the four or five jurisdictions the most common and convenient jurisdiction which a claimant invokes for

⁶⁹*Supra* Note 52, Rule 28

⁷⁰*Interglobe Aviation Limited v. N Satchidanand*, Civil Appeal No. 4925 of 2011

⁷¹*A.B.C Lambart (P) Limited v. A.P. Agencies* 1989 2 SCC 163

⁷²*Ibid.*, paragraph 14

⁷³*Ibid.*

the purposes of claiming damages under the Carriage by Air Act 1972 is the jurisdiction where the contract of carriage has been concluded. However in the cases of online booking the web page of the carrier is used for making a confirmed reservation. In such cases of online booking it is very difficult to determine where the other contractual partner is located. Location of the server cannot be regarded as an appropriate place where the contract of carriage has been included or where the principle place of the carrier can be regarded to have been located. Hence determining the jurisdiction in the cases on online or electronic booking is a dicey and a grey area till date.

Arbitration

The third schedule entitles the consignor to enter into arbitration with the carrier for the purposes of settling a claim for compensation for the damage suffered due to loss, damage or destruction of cargo⁷⁴. Though a novel concept incorporated with the intention of providing a better protection to the consumers and giving them an option for an inexpensive and speedy remedy to their dispute, but the provision suffers from various lacunae of its own. First of all it is limited to claim for compensation for loss, damage or destruction suffered to cargo. The provision of arbitration could have been extended to other cases of damage as well. But there is no justification for not doing so. Going by the underlying principle and objective of providing a better protection to consumer, the provision for arbitration could have been extended to other cases as well. In fact they would have been more useful in the cases of determination and settlement of amount of compensation in the cases of death or personnel injury to the passenger where in an early settlement would always be beneficial. Secondly, another problem is with regards to the place of arbitration. Rule 34 categorically states that the arbitration should take place at any one of the location specified under Rule 33. Rule 33 has provides for five jurisdiction including the fifth jurisdiction which can be exclusively invoked only in the cases of death or personnel injury to a passenger. This implies that if a consignor prefers to pursue ordinary litigation for the purposes of claiming compensation, he or she has the option of four jurisdictions, but if the same consignor prefers to enter into arbitration proceedings, then that person has the option of conducting the proceedings at any of the five jurisdictions including a forum which is ideally available for only claiming compensation for death or personnel injury. Such discrimination is uncalled and unjustified and unreasonable.

India has the proud history of having engaged into general and civil aviation at a very early stage. However absence of a proper, concrete legislation to govern the liability of the air carrier had always handicapped the judiciary in making a justifiable determination of the cases which related to the fixing the quantum of relief that should have been granted in the cases of death or personnel injury to a passenger or in the cases of damage, loss or destruction to goods and cargo. Therefore there was a dire need to have a legal framework which would provide for a liability regime to fix and govern the liability of the air carriers in the above mentioned circumstances.

With the advent of the Carriage by Air Act 1972, this need was met and India had a concrete liability regime for the purposes of governing liability of the air carriers. As India went ahead

⁷⁴*Supra* Note 52, Rule 34

with subsequent ratification and accession of the Warsaw Convention as amended by the Hague Protocol and the Montreal Convention 1999, respectively, India in pursuance of its international obligations undertaken under these international conventions, incorporated the provisions of these conventions by way of incorporating the same in three schedules annexed to the main text of the Carriage by Air Act 1972. This legislation along with its schedules was a unique legislation in itself and provided a concrete liability regime. It brought predictability and certainty in the air carrier's liability regime by fixing the cases and the maximum limit on the liability of the air carrier. It was highly appreciated for its clarity as it clearly demarcated the jurisdictions where the cases against air carriers which arises under this legislation can be brought about and most importantly it specifically excluded the provision of the other domestic legislations or tort law which governed the determination of the amount of compensation in the cases of death of a passenger. Its mandatory requirement of states ensuring that the carriers take adequate insurance and provision for advance payment if the same is required by the national law, were novel concepts introduced to ensure that the consumers of the air services and/or their dependents are not left without adequate financial relief in the event of death of such consumers or personnel injury or damage, loss or destruction of the goods or cargo of such consumers.

However despite being much needed relief, the third schedule of the Carriage by Air Act 1972 still suffers from numerous lacunae which come in the path of providing justice to the consumers who suffer a loss under this legislation. These impediments or lacunae's have been discussed above. One of the chief reasons for the same is the generality of the provisions. The first and foremost reason behind these impediments lies the failure on the part of the drafters of the Carriage by Air Act 1972 to realize that the international conventions merely provide for general provision or a broad framework containing the essential principles and means of fixation of liability and determination of the amount of compensation. Any international convention can never provide for a stringent or strict and detailed legal framework for governing air carrier's liability otherwise it would not receive enough participation and would in many cases be taken as a means to endanger the sovereignty of a state. Whenever a state party to an international convention, in pursuance of its obligations undertaken therein, incorporates the provision of the same in the domestic legal framework, it has to supplement the same by way of detailed rules and regulations for the purposes of the effective implementation of the principle contained in the conventions and consequently fulfil its international commitments undertaken therein in the true sense. However the drafters failed to realize this fundamental concept behind ratification of the international conventions. This claim can be further substantiated by the second reason which is contained in the Preamble of the Carriage by Air Act 1972. The Preamble of the act, which lays down the primary objective and often the guiding principle behind the Act, clearly specifies the sole reason behind enactment of this legislation is to meet the commitments undertaken by India under the Warsaw Conventions, Warsaw Convention as amended by the Hague Protocol and the Montreal Convention of 1999, instead of providing for a justified regime to govern air carrier's liability in India. Meeting of international commitments by way of domestic legislation is indeed essential but cannot be the sole objective. The international conventions were enacted for the prime purpose of providing adequate financial relief to the consumers of air services and not to ensure that the state parties follow the black letters of the conventions without understanding the spirit behind the same. The drafters failed to realize

that a concrete domestic legislation to govern the liability of the air carriers in the cases of death or personnel injury or in the cases of loss, destruction or damage to goods and luggage was required to provide a better protection to the consumers of the air services and guarantee adequate financial relief in the cases that may arise under the act. Rather for the drafters the chief and the only reason behind having this regime is to meet its international commitments. As a result the verbatim copy of the international conventions in the domestic legal framework, the present liability regime is very general and vague and till date remains unsupplemented by detailed rules and regulations. The generality of the provisions have given rise to numerous ambiguous interpretations of very crucial provisions. Consequently these ambiguous provisions carry the potential of being misused by the air carriers in order to escape their liability under the act and the entire objective behind providing a better protection to the consumers can be said to have been defeated.

THE CARRIAGE BY AIR (AMENDMENT) ACT, 2009

India became 91st country to have ratified Montreal Convention 1999. Director General of Civil Aviation (India) has deposited with ICAO on 01-May-09, the Instrument of Accession by India to the Convention for Unification of Certain Rules for International Carriage by Air done at Montreal on 28-May-1999. The Convention will become effective for India on 30th June 2009, being the 60th day after depositing the Instrument in accordance with its Article 53 Para (7) of the Convention. As per ICAO statement on this occasion, the State of India has ratified in all 43 International Air Law Instruments and its standing has been found excellent as on May 1, 2009, from the view point of legislation of air law instruments into national laws. The Montreal Convention, 1999 has been incorporated into the Carriage by Air (Amendment) Act, 2009 in India.

Salient Features:

- The Carriage by Air Act, 1972 covers the provisions of the Warsaw Convention, 1929 and the Warsaw Convention as amended by the Hague Protocol, 1955 relating to the liability of the carriers towards passengers and shippers.
- The Montreal Convention, 1999 supersedes all previous international instruments on air carrier liability.
- The Montreal Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward.
- International carriage means any carriage in which the place of departure and the place of destination are situated:
 - Within the territories of two State Parties; or
 - Within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a Party to the Convention.
- The Montreal Convention, 1999 has been ratified by 91 countries so far.
- Since Indian carriers are operating to most of these countries, they are required to maintain the required insurance and pay higher premium.
- For death of a passenger, there is a strict liability of 100,000 SDRs.
- The carrier shall not be liable beyond this limit if it proves that:

- Such damage is not due to negligence or other wrongful act or omission of the carrier; or
- Such damage is solely due to negligence or other wrongful act or omission of a third party.
- If the carrier proves that the damage was caused or contributed by the negligence and wrongful act or omission of the passenger or the person claiming compensation, it shall be exonerated to the extent of such negligence or wrongful act or omission.
- The carrier is liable for damage occasioned by delay in the carriage of passengers, baggage or cargo.
- The limits of liability shall be reviewed if the inflation factor had exceeded 10%.
- In case of death or injury of passengers, the carrier shall make advance payments without delay to natural persons.
- Fifth jurisdiction – State Party in which the passenger has his principal and permanent residence to which the carrier operates air services.
- Any action for damage shall be brought within two years.
- A State Party may require the carrier to furnish evidence that it maintains adequate insurance.

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AIR CARRIER LIABILITY FOR PASSENGER DEATH OR INJURY IN INDIA

With the developments in civil aviation in the first half of twentieth century, one of the concerns to emerge early in the field was liability for damage caused to the parties during the air transportation. Since the civil aviation was in its rudimentary stage of development, mishaps were common resulting in death of or injury to passengers and damage to baggage and goods. International deliberations in 1920s resulted in the Warsaw Convention 1929, which was to deal with the liability of carrier for damage caused during air transportation with an objective of having certain degree of uniformity in the laws applicable to different States. Though the Convention speaks about the liability of carrier, it is more carrier oriented rather than victim oriented. This is reflected in wide range of defences and limits of liability available to carrier under the Convention. The obvious reason for this is that civil aviation and aviation technology were still in the initial stage of development, and imposition of heavy burden on air carriers would have disincentivised investments and developments in the sector.

However with the developments in aviation sector and consequential increase in revenue generated by the air carriers, it was found that the continuation of carrier oriented regime would be unfair from the public perspective. This awareness has resulted in amendments to the Warsaw Convention in the form of Hague Protocol 1955 , Guadalajara Convention 1961 , Guatemala City Protocol 1971 and four Montreal Protocols of 1975 . These subsequent instruments reduced the defences available to the carrier, and increased the sphere of application and limits of liability to further the interests of victims. Unfortunately, the amendments of Warsaw Convention were not uniformly accepted by all the State parties to the Convention. Consequently, there has been a complete diversification of air carrier liability regime in different parts of the world. In order to harmonize and modernize the air carrier liability regime in the international level, the Montreal Convention 1999 has been entered. However, this did not solve the problem, since all the parties to Warsaw system did not become parties to the Montreal Convention. Thus Montreal Convention ended up in adding one more parallel regime to further diversify the international carrier liability law. Once all the parties of Warsaw system become parties to Montreal Convention, the earlier regime would abrogate to establish uniformity.

India is a party to Warsaw Convention, Hague Protocol and Montreal Convention. Consequently, the Carriage by Air Act 1972, which is enacted for implementing the international norms in Indian domestic level, contain three sets of liability norms. Section

3 read with First Schedule outlines the Warsaw Convention norms, Section 4 read with Second Schedule outlines the Hague Protocol norms, and Section 4A read with Third Schedule outlines the Montreal Convention norms as applicable to international carriage in India. Part I, II, and III of the Annexure provide the list of States which would be governed by Warsaw Convention, Hague Protocol and Montreal Convention respectively. Section 8 of the Carriage by Air Act empowers the Central Government to come out with the notification to extend carriers' liability norms to the domestic carriage with or without modifications.

Liability Norms relating to Death or Injury

Air carriers are liable for death or injury sustained by the passenger during transportation by air under all three schedules. While First and Second Schedules refer to death, wounding and bodily injury, the Third Schedule makes a reference only to death and bodily injury. There are debates about the interpretation of 'bodily injury' especially regarding the status of psychological injury being the part of bodily injury. It is more or less settled ¹⁴in most of the States that mere psychological injury is not compensable. However, the psychological injury, in order to be compensated, needs to emerge from physical injury.

The victim needs to prove that damage is caused by the accident which took place on board the aircraft or in the course of any of the operations of embarking or disembarking. Thus mere proof of death or injury is not sufficient, but the plaintiff has to prove the occurrence of accident, which is ¹⁶interpreted as 'happening of unexpected event', causing the damage. In addition, the concerned accident must have occurred on board the aircraft or in the course of embarking or disembarking, which are the questions of fact ¹⁷to be established separately in each case.

Limits of liability of carrier under the three schedules are different. Under First Schedule, the maximum limit of liability for passenger death and injury ¹⁸is fixed at 1,25,000 francs. However, there can be a special contract between the passenger and the carrier to increase the limit. In addition, if there is willful misconduct or a default equivalent to willful misconduct by the carrier which causes the damage, the limit of liability is lifted to expose the ¹⁹carrier to unlimited liability. Second Schedule increases the limit of liability for passenger death or injury to 2,50,000 francs. Similar to First Schedule, the limit can be increased by a special contract. Finally, an intentional act or omission of the carrier to cause damage or his reckless act or omission with the knowledge that damage would probably result would lift the limit of liability of carrier, if the damage is resulting from such act or omission. Same rule on lifting the liability limit is applicable under both First and Second Schedule, if servants or agents of carrier are found within the sphere of application of the provision.

Third Schedule introduces a different scheme of liability consisting of two tiers. Under the first tier, carrier is strictly liable up to 1,00,000 SDR. He cannot avail the defences or limits of liability except the defence of contributory negligence of the victim. Under the

second tier, carrier is liable over and above 1,00,000 SDR on the basis of fault liability. If the carrier wants to escape liability under the second tier, he has to prove either the absence of negligence or other wrongful act or omission on his part, or that the damage is solely caused by third party's negligence or other wrongful act or omission.

Contributory negligence of the victim stands as a defence available to the carrier under all three schedules regarding the passenger death or injury. This defence has got the effect of either complete or partial exoneration from liability depending on the extent of contributory negligence. In addition, First and Second Schedules provide the defence of taking all necessary measures to avoid damage or impossibility of taking such measures by the carrier, which is not available under Third Schedule in case of passenger death or injury. This is of particular relevance as it has the effect of completely changing the nature of liability from fault based liability (under First and Second Schedules) to strict liability with the only exception of contributory negligence of victim (under Third Schedule). The above discussion clearly outlines the differences in the regime set forth under three schedules of Carriage by Air Act. This has resulted in the emergence of several critical issues in air carrier liability regime adopted by India. The major reason for problems is found in the conflicting basis of three international instruments, Warsaw Convention, Hague Protocol and Montreal Convention, on the basis of which the Carriage by Air Act is enacted. As mentioned above, the Warsaw Convention (First Schedule) is fundamentally carrier oriented and the Montreal Convention (Third Schedule) is completely victim oriented. Hague Protocol (Second Schedule) stands somewhere in between the two extreme points.

Role of Judiciary

First and Second Schedules provide four jurisdictions in which the plaintiff can file case seeking compensation. The jurisdictions include the ordinary residence of the carrier, principal place of business of the carrier, place of business of the carrier wherein the contract of carriage is made and the place of destination. Exercise of jurisdiction by any other State or by a State that's not a Contracting Party to the Warsaw Convention would result in rejecting the enforcement of the decision on the ground of forum not having jurisdiction to hear the case. A glance at these jurisdictions show that they are chosen by giving due weightage to the interests of carrier. Third Schedule adds fifth jurisdiction in the form of place of principal and permanent residence of the plaintiff to or from which the carrier operates services for the carriage of passengers by air.

The fifth jurisdiction under Third Schedule gives due consideration to victims' interest by allowing the victims to choose the most advantageous ³²jurisdiction of their own respective State. It is of added advantage to those victims and their families who are handicapped to move out of their country to seek compensation from carriers. However this may result in discrimination between victims of same accident depending on the State to which they belong, since the applicability of respective Schedule depends on the concerned State's ratification of corresponding international instrument/s. Purely looking from victims' perspective, discrimination does not seem to be on any sound premise but

only due to the sheer chance of victim hailing from one particular State as against another.

Another question that has arisen on the jurisdiction under the Carriage by Air Act is, whether the consumer forum are courts of competent jurisdiction under the Act to entertain the cases? In other words, the question is about the possible overlap between the Consumer Protection Act and Carriage by Air Act. This question was contested in many cases, finally reaching the Supreme Court for determination in *Trans Mediterranean Airways v. M/s. Universal Exports and Another*⁷⁵. While answering the question in affirmative, the Supreme Court held that “Section 3 of the Consumer Protection Act gives an additional remedy for deficiency of service and that remedy is not in derogation of any other remedy under any other law.” Thus, the consumer forum are the courts of competent jurisdiction under Carriage by Air Act. However, by virtue of Section 5 of Carriage by Air Act, the above logic is not applicable in case of death of the passengers consequent to aviation accidents. Section 5 has the effect of excluding the liability of carrier for death under the Fatal Accidents Act 1855 and any other enactment or rule of law in force in India except the three schedules of Carriage by Air Act. Hence, the consumer forums are not competent to deal with the cases involving the death of passengers

IMPORTANT CASES

1. Kandimallan Bharathi Devi and Others v. The General Insurance Corporation of India⁷⁶

In *Kandimallan Bharathi Devi and Others v. The General Insurance Corporation of India*, the Andhra Pradesh High Court had to decide on the question, whether the benefit received out of the personal accident insurance policy has to be set-off in computing the compensation under the Carriage by Air Act? While answering this question in negative, the Court ruled that compensation under Rule 22 (1) is the minimum compensation in case of death subject to the higher limit under special contract between the carrier and passenger. Hence, the Court did not base the computation of compensation for death on any extrinsic factor, rather went by the logic that death of passenger, irrespective of his/her status, would result in reaching the full limit of compensation set forth under Rule 22(1).

2. Airport Authority of India v. Ushaben Shirishbhai Shah⁷⁷

In this case, despite poor visibility in Ahmedabad airport, Air India pilots decided to land the aircraft resulting in accident. Though this accident happened in 1988, it took 22 years of litigation for final determination in 2010 by the Gujarat High Court. Plaintiff's claim to lift the limit of liability of the carrier under the Second Schedule (which was the applicable law) was allowed by the Court, since there was a reckless act of carrier's employees (pilots) causing damage. However, the Court went on to

⁷⁵ (2011) 10 S.C.C. 316 (India)

⁷⁶ A.I.R. 1988 A.P. 361

⁷⁷ (2010) 1 G.L.R. 32

calculate the compensation on the basis of victim's income in 1988 coupled with other extrinsic factors and awarded a compensation of Rs. 7.53 lakhs. This is certainly much less the amount than what is normally expected in an aviation claim in other States.

3. S. Abdul Salam v. Union of India and National Aviation Company of India Ltd⁷⁸.

After the Third Schedule was incorporated in the Carriage by Air Act, the first major incident to test the norms on computation of compensation under the Third Schedule is Mangalore air crash of 2010. Soon after the accident, the carrier, Air India, negotiated compensation to be offered to the victims. The compensation offered was on an average Rs. 80 lakhs, but individually varied from Rs. 7.757 crores to Rs. 35 lakhs depending on victims' positions. One of the victims, Mohammed Rafi, was a 24 year old working at UAE as a salesman with a monthly salary of Rs. 25,000. The legal heirs of Mohammed Rafi were offered a sum of Rs. 35 lakhs as full and final compensation for his untimely death. Unsatisfied with the offered sum, the victim's family approached the Kerala High Court resulting in the case, *S. Abdul Salam v. Union of India and National Aviation Company of India Ltd*⁷⁹.

The plaintiffs' contention in this case was that the principle of strict liability is applicable to the extent of 1,00,000 SDR (approximately Rs. 75 lakhs) while deciding the liability under Rule 21(1) of the Third Schedule. They went on to contend that the proof of extent of damage sustained is required only in case of bodily injury, which is partial damage, but not in case of full damage like death.

In case of full damage (death), the compensation shall be full, that is, 1,00,000 SDR. Rule 26 was used in support of this argument, since it states that "Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in these rules shall be null and void..." The Single Judge while agreeing to the above argument, observed that the factors such as age, income, earning capacity, loss of dependency, loss of future prospects etc. need not be taken into consideration, since the liability norms under the Third Schedule do not make any specific reference to them. The proof of extent of damage caused by injury becomes irrelevant when the injury leads to death. In addition, the Court relied on the statement of Minister for Civil Aviation during the parliamentary debates leading to the amendment of Carriage by Air Act in 2009 to incorporate Montreal Convention 1999. While answering the question whether there would be a distinction in compensation between a passenger travelling in economy class and a passenger travelling in business class, the minister replied that all passengers would be treated equally, since compensation is guided by the principle of equity. Assessing all these cumulatively, the Court concluded that the plaintiffs are entitled to a minimum of 1,00,000 SDR on the basis of no fault liability under the Third Schedule.

The respondents went on appeal against the above decision to the division bench of

⁷⁸ .L.R. 2011 (3) Ker. 457

Kerala High Court in *National Aviation Company of India Ltd. v. S. Abdul Salam*⁸⁰. The Division Bench overruled the Single Judge's decision to hold that there is no minimum compensation fixed for death under the Third Schedule. For this conclusion, it relied on multiple factors. First, Rule 21(1) deals with the compensation not only for death but also for bodily injury as specified under Rule 17(1). The interpretation of minimum compensation of 1,00,000 SDR for death would by the same logic be transported to bodily injury, which results in absurdity. Second, the Rule 21(1) is not without any exception, since applicability of Rule 20 exonerates carrier's liability even under Rule 21(1). This shows that 1,00,000 SDR under Rule 21(1) is not a hard and fast rule. Third, Rule 28 while obligating the carrier to make advance payments to meet the immediate economic needs of the victims in ⁴⁶case of death or injury of passengers does not stipulate minimum amount to be paid as advance. According to the Court, if Rule 21(1) is intended to provide minimum compensation, Rule 28 should have fixed a minimum sum as advance payment.

For the above reasons, the Court held that Rule 21(1) does not stipulate minimum compensation to be paid but has the effect of only preventing the carrier from taking the defence of want of negligence within the limit of 1,00,000 SDR. The effect of Rule 21(2) is that in cases where the claimant can prove the damage caused beyond 1,00,000 SDR, the carrier can invoke the defences to exonerate from liability over and above 1,00,000 SDR. Therefore, the claimant needs to prove the extent of actual damage suffered to get proportionate compensation even in case of strict liability under Rule 21(1). In order to assess the extent of damage, the factors like age, income, earning capacity, loss of dependency, loss of future prospects etc. need to be taken into consideration.

Aggrieved by the verdict of the Division Bench, the claimants have appealed to the Supreme Court. One of the major issues in this regard before the Supreme Court is the interpretation of differing languages of Third Schedule as against the First and Second Schedules. While First and Second Schedules ⁴⁷use the words "...liability of the carrier for each passenger is limited to the sum of..." , the Third Schedule mentions "...not exceeding one lakh Special Drawing Rights for each passenger, the carrier shall not be able to exclude or ⁴⁹⁵⁰limit its liability..." in case of death or bodily injury. Thus, the First and Second Schedules expressly mention about the limit of liability, which is not found under the Third Schedule. Therefore, the Supreme Court's stand on the issue of computation of compensation is eagerly awaited.

Carriage Liability under Indian Law

Section 8 of the Carriage by Air Act empowers the Central Government to apply the above-discussed liability norms of international carriage to the domestic carriage with or without exceptions, adaptations and modifications by notification in the Official Gazette. While exercising this power, the Central Government had notified the

⁸⁰ .L.R. 2011 (4) Ker. 4.

Second Schedule in 1973 and the ⁵²Third Schedule in 2014 with modifications. Since the 2014 Notification expressly supersedes the 1973 Notification, the Third Schedule's liability norms as modified in 2014 Notification apply currently to the domestic carriage in India.

Interestingly, the 2014 Notification modifies the Third Schedule substantially for application to the domestic air carriage. The sphere of application of liability norms has been reduced down by incorporation of several exceptions under Rule 2 of Third Schedule. Such exclusion also includes the carriage of employees of the carrier who are performing duties on board the aircraft. Thus, the flying personnel of the domestic air carriage are entitled to relief for any damage caused to them under the labour laws and not under the Carriage by Air Act.

As far as the liability for the death of or injury to the passenger is concerned, though the norm of unlimited liability of the carrier is continued, the 2014 ⁵⁴Notification reduces the strict liability of the carrier to Rs. 20,00,000. Thus, the carriers are entitled to the defences available under the Third Schedule once the limit of Rs. 20,00,000 crosses. Added to this, the 2014 Notification ⁵⁵exempts the carrier from taking mandatory liability insurance coverage. These modifications clearly reflect the intent of Central Government to favour the domestic air carriers with a view to promote civil aviation.

The above changes in the liability regime may find support in light of ailing aviation industry in India. However looking from the consumers' perspective, they are problematic. Such a differential norm of liability may end up in being unjustifiable discrimination between the two passengers of equal status, one performing the international carriage and the other performing the domestic carriage in the same aircraft. Thus the differential liability norms lead to arbitrary discrimination between the passengers in practical terms.

MANGALORE CRASH AND IMPLEMENTATION OF MONTREAL CONVENTION OF 1999

Before look at air carriers Liability issue in India let's take a look at Mangalore crash in India. The recent Mangalore crash of an Air India flight from Dubai brought to the Fore front the yet untested liability of the air carriers and the compensation due to passengers under the Montreal Convention of 1999 ("Montreal Convention") which was ratified by India only last year.

1. Until recently, India was a signatory to the antiquated Warsaw Convention of 1929 ("Warsaw Convention") as amended by the Hague Protocol of 1955 ("Hague Protocol") which secured significantly low limits of liability on the carrier in case of death or injury to the passengers or upon delay, lost or damaged baggage. By virtue of the Carriage by Air (Amendment) Act, 2009 revising the Carriage by Air Act, 1972(the "Act"), India has ratified

the Montreal Convention securing higher levels of compensation and obviating discrimination for Indian passengers.

1.0 Status prior to accession of Montreal Convention

1.1 Liability

The Warsaw Convention and Hague Protocol regime provided a maximum liability of air carriers for bodily injury or death of passengers of 250,000 francs (approximately \$16, 6663). This was not only a significantly low compensation but the regime also did not make provision for any advance payment by the carrier leaving claimants to go against the carriers to seek compensation. This is evident from the October 2009 ruling⁴ in respect of a crash of a domestic flight of Indian Airlines in 1988 wherein the Gujarat High Court determined an amount of Rs. 7.53 lakhs (approximately \$16,700) as compensation based on the income of the victim in 1988 viz., Rs. 1 lakhs (approximately \$2,200), likely residual life, potential expenses during residual life etc. and awarded a 9% interest from the date of filing the appeal. The other interesting aspect of the judgment is the heavy reliance on verdicts of motor vehicle claims.

1.2 Jurisdiction

The victim or their families were entitled to take action against foreign carriers in the territory of one of the signatories of the Warsaw Convention which could be either where –

- (i) The carrier maintains its principal residence,
- (ii) The carrier has its primary location of business,
- (iii) The contract is made, or
- (iv) The flight intended to have its final destination.

The Warsaw Convention effectively left it to the claimants, who were not residents of the above states, to pursue a claim against such carriers in a jurisdiction other than their own which was not always feasible for claimants.

2.0 Status subsequent to accession of Convention

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

2.1 Two-Tier Liability

It introduced a two-tier liability system: (i) a first tier of strict liability for damages of up to 100,000 SDR5 (approximately \$155,000) and; (ii) a second tier of liability based on the presumed fault of the carrier in which case there is unlimited liability.

It is pertinent to note that while the Montreal Convention provides for a first-tier

100,000 SDR as a strict liability, this amount does not reflect the minimum liability of the carrier. In other words, the Convention has left the determination of the level of damage to the local law. As such, if the courts in India rule that the damage sustained by each victim in the Air India crash is up to 100,000 SDR, the carrier cannot escape liability on the ground that it is not responsible for the accident.

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

2.2 Jurisdictional Flexibility

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

3.0 Impact on compensation in the recent Mangalore crash

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

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

Given the low compensation, it is likely that the next of kin of some of the deceased passengers and the injured passengers would seek a higher final compensation which would be at least close to 100,000 SDR or \$155,000. It appears that NACIL is attempting to determine any further compensation on the basis of “proof of loss” implying that a child and an adult placed low in the economic strata would qualify for less compensation than an adult who is healthy and was from a good economic status⁷, since such amount would be much lesser than 100,000 SDR and this would reduce NACIL’s liability. Assuming the claimants

file the claim in India, it will be interesting to see whether the courts assess the strict liability on the basis of the “proof of loss” basis or be more liberal in granting compensation. The final compensation determined would set the base line for compensation in future liability cases.

ISSUES

There are no requirements that airlines must meet regarding delayed or cancelled flights. Each airline has its own policies. It's important to know that airlines are not required to compensate passengers whose flights are delayed or cancelled.

If your flight is delayed or cancelled, most airlines will book you on the next flight to your destination. But also try asking them to book you on another airline and see if they will endorse your ticket so it can be used on the other airline. (No airline is required to do this, however), and the airline will compensate passengers for meals or phone calls if you're delayed. Again, airlines are not required to do so, but some may, depending on the circumstances. You can always write a letter to the airline about delay and cancellation problems you had, explaining your experience and asking for some sort of compensation. Often, airlines will send travel vouchers or coupons.

Lost Baggage

Airlines are constantly making any effort to avoid luggage lost, but it still happens. Ever imagined that we couldn't find our luggage on the reclaim belt? If unluckily, we become one of those poor passengers, there is something important we should know to compensate our loss. If you are unable to locate your checked luggage upon arrival, please notify your airline's personnel prior to leaving the airport on the day of loss.

The following procedure varies from airline to airline regarding same Issue:

Deccan will reimburse your loss if your luggage is not located within 7 days. Jet Airways will send you a questionnaire for more detailed information in case of your luggage has not been traced within 7 days, if they don't locate your luggage within 15 days, a claim will be in process, and the tracing process still continues.

Following 'Carriage By Air Act 1972', compensation for lost luggage of domestic routes is limited to a sum of Rs.450/ per kg of check in luggage, and a sum of Rs.4,000 of cabin luggage or articles.

Cancellation and delay of flight

A delay of anywhere up to an hour is a matter of routine for many domestic flyers. Effective from 15th August 2010, the Ministry of Civil Aviation has brought out certain policy changes to ensure that passengers have at least some entitlement in case their flight is delayed.

If passenger's flight has been delayed, without any prior notice of such delay, AND he has checked in on time, the airline will have to offer free of charge facilities to him (such as meals/refreshments etc) while he is waiting, if:-

Block Time of Flight* is Up to 2.5 hours if Delay in flight is of 2 hours or more
Block Time of Flight is between 2.5-5 hours if Delay in flight is of 3 hours or more
Block Time of Flight is more than 5 hours if Delay in flight is of 4 hours or more

If flight is delayed for more than 24 hours, than the passenger is also entitled to be provided with hotel accommodation and transfer facility.

Important points for Passengers to note regarding same Issues:

- a) The airline will not be required to compensate you where the reason for delay is beyond its control for instance, due to political instability, natural disaster, civil war, insurrection or riot, flood, explosion, government regulation or order affecting the aircraft, strikes and labour disputes causing cessation, slowdown or interruption of work or any other factors that are beyond the control of the airline.
- b) The airline is not required to compensate you if the reason for fault of delay is clearly due to the fault of the Air Traffic Controller (ATC) - airlines would also not be liable to pay any compensation delays clearly attributable to (ATC), meteorological conditions, security risks, or any other causes that are beyond the control of the airline but which affect their ability to operate flights on schedule.
- c) Airline has to prove it contacted you - The burden of proving whether and when the passenger had been informed of the delay of the flight shall rest with the operating airline.
- d) Mode of compensation- The compensation can be paid in any mode - cash, bank transfer or even in form of a signed agreements like- travel vouchers.
- e) Measures for passenger redressal- It is the responsibility of the airline counter at the airport to first inform the passenger about the reasons for delay of flight and provide them adequate compensation. If aggrieved passenger is not compensated, than he may complain to the internal grievances settling mechanism of the airlines. A nodal officer and the Appellate Authority are generally appointed for settling such passenger grievances. The complaint that is registered is also given a unique reference number.
- f) Airline has to display information about their policies-It is the airlines duty to display the information and inform the passengers about their policies regarding compensation, refunds and the facilities that they will provide in the event of denied boarding, cancellations and delays. Such information should be included in ticketing documents as well the websites (under passenger Charter of Rights) of each airline.

Overbooking

Overbooking is a widespread practice amongst scheduled airlines. There is always a proportion of passengers booked onto a flight who do not arrive at the airport, whether through missing connecting flights or because flexible ticketing allows them to catch a

different flight without penalty. Airlines use their past experience to estimate this number and sometimes overbook to avoid flying with empty seats. On most flights their estimates are correct and no passengers are denied boarding. However, on some occasions more passengers want to fly than there are seats available and as a result some are unfortunately denied boarding. Overbooking is not illegal, but the Department of Transportation requires airlines to ask for people who would like to give up their seats voluntarily, in exchange for compensation. If you are bumped against your will, you are usually entitled to compensation

Compensation in the case of death or injury

There are no financial limits to the liability for passenger injury or death. For damages up to 100,000 SDRs the air carrier cannot contest claims for compensation. Above that amount, the air carrier can defend itself against a claim by proving that it was not negligent or otherwise at fault.

If a passenger is killed or injured, the air carrier must make an advance payment, to cover immediate economic needs, within 15 days from the identification of the person entitled to compensation. In the event of death, this advance payment shall not be less than 16,000 SDRs.

Passenger delays

In case of passenger delay, the air carrier is liable for damage unless it took all reasonable measures to avoid the damage or it was impossible to take such measures. The liability for passenger delay is limited to 4,150 SDRs.

Baggage delays

In case of baggage delay, the air carrier is liable for damage unless it took all reasonable measures to avoid the damage or it was impossible to take such measures. The liability for baggage delay is limited to 1,000 SDRs.

Destruction, loss or damage to baggage

The air carrier is liable for destruction, loss or damage to baggage up to 1,000 SDRs. In the case of checked baggage, it is liable even if not at fault, unless the baggage was defective. In the case of unchecked baggage, the carrier is liable only if at fault. In the case of damage, the airline will probably try to repair the bag or compensate you for the damage and damage to anything inside. Even if you sign a baggage disclaimer before the flight, if the damage is caused by airline mishandling, passenger may be able to get compensation. A passenger can benefit from a higher liability limit by making a special declaration at the latest at check-in and by paying a supplementary fee.

If the baggage is damaged, delayed, lost or destroyed, the passenger can write and complain to the air carrier as soon as possible. In the case of damage to checked baggage, the passenger can write and complain within seven days and in the case of delay within 21 days, in both cases from the date on which the baggage was placed at the passenger's disposal.

Liability of contracting and actual carriers

If the air carrier actually performing the flight is not the same as the contracting air carrier, the passenger has the right to address a complaint or to make a claim for damages against either. If the name or code of an air carrier is indicated on the ticket, that air carrier is the contracting air carrier.

Temporarily Lost Baggage

Airlines are liable for provable consequential damages up to the amount of their liability limit in connection with the delay. Airlines will usually pay you compensation for any reasonable expense you incur while waiting for your belongings. Sometimes the airline will give you a cash advance while you are waiting for them to find and deliver your bag.

Future Challenges

Air travel will double over the next 20 years according to FAA estimates. The airlines will transport over 2.5 billion passengers a year by 2020. Former NTSB officials have predicted that the average airline accident rate will grow in a corresponding ratio. As the safety challenge grows in the new millennium, the legal system must be improved to ensure fair compensation for victims of air disasters. Major improvements in airline liability law have been made largely through the efforts of victims' families and their lawyers. More improvements are needed that will require action by Congress, which means that the people are in a position to demand change through their elected representatives.

Human error and mechanical causes, or a combination of these two factors, are the most common probable causes of airline disasters. If accidents are predictable, they are preventable. We depend on the NTSB to investigate major air crash disasters and to come up with "feasible" safety recommendations to prevent future accidents.

Now we have a "possible cause," that may challenge the independence of the Board to determine the "probable cause" uninhibited by political considerations. New threats to airline safety may also require new security and surveillance procedures. National pride should not be allowed to delay necessary investigations particularly in a world where "copy cat" crimes have become an unfortunate reality.

General aviation is growing rapidly both in the developed and developing countries. India's general aviation has failed to keep pace with the rest of the world due to general misconceptions, non-awareness and miscommunication between government and public. Air travel will double over the next 20 years. The airlines will transport over a billion passengers a year by 2020. At the same time that the average airline accident rate will grow in a corresponding ratio. As the safety challenge grows in the new millennium, the legal system must be improved to ensure fair compensation for victims of air disasters. Major improvements in airline liability law have been made largely through the efforts of victims' families and their lawyers. Human error and mechanical causes, or a combination of these two factors, are the most common probable causes of airline disasters. If accidents are predictable, they are preventable.

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

MODULE-V:

CIVIL AVIATION

&

CONTEMPORARY

ISSUES IN INDIA

LIBERALIZATION, GLOBALIZATION AND PRIVITIZATION: IMPACT ON THE INDIAN AVIATION SECTOR

LIBERALIZATION

The term liberalization in its broadest sense means to be free of control. Liberalization in aviation industry means setting airlines and airports free from the state's control like deregulation of prices, entry and exit of international flights. In the 1970s, deregulation resulted in freedom of entry/exit, capacity, operations, flexibility of fare setting and increased competition. As a result, the aviation industry's landscape has been harmonized under the EU provisions.

The objective of on-going regulatory evolution is to create an environment in which international air transport may develop and flourish in a stable, efficient and economical manner without compromising safety and security and while respecting social and Labour standards. States which have not yet become parties to the International Air Services Transit Agreement (IASTA) should give urgent consideration to so doing. Liberalization should be underpinned by the worldwide application of a modern uniform air carrier liability regime, namely the Montreal Convention of 1999. Each State will determine its own path and own pace of change in international air transport regulation, in a flexible way and using bilateral, sub-regional, regional, multilateral or global avenues according to circumstances.

States should to the extent feasible liberalize international air transport market access, air carrier access to international capital and air carrier freedom to conduct commercial activities. States should give consideration to accommodating other States in their efforts to move towards expanded international ownership and control of air carriers, and/or towards designation of air carriers based on principal place of business, provided that clear responsibility and control of regulatory safety and security oversight is maintained. States should give consideration to liberalizing the regulatory treatment of international air cargo services on an accelerated basis, provided that clear responsibility and control of regulatory safety and security oversight is maintained.

Transparency is an important element in promoting economic growth, competitiveness and financial stability at the domestic, regional and international levels, and enhances the benefits of liberalization. The air transport industry should continue to be encouraged to improve services to passenger and freight customers, and to develop and implement appropriate measures to protect consumer interests.

For decades, air travel in India was meant for the most elite and powerful in society. An overwhelming majority of travellers who could not afford the prohibitive air travel fares, preferred to journey on trains and buses.

The revolutionizing effects of liberalization swept India with dynamic changes in the aviation sector. From being a service that few could afford, the sector has now graduated to being a fiercely competitive industry with the presence of a number of private and public airlines and several consumer-oriented offerings. In ten years of competition in the aviation sector, private airlines have changed the rules of the game, and they now account for more than 60 % of the domestic aviation market. It increases free trade between nations.

The Indian aviation industry is one of the most talked about aviation industries in the world. The major reason behind this interest is its liberalization. After the latter move, India's airline passengers began enjoying the benefit of choice because Indian carriers quadrupled in number. As if that was not enough, the country recorded a twenty two percent increase in passenger traffic.

Deregulation and Liberalization Worldwide

Since the deregulation of US airlines in 1978, the pressure on governments to reduce their involvement in the economics of airline competition has spread to most of the rest of the world. The US experience with airline deregulation is perceived to be a success by other countries, as the overall benefits to the vast majority of air travelers have been clearly demonstrated. While US domestic air travel grew at rates significantly greater than prior to deregulation, average real fares declined since deregulation and today remain at less than half of 1978. Several successful new entrant and low-fare airlines had a great impact both on airline pricing practices and on the public's expectations of low-priced air travel. And, despite worries at the time of deregulation that competitive cost pressures might lead to reduced maintenance standards, there is no statistical evidence that airline safety deteriorated. The management strategies and practices of airlines were fundamentally changed by deregulation, liberalization and, very simply, competition. The aviation industry is in the midst of a dramatic restructuring that involves even more fundamental changes than those experienced following its deregulation in 1978. Yet, nearly three decades after deregulation – and after multiple cycles of financial successes and failures – the industry remains fragile.

Airline Liberalization

Further liberalization of international air transport is essential. The liberalization of operational and ownership restrictions is not an easy process, but it can be a very beneficial one. Experience from other industries demonstrates the positive impact it can have for both consumers and producers. A modern, commercial and global airline industry requires modern, commercial and global rules.

International air transport is governed by a 60 year-old set of rules, the bilateral system. It was designed for another age. Bilateral Air Service Agreements contain restrictions on the number of airlines and frequency of services on many international routes, while many countries have limits on airline ownership and control by foreign nationals. Airlines have built an industry that is safer, more accessible and more efficient than ever before. Now we need governments to bring policy in line with the changes airlines have achieved.

The future success of the industry rests on greater commercial freedom to serve markets where they exist and to merge and consolidate where it makes business sense. IATA worked closely with consultants to analyze the impact of operational (i.e. product market) and ownership (i.e. capital market) liberalization in four different industries: retail banking, energy, telecoms and media. The parallels of these industries to air transport are close: strategically important, network oriented and customer-focused. Each industry also has a definitive point in time at which liberalization was undertaken.

Liberalization Provides Benefits for Consumers

Further airline liberalization can provide significant benefits for consumers. Experience in the other industries shows that liberalization can:

- **Lower Prices.** For the EU countries that have liberalized their energy markets, electricity prices are 10-20% lower and gas prices 35% lower than they would have been without liberalization. In Korea and Japan, liberalization of the telecoms industry has also seen the cost of long- distance calls fall by up to 50% as new entrants engage in price competition with incumbents;
- **Increase Output and Choice.** Liberalization of TV and radio markets has increased the available output and increased the number and diversity of options, including specialist channels for different consumer tastes (e.g. Indian TV, New Zealand radio);
- **Improve service quality.** For example, relaxing ownership restrictions in the US banking sector has increased both service quality and the ease of access to it. Customer service quality has increased, as shown through satisfaction surveys. Service fees have risen to cover the extra costs involved but consumers are willing to pay for higher quality.

Benefits for Producers

Full liberalization that provides firms with the full commercial freedoms to respond to increased competition can:

- **Improve capacity utilization** towards its optimal level (e.g. UK energy markets).
- **Increase productivity** for both incumbents and new entrants (e.g. telecoms in Japan). Firms also look to compete over the longer-term through innovation.
- **Transfer best practice.** It helps to transfer managerial and technological knowledge and best practice (e.g. New Zealand media sector).
- **Increase investment.** It can increase investment in the sector (e.g. telecoms) and lower the cost of capital as firms have access to more efficient sources of finance.
- **Improve profitability.** It can help firms to lower costs, improve efficiency and to develop economies of scale – resulting in improved profitability (e.g. EU banking).
- **Increase a firm's market value.** It allows for a greater potential for takeovers and hence for shareholders of target companies to benefit from the significant share price appreciation that characterizes such activity (e.g. Nestlé)

Key Lessons for the Airline Industry

- ❖ Liberalization is not a seamless process, but it is possible.
- ❖ Lessons from the other industries show that full liberalization is often not a seamless process. Liberalizing markets over different timescales or removing restrictions on operations without removing those on ownership can create distortions and reduce the

potential benefits that are available. However, a discussion paper produced by the UK Civil Aviation Authority shows that a clear pathway to full liberalization for the airline industry, that is consistent with optimal safety and security standards, does exist.

- ❖ Full liberalization is required to maximize the potential benefits.
- ❖ The benefits of liberalization are maximized where both operational and ownership and control restrictions are removed. The structure of the airline industry means that removing operational restrictions can lower barriers to entry to the industry. But it will not maximize the potential benefits to customers, airlines and the wider economy unless ownership restrictions – and the barriers to exit or to adjust capacity – are also removed.
- ❖ Further liberalization can provide substantial consumer benefits.
- ❖ Further operational and ownership liberalization can protect and enhance the consumer benefits, in terms of greater choice and lower fares, already obtained from liberalization so far in the airline industry. It can also widen and expand these consumer benefits to new regions and routes that currently have highly regulated markets. Therefore, it can continue to provide benefits for airline users, while also providing significant benefits for the wider economy.
- ❖ Greater commercial freedom allows airlines to improve productivity and efficiency.
- ❖ Liberalization can create the freedom for airlines to operate on a fully commercial basis. This will allow them to allocate capital more efficiently, to respond better to changes in demand in markets and to improve productivity. It provides a platform for the airline industry to expand or rationalize capacity and ownership in accordance with customer needs. It can also improve the return on capital invested that is earned by the airline industry as a whole.
- ❖ Liberalization can provide benefits for a flexible and efficient firm.
- ❖ In a fully liberalized market, the key for firms is to recognize where its competitive advantage lies and to focus on it. Liberalization provides opportunities for expanding into new markets as well as threats to existing markets. There will be winners and losers from liberalization. However, experience from the other industries has shown that firms who are efficient, flexible and responsive to customer needs – regardless of their size – are best placed to benefit.
- ❖ A multilateral approach to liberalization is preferable.
- ❖ A multilateral approach is likely to have more substantial and positive implications for both consumers and airlines. Bilateral negotiations remain the main forum for discussion and a useful mechanism for reform, but the rationale for more supranational leadership is strong. Globally brokered agreements (e.g. through ICAO) are desirable but face practical difficulties. Therefore, at least for the short- term, co-ordinated bilateral and/or regionally focused negotiations can offer the best way forward.

- ❖ Governments must now provide the leadership that the airline industry needs. Governments will not all be able to liberalize markets at the same pace. But it is important that they all recognize the need to move in the right direction. Reform is now necessary to support the long-term health of the industry.

OPEN SKIES POLICY

Open sky refers to an agreement between two countries to allow any number of airlines to fly from either of them without any restriction on number of flights, number of destinations, number of seats, price and so on. However, this is a general definition. In actual practice, there are always some restrictions.

Its primary objectives are:

- to liberalize the rules for international aviation markets and minimize government intervention as it applies to passenger, all-cargo, and combination air transportation as well as scheduled and charter services; and
- to adjust the regime under which military and other state-based flights may be permitted.

For open skies to become effective, a bilateral (and sometimes multilateral) Air Transport Agreement must be concluded between two or more nations.

India's current Open Sky agreements

Currently, India has open sky agreements with US without restriction. Further, it has such agreement with some restrictions with UK, a limited open-sky with ASEAN and bilateral agreements with more than 100 countries.

- There is no restriction on number of flights, seats or destinations to / from United States.
- India has open-sky with UK with restriction on frequencies with respects to flights to and from Mumbai and Delhi.
- For some tourist destinations of ASEAN, India has limited open sky policy.
- India has also entered into bilateral agreements with more than 100 countries over landing points, traffic rights, seasons, capacity etc.

Open sky policy in National Civil Aviation Policy 2016

The National Civil Aviation Policy 2016 has proposed to remove all restrictions on number of flights to and from destinations in SAARC and a radius beyond 5000Kms. Within that radius (covering West and South Asia as well as the countries to the east) flying rights will be auctioned. The government would enter into Open Sky agreement with SAARC countries and countries with territory located entirely beyond a 5000 km radius from New Delhi. Under this:

- Unlimited flights above the existing bilateral rights will be allowed to and from major ports of the country.
- Additional seats above the existing seats within the 5000km radius from New Delhi will be auctioned.

The above proposals imply that European airlines and SAARC airlines (which fall outside 5000 kilometres from New Delhi) will have unlimited access, in terms of number of flights and seats, to some airports in India. For countries within 5000 kilometres, the rights will be auctioned so that the revenue accrues to the government. The government has also restricted this to few airports to protect the domestic airlines.

AIRPORT PRIVATIZATION: EMERGING LEGAL ISSUES

Airport transport system plays a vibrant role in the development of an economy, and literally it is the gateway for the economic development of the nation. To a foreigner, airport is the first sight he sees when he/she visits some country. Thus, it becomes very important with which he/she measures the economic development of the country.

With the advent of Globalization, Privatization and Liberalization in the 1990's has paved the way for the development of world class airports in India, out of different modes of privatization, the measure of Public Private Partnership (PPP) being the better mode of development of private airports. The PPP model was developed and enhanced to bring the economic strength, provide increment in employment opportunities, increasing investment and for augmenting the infrastructure work. The daunting task of arranging funds of Rs 40,000 Crores needed for up gradation and modernization of airports, private sector need to be invited to fulfill the fiscal deficit and capital requirement in this sector.

For this purpose the amendment was done in the year 2003 to the Airports Authority Act, 1994 to invite private sector participation. Simultaneously in 2006, 100 percent FDI was permitted in the aviation sector for setting up Greenfield airports. Added to this, various policies were brought into existence like called Greenfield Airport Policy and Airports Economic Regulatory Authority to liberalize more airport regime Etc.

To cope up with the expansion of global trends of trade and commerce and movement of passengers, increase in the frequency of the passengers in domestic and international market the focus upon the evolution and expansion of the airports by private players is required. The concept of Globalization, Liberalization and Privatization was introduced to expand the trade and commerce in tune with the globalization of trade by that time finance minister Dr. Manmohan Singh. The initial step towards privatization of airport in India was first taken up by the Ministry of Civil Aviation (MoCA) and established Greenfield Airports at Bangalore and Hyderabad under PPP Model.

Aviation industry is said to be '*Glamorous Industry*' and travelling by air fleet has become status symbol as the purchasing power has been tremendously increased among people by increase in GDP. According to the reports of the World Bank the developing Countries economy can be developed by integrating their economy into global economy. Such integration of policies applies to the aviation industry also. The privatization of airports has been frequently practiced by the different states globally. As this industry is developing globally and there is link between them so the development rate of this industry is very high. This industry has to be properly politically handled, because any harm to it can result into the destruction of the economy. The philosophy of privatization has gained global prominence as the most preferred policy solution to improve a nation's economy by minimizing the role of the state, the affirmative action to be taken by states and reducing interference in the operation. Such a policy choice does not affect the command of the state as ultimately public accountability remains with the domain of the state and it has the reviewing power as it is the state which is legally and constitutionally accountable to the public for the state of public affairs.

In India, the introduction of economic reforms requires the government of India to invest 35000 million for the up gradation and construction of airports, but the budgetary support of Rs 485.50 million was only allocated to AAI in 1996-97. Therefore, in 1996, in major policy liberalization, the government allowed the private sector to set up air cargo complexes in a bid to ensure smooth movement of cargo to increase the frequent movement of goods by means of import and export.

Globally, Airport privatization first began in 1987 when former British Prime Minister, *Margaret Thatcher*, decided to privatize many public sectors into private sectors to raise funds and airport was also one of the sectors in it. This policy spread rapidly all through the world. It is strongly held that if airport development can be done through commercial means by private entities' participation, state funds can be redirected to other public financial commitments and infrastructure development. This is the instance in the case of *Sydney's Kingsford International Airport*, which was privatized in order to finance part of the Australian Government's Debt.

Almost a revolutionary transformation has occurred in this sector as government deliberately encouraged and invited private stakeholders and investors to develop various airports in India. Having become the 9th largest civil aviation market in the world in 2011, India now plans to be a global aviation hub and become one of the top three aviation markets in the world by 2020. Consequently over the years there has been a transfer of India's major metropolitan airports to private aviation companies GMR and GVK. The transportation business is mainly driven by two main factors 'infrastructure' and 'management'. The buildings of infrastructure need much economic support for developing countries like India where there is a fiscal deficit so they need to promote private participation for the up gradation and development of the airport.

Aviation transport is close to 2 billion⁸¹ passengers annually; airline and airport industry directly employs 4.3 million people globally. The civil, aerospace sector employs 730000 people, 5.8 million indirect jobs through purchase of goods and services from companies in a supply chain. Aviation's global economic impact is 2960 billion equivalents to 8% of world Gross Domestic Product. The world's 900 airlines companies have nearly 22000 aircraft.⁸² They provide services to 1670 airports⁸³ through a route network of several million kilometers managed by around 160 air navigation service providers.⁸⁴ 25% of all companies' sales are dependent on air transport. 70% of business reports that serving a bigger market is a key benefit to the air services providers. Basically airport is a junction between Airlines, Air Navigation Services (ANS), Customers, and Airport Users.

⁸¹ The figure is based on counting passengers per flight. This corresponds to ACI's 3.9 billion passenger figure, since airports count their passengers twice according to both passenger departure and arrival.

⁸² ICAO Annual Report of the council, 2004 Doc. 9851

⁸³ Airports Council International ACI Figures, 2005

⁸⁴ Civil Air Navigation Organization (CANSO) estimation, 2005

CONCEPT OF AIRPORT PRIVATIZATION

The three forms of privatization are as follows:

- i) **Delegation:** Privatisation's first form is Partial privatisation. In this form vital role is played continuous by government. This type is mostly practised in the United States. Privatisation's has one of the other forms i.e., Franchising.
- ii) **Divestment:** In the case of divestment, the second broad form of privatisation the public asset is sold or given to the on-going business. In the developing nations, divestment is typically referred to as denationalisation and is the most common form of airports privatisation.
- iii) **Displacement:** The third form of privatisation is the displacement. It typically occurs when the government deregulates a public good. United States commonly practised this displacement.⁸⁵

In India one of the fastest growing industries is aviation industry. With the introduction of the concept of Liberalization in the Indian economy this industry has undergone rapid transformation. The private participation is highly encouraged and promoted in this industry. Private airlines have covered almost 75% of the domestic aviation market.

MOTIVATIONS OF AIRPORT PRIVATIZATION

From one aspect airport privatization can be seen as just an evolutionary stage of airport development and up gradation. They have evolved from public sector utilities to commercial enterprises and privatization can be considered as commercialization to the high extent. Rapid commercialization has brought about huge profits and market oriented management. Further, the changes within the airline industry have inevitably had a major impact on the airport sector and it progressive too. The transformation from a predominately publicly owned and state controlled airline industry to a global business with much more commercial freedom has forced many airports to have a much more customer focused outlook when coping with their airline customers.⁸⁶

However following three factors are considered to be the major motivations for Airport Privatization:

Limited funds: Government funds are limited funds to expand airport capacity to meet air transport demand, which is rapidly increasing in total volume and concentrating on hub airports, development of Infrastructure; Up gradation it requires the funds from the private entities.

Economic Efficiency: By inviting the private sector to participate in airport operation, it may be possible to increase economic efficiency, which will result in improved airport revenue and profit performance⁸⁷.

⁸⁵ One example of displacement in the US is the centers on Public education.

⁸⁶ Anne Graham, "Managing Airports – An International Perspective" 2nd ed.2003, at p.12

⁸⁷ Rigas Doganis, "Airport Business", 1st ed.1992, at p.30

Open-sky Policy: Airlines have more freedom to choose hub airports for their flight service networking, according to the recently developed deregulation or open-sky policy of the international air transport industry. Until privatization, airlines were forced to use certain airports as their hubs or bases, because some business environments are constructed by rigid bilateral agreement of international air service.⁸⁸

Substantially, it is stated that it is difficult for government undertakings to achieve efficiency and provide services of high standard at the efficient cost as they are constantly hampered by factors like procedural delays, diffused accountability, bureaucratic inflexibility and political interferences so they have to shift the ball towards the private players.

Mr. Tulsi Kesharwani, consultant, ICAO considers the emergence of global airport management industry with private participation is in the interest of the industry. He expresses that the business community and the financiers consider investment in airports a sound commercial proposition and beneficial. They draw confidence from the monopoly position of the airports, the possibility of sustained growth in traffic and strong cash flows. The credit ratings of airports are generally high despite economic turbulence in the post de-regulation period of the airline industry.⁸⁹

ADVANTAGES OF AIRPORT PRIVATIZATION

The advantages of Airport Privatization can be enumerated as follows⁹⁰:

- Private sector capital can be easily accessed.
- Airport operators to take advantages from other organizational opportunities in and adjacent to their airports. Many people come to airports and this makes various businesses possible the opening of retail market, hotels, shopping centre are best example of it. People that come to airports are usually neither the poor nor the lower class but they have good purchasing power. Such an environment can give airport operators a variety of business opportunities in the airport.
- Efficient economic operation can be conducted. This view is based partly on the belief that privately owned utilities are likely to be run more efficiently, giving more facilities than publicly owned entities. As private airports would be driven by profit, better delivery of services, the allocation of resources would be more efficient, and business judgment, rather than political considerations, would be used to conduct operations of the business.
- Private Player's airports may pursue marketing-oriented managements system. This will improve the level of customer-service for airlines and air passengers, giving more comfort and convenience to the passengers. Currently, many airports face intensified cost pressure, inconvenience in services, and un-satisfaction from their carriers.

⁸⁸ Soon and Kwang ,Airport Privatization,p.5

⁸⁹ Charles Sander, "Airport Privatization: Trends and Opportunities", http://www.unisys.com/transportation/insights/insights__compendium/airport__privatization_c0__part__1.htm (last visited septemeber26th, 2008);Keharwani Tulsi, Emerging Trends in Civil Aviation-Changes in Ownership of Airports and Air Navigation Services,Chapter.3, Dr. V. Balakista Reddy, Emerging Trends in Air and Space Law, Uppal Publishing House 2007(herein after referred as- Tulsi, Emerging Trends in Civil Aviation)

⁹⁰ Soon and Kwang ,Airport Privatization at p.6

Marketing-oriented management may lead to a reduction of the airfield user charge, thereby complementing the deficit with the income accrued from vigorous commercial activities in the terminal buildings.⁹¹

- Governments could benefit financially because the transfer of an airport from a public to private enterprise would convert it into a tax paying corporate entity and land would be also taxable. Hence due to all the above reasons private sectors are attracted towards airports privatization.

RISKS IN AIRPORTS PRIVATIZATION

Privatization also entails some risks. Most large airports enjoy a substantial degree of monopoly, which may well increase traffic growth outstrips the provision of new facilities. Given this, many governments will be loath fully to privatize airports without maintaining powers to prevent abuse of dominant positions. Airport managers may reduce space for passengers and cargo shippers in order to maximise revenues from a variety of commercial activities, which will consequently result in deterioration of service.

Second, there are risks associated with the loss of government control over airports. For example, safety standards may be relaxed resulting in a threat to public safety. Moreover, airport systems have a functional role in national defence. With privatized airports, if a national crisis situation arises, the appropriate government officials may not be allowed to take immediate action. Furthermore, there are also some chances that privatized airports would not support a national system of transportation, but rather act for profit-motive as opposed to public utility.

Third, there are risks related to narrow responsibility. When an airport is in the public sector, there is a chance to input citizens' opinions of quality service through the elective process, and airport management teams might be considered to have a responsibility to the general public. Privatized airports' management teams, however, may become over-sensitive to fluctuations in the share price and their decisions may well be influenced by this economic factor. For instance, the British Airports Authority (BAA) has become much more secretive since privatization because of concerns that any information may have an impact on its share price.

Fourth, the diversification of operation pursued by privatized airports may also be dangerous. Diversification away from airport business has proven highly risky in the BAA's experiences. As the BAA moved into other activities, such as property development, senior management's energies became dissipated. Moreover, airports that are part of conglomerates may lose their flexibility and speed of response. As a result, the BAA refocused its efforts on its core airport business in 1990. To this end, the non-airport hotels were sold and the three London airport hotels were leased to major hotel chains. At the same time, the BAA has renewed its emphasis on expanding airport retailing and selling its expertise in this area to other airports.

Finally, the Changes in government can also result in changes to operational requirements and regulations. The international airports investment community can neither predict nor

⁹¹ Spencer Dickerson, To Privatize or Not To Privatize, Airport Magazine, May/June 1990, at 7

avoid these universal risks, and their ability to withstand any consequential business disruption is inelastic and long in recovery.⁹²

On evaluating the advantages and risks in Airport Privatization, it is understood that although there are certain uncertainties and pitfalls, the advantages of improved business opportunities, overall efficiency etc. override all the problems. Further these problems can be mitigated through properly structured privatization agreements and contracts preserving a government's option to reclaim the lease or concession and award it to a more qualified bidder.

MODES⁹³ OF AIRPORTS PRIVATIZATION

Airports can be privatized by many ways. Some of them are as follows:

1. *Management Contracts*: Management contract (also referred to as Service Concession and Contracting Out), Public Sector Operator continues to operate of core activities such as managing runways and air traffic control facilities and holds airport infrastructure. The private sector operator manages airport assets such as passenger terminals and other activities for a fee, which is typically linked to revenues from these activities.⁹⁴ This model of private participation allows the private operator to introduce best practices across airport activities thereby increasing revenues and enhancing profitability of airport operations.

Management contracts have been used extensively in developed economies as a mechanism for increasing the efficiency and cost-effectiveness of airports and airport services. In developing economies too, where capital markets are often not developed enough to undertake full privatization, management contracts often serve as an intermediate mechanism to improve performance and profitability through private sector management.⁹⁵

2. *Lease/Concession Contracts*: Under Lease/Concession Contracts, An airport is shifted to a private entity for operation, expansion, management, improvement and development. The government holds the ownership of the airports. The lessee pays rental or concession fee or taxes to the government or the owner of the airport. These arrangements can possibly increase the efficiency and effectiveness of the infrastructure.

⁹² Supra note 7

⁹³ “*An Empirical Investigation Of Financial And Operational Efficiency Of Private Versus Public Airports*”, Binan vaisgh embry riddle Aeronautical University Dytona Beach, Florida and Mehdi Haririan, Bloomsburg University of Pennsylvania Bloomsburg, Pennsylvania, Journal of Air Transportation, Vol. 8 No 12003

⁹³ An example of a management contract is evident in Cameroon, where the Government of Cameroon created an independent company, Aeroports Du Cameroon, to operate 7 out of the 14 airports in the country for a fifteen year period. The company comprises a joint venture between Aeroports de Paris (34%), Cameroon Government (24%), with the remaining shares being held by airline carriers and financial institutions. Other examples of management contracts can be seen in Albania, in the case of Tarana Airport, in Hong Kong for Kai Tak airport, and in Chile for the management of a terminal in the international airport in Santiago.

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⁹⁵ Somesh.K.Mathur, "Efficiency of Delhi International Airport Using Data Envelopment Analysis: A Case of Privatization and Deregulation", GARS Workshop Slots, Airport Competition and Benchmarking of Airports, Bremen, Germany November 19, 20, 2004 <http://129.3.20.41/eps/io/papers/0412/0412010.pdf>

In the case of privatization in Australia, airports were awarded through a fifty year lease that has an in built option to renew for another 49 years. The U.S. has opted for the long-term lease route in privatizing Stewart Airport in New York. In 1998, New York State opted to lease Stewart Airport for 99 years to a U.K. firm, National Express Group, plc. over four other finalists, having offered \$35 million in cash up-front, plus a percentage of airport revenues.⁹⁶

There are few shortcomings in it. First, the process of conducting economic and technical studies and choosing a concessionaire need the much research for the effective implementation so it is time consuming. Secondly, the concessionaire's costs could be inflated due to uncertainty of how compensation clauses at the end of the concession will actually play out. Finally, Lack of ownership command discourages the private players to go for the further capital raising.

3. Build-Operate-Transfer (BOT): BOTs are just form of lease. BOTs differ from traditional concessions agreements in that the BOT doesn't include operation of the entire airport (with the exception of green-field enterprises), only the element being developed or enhanced. In this scheme the contractor undertakes the construction of a given infrastructure facility, including financing, operations and maintenance. The contractor operates the facility for a fixed period of time during which it is allowed to charge the facility users tolls, fees, rentals, and charges sufficient to recover its costs with the rate of return. This arrangement involves the government's active participation, which retains the operating revenue risk and any surplus operating revenue. With these types of contracts, government entities need to take care to specify all standards to be met by the private entity because unless needs are not identified up front, they will usually not be met.⁹⁷ Toronto's terminal 3 was the first major project of this type. In Turkey, a Lockheed-led team, plus several Turkish firms, developed a terminal at Istanbul Airport with the expectancy to operate it.

4. Public Sales by Flotation: Public sale of an existing airport by floating shares on the stock market is the most fundamental way of privatization. It is agreed that the British government's conversion of the BAA into a private company is the best example of airport privatization by this method. Shares of the BAA, which were previously owned by the British government, were floated through a public stock offering on the London Stock Exchange in 1987. Copenhagen and some other airports also partially sold their shares through the stock market. When this method is adopted, governments should devise a way to reserve the right to control airport operations for the protection of public safety and utility.⁹⁸

5. Trade Sales⁹⁹: The advantage of airport privatization through trade sales is that the benefit of privatization can still be profoundly obtained while retaining the necessary governmental control. The most large-scale and recent example of a trade sale is the Federal Airports Corporation of Australia's privatization. The Australian government completed phase 1 sales of three airports-- Melbourne, Perth, and Brisbane--in 1997. The sale consisted of fifty-year long-term leases plus 49 year options. Foreign ownership was limited to 49% while a 5%

⁹⁶ Supra note 7

⁹⁷ Nicholas J. Farber, "Avoiding The Pitfalls Of Public Private Partnerships: Issues To Be Aware Of When Transferring Transportation Assets", 35 Transp. L.J. 25, 2

⁹⁸ Soon and Kwang, Airport Privatization, p.9

⁹⁹ ibid

ownership limit was placed on airlines. The winning consortia included the BAA, Amsterdam Schiphol, and Airport Group International as airport operator.¹⁰⁰

6. *Build-Own-Operate (BOO)*: In this scheme, the private entity has the right to develop, finance, build, own, operate and maintain an entire project, which it owns completely. Such an arrangement is considered favourable by the lenders to the projects as the private operator owns all the assets and the collateral and the recourse can be clearly established. Further this simplifies the procedure for project execution and time and cost overruns are expected to be minimal.¹⁰¹

7. *Public/Private Participation*: This is another concept in the ownership and management in which both public and private sector participate. Part of the equity held by the public sector and part by the private sector represents public/private participation or in brief called PPP.¹⁰² It is also possible to apply PPP in case of lease. India has developed a model where the airport will be on lease for a specified period to a company in which the government will have shareholding of 26 percent. In this case the Airports Authority is the lessor and also a part of the lessee company.¹⁰³

Eleventh Five Year Plan (2007-12): Policy Regime

The following are the policy initiatives of the eleventh five year plan¹⁰⁴:

- i) 100% FDI is permissible for existing airports; FIPB approval is only required when FDI beyond 74%
- ii) 100% FDI under automatic route is permissible for Greenfield airports
- iii) 49% FDI is permissible in domestic airlines under the automatic route, but not by foreign airlines companies;
- iv) 100% equity ownership by Non Resident Indians is permitted
- v) 100% tax exemption for airport projects for a period of 10 years
- vi) ‘Open Sky Policy’ of the government and rapid air traffic growth have resulted in the entry of several new privately owned airlines and increased frequency/flights for international airlines;
- vii) A Model Concession Agreement is also being developed for standardizing and simplifying the PPP transaction for airports, on the analogy of the highway sector;
- viii) Upgrading of the ATC services at the airports, Issues relating to Customs, immigration and security are also being resolved in a manner that enhances the efficiency of airport usage;

¹⁰⁰ *ibid*

¹⁰¹ Simirit Kaur, “Financing Indian Infrastructure: A Greenfield Privatization Approach, V.K. Bhalla, Contemporary Issues in Finance, Anmol Publications PVT. LTD., 2004 at p.129

¹⁰² Refer Chapter 4 of this project.

¹⁰³ Tulsi, Emerging Trends in Civil Aviation at p.28

¹⁰⁴ http://www.pppindia.cpm/pdf/ppp_position/paper_airports_052k9.pdf (visited on 5-12-2010)

- ix) A comprehensive Civil Aviation Policy is in the process of finalization covering different areas of the aviation sector. India has entered into bilateral services agreement with 104 countries.

LEGAL ISSUES IN AIRPORT PRIVATIZATION

Nature of Legal Issues: The advent of LPG has paved for many countries to privatize their airports by means of equity divestitures, leases and incentive laden management contracts. As many countries adopted the concept of airport privatization more than a decade had experienced but many of the benefits of airport privatization are becoming more discernible. Recognizing some of the benefits, doesn't mean that the concept is not free from any legal issues. The following are the legal issues which may be confronted due to the Airport Privatization in India:

- i) *Airport Based Issues:* Special Economic Zones, Land Acquisition Rehabilitation, Infrastructure, Resettlement, Slot Allotment, Landing Rights, Airport operation, refueling Infrastructure ownership and Investments, Airport Licensing, Air Traffic controllers, Air management etc.
- ii) *Agreement based Issues:* Concession Agreements, Operation Maintenance Development Agreement, Open Sky Policy, Public Private Partnership etc.
- iii) *Airlines based Issues:* Cabin crew Safety, Leasing and Financing of Aircraft, Slot Allocation, Code Sharing Alliances, Air carrier Liability (Montreal Convention), Survival of Low Cost Carriers (LCC), Project Finance in Airlines etc.
- iv) *Aviation based Issues:* Aviation Insurance, aviation ombudsman, consumer protection, aviation education, aviation consultancy, dispute settlement and arbitration process, consolidation in aviation industry, bio fuel, etc.
- v) *Charges based Issues:* Passengers Service Fee (PAF), User Development FEE (UDF), Airport Development Fee (ADF) Route Navigation facility charges (RNFC) etc.
- vi) *Communication based Issues:* Communication, Navigation and Surveillance (CNS) Satellite Communication- Aeronautical Communication etc.
- vii) *Corporate Based Issues:* Competition Law and Policy, FDI and Changing dimensions of ownership, Investment and Finance, Joint Venture in Civil Aviation, Leasing and Financing of Aircraft, Mergers and Acquisitions, Predator Pricing, Tax, Closure of Airport. Etc.
- viii) *Environmental based Issues:* Air Quality, Noise Pollution, Third Party Risk, Biodiversity, Climate Change, Land Use Planning, Emissions and Planning, Congestion in the skies etc.
- ix) *IPR based issues:* Patent, Trademark, and designs etc.

- x) *Labour Based Issues:* Labour and Management relations, Employment, working conditions, Occupational Health Hazard, Trade Unions, and Ratification of ILO's Conventions
- xi) *Safety Based Issues:* Mid-air collision, runway Incursions, Calculating Aircraft Performance Data and Fatigue related accidents, Liability of Pilot and Air Traffic Controller Officers, Bird Strikes Cabin Crew Safety etc.
- xii) *Security based Issues:* Cyber Crimes, Computer Hacking, Screening and Radiation, and Technological etc.

CONCLUSIONS AND RECOMMENDATIONS

Privatization of airports is yet another stage in the evolution of the ownership and management of Airports. It is very much needed for the infrastructural development of the aviation industry as governments cannot afford huge funds. There are many modes through which an airport can be privatized and it is for the state to choose the one that suits its economic and social conditions.

Since this industry is strategic to the safety and security of any nation the governments should be vigilant while privatizing it. The states must take the aid of the international Organization ICAO which has been industrious in formulating policies that accommodates the changes in Airport Management and Ownership, the recent conference is an instance to it. However it is unfortunate that these policies have not been properly understood and applied by the functionaries of the states. It is hence important to create awareness about the importance of these policies. Turning towards the Indian perspective of Privatization of Airports, the mode of Public Private Participation (PPP) is suitable to our conditions. However there is a need for amendments in all laws regarding airports to suit the mode of privatization. Although few legislations like the Airports Authority of India Act, 1995 has accommodated private airports under its purview, there are some issues like employees interests, the solutions while the clauses in special agreements is against the legislations.

Further the existing regulatory regime will not be sufficient to meet the future challenges of privatization. Finally, the researcher concludes that, '*AIRPORT PRIVATISATION*' is at its bud stage, hitherto applied by many countries, the fact thus states that, unless the countries witness the rigor of experimenting the privatization process which is a time tested fact, wait for its results. The experience of airport privatization shows that whatever the ownership model chosen, the goal is to enable the airport operator efficient business that brings customer satisfaction. Ownership may evolve, for business and investment purposes, but the goal remains the same: operate with sound business principles because privatized airports may have more flexibility for introducing new business models when freed from government bureaucracy. On the other hand, privatization seems unlikely for airports that have very low traffic volumes and would not be able to attract private investments. Indeed, they need government subsidies to continue to operate like in some developing countries including India. Hence, the researcher opines that any model opted for 'Airports Privatization' has its pros and cons in its outlook. But still, lessons are to be learnt in the process of 'Airport Privatization' by various airports across the globe.

THE AIRPORTS AUTHORITY OF INDIA ACT, 1994 AND VARIOUS AMENDMENTS

India occupies a central position on the aviation map of the world especially because of her geographical location and topographical situation in the international air route pattern. The enormous size of the country, the need to cut down upon large distances that separate the main centres of its population in the hinterland and her special potential and charm for the international tourists can be enumerated as some of the factors which underline the need for development of real modern and well equipped airports. But the concept of planning, designing and constructing a modern airport is a very complex technical exercise which involves an immense magnitude of work and massive financial investments to build and develop airports of various sizes and for all weathers. The introduction of the jet aircraft, and a gradual increase in the size of the aircraft, passenger air traffic increased considerably resulting in serious congestions and delays at the airports. To review this situation and to recommend measures which would enable civil aviation in India to keep abreast of World Wide developments, the Government appointed a Committee under the Chairmanship of Mr. J.R.D. Tata in July, 1967. Based on this Committee's recommendations, the **International Airports Authority of India (IAAI)** was set up in April, 1972 to plan, develop, construct and maintain the four international airports in India, viz., Bombay, Calcutta, Delhi and Madras.

The **National Airports Authority (NAA)** was established by carving out the Directorate of General Civil Aviation (DGCA) on June 1, 1986 through an act of parliament. It was enacted by Parliament in the Thirty Sixth year of Republic of India. It was managed by a board consisting of a Chairman, four full-time members and eight part-time members. The NAA manages all domestic civil airports and civil enclaves to a total of hundred and sixteen. The NAA provides all the essential facilities to make flights possible by managing the runways, the technical buildings, air traffic control services, radio navigation, security and ensure the safety of all operations.

The Central Government constituted an authority to be called the National Airports Authority. The Authority was a body corporate by the name aforesaid having perpetual succession and a common seal, with power, to acquire, hold and dispose of property both movable and immovable, and to contract and shall by the said name sue and be sued. The Authority consisted of a Chairman to be appointed by the Central Government, the Director-General of Civil Aviation, ex officio and not less than eight and not more than fourteen members to be appointed by the Central Government. The Chairman elected by the central government was a whole-time member. They were supposed to have a special knowledge in air transport.

The objectives of the NAA are for the maintenance of efficient air traffic services at domestic and international airports to ensure the highest standards of air traffic control system using modern communication systems, radars, navigational and landing aids, maintenance of international standards in air traffic control and ground safety operations, maintenance and upkeep of domestic airports and civil air terminal at airports controlled by the IAF and the Indian navy and to ensure quick and efficient passenger handling facilities at domestic airports.

FORMATION OF AIRPORTS AUTHORITY OF INDIA



The Airport Authority of India (AAI) was constituted on 1st April, 1995 in the forty fifth year of Republic of India to take up the challenges both at the national and international levels as the civil aviation has made rapid progress over the years.

The vision of airport authority of India was- “To be a world-class organization providing leadership in air traffic services and air transport management and making a major hub in Asia Pacific region by 2016” and its mission being- “To achieve highest standards of safety and quality in air traffic services and airport management by providing state-of-the-art infrastructure for total consumer satisfaction, contributing to economic growth and prosperity of the nation.”

Airports Authority of India (AAI) was constituted by an Act of Parliament and came into being on 1 April 1995 by merging erstwhile National Airports Authority and International Airports Authority of India. The merger brought into existence a single Organization entrusted with the responsibility of creating, upgrading, maintaining and managing civil aviation infrastructure both on the ground and air space in the country. The AAI manages 126 airports including civil enclaves (12 international airports, 8 customs airports, 28 civil enclaves and 81 domestic airports). The AAI provides CNS and ATM services at all civil airports in the country, which covers over 2.8 million square nautical miles (land area 1.05NMz and Oceanic area 1.75 NMz). The CNS and ATM services are provided by the AAI at 9 other airports also which are not managed by the AAI at Delhi, Mumbai, Bangalore, Hyderabad, Cochin, Lengpui, Diu, Putaparthi and Vidhyanagar airports.

THE AIRPORTS AUTHORITY OF INDIA ACT, 1994

The Airports Authority of India Act, 1994 is the Central legislation enacted with the intent to establish an airport authority as well as to transfer and vest the activities of International and National Airports Authority of India with the Indian Airports Authority so created for advanced management and consistent administration of airports along with civil enclaves in the manner of services rendered by air transport and the mode in which they function and the station for entire aeronautical communications. It further aims to constitute or aid the formation of airports. The Act applies to airports where the functions of air transport services are carried out excluding the airports or airdromes under the authority of armed forces of India. It also relate to private airports that gives air traffic service, civil enclaves, stations of aeronautical communication added with training stations, institutions and workshops which is connected with air transport services.

The Act provides for the establishment of Airports Authority of India. It shall be a body corporate with continuous succession and common seal. It shall have the power to purchase, possess and sell off property and to enter into legal agreements along with the power to litigate. The Authority contains a Chairperson to be appointed by the Central Government, ex officio member who shall be Director General of Civil Aviation or equivalent and eight to fourteen other members. The Chairperson as well as other members shall be selected from persons with unique awareness and knowledge in air transport including transport services, commerce, industrial or economic matters or management and other persons on behalf of association of workers and customers. The whole-time members shall continue in the office for a term of five years or up to sixty years whichever previously happens and part time members shall continue in office for a term of three years. Such term is specified except with regard to ex – officio members.

The main functions of the authority are to administer airports, stations of aeronautical communication and civil enclaves, give services in air traffic and air transport in such enclaves, arrange, organize, build up, create and sustain runways, terminals, ancillary constructions at airdrome, aprons and taxiways, constitute airdromes and aid in the organization of private airfield by providing such mechanical, economical or other help that are considered essential by the Central Government. Other task includes procurement, installment and upholding navigational assistance, communication equipment, beacons and gives assistance at airdromes and other situations, give services for air safety and investigate and rescue, abilities in harmonization with other agency, constitute schools or organizations or centers for training for officials, build residential structures for employees and constitute and maintain restaurants, hotels as well as rest rooms close to airdromes. The constitution of storehouse and consignment complex and organize postal, insurance and money exchange are also functions of the Authority.

In addition, the Act transfers all the undertakings under the International and National Airports Authority to the Airports Authority of India. The undertakings so transferred shall be inclusive of material goods, rights, supremacy, privileges and land, structures, equipments, machines, works, cash balances, savings, capital etc. After the appointed day, the licenses, quotas, exemption and permits provided to International or National Airports Authority with regard to the business shall be considered to be given to the Authority where such

establishments are vested according to the provisions of the enactment. In order to perform the functions under the enactment, the authority shall have the power to enter into contracts and legal agreements. Such contracts shall be entered on behalf of the Authority by the Chairman. The land needed for the proper fulfillment of functions of the Authority shall be deemed for public purpose and acquisition of the land shall be as per the Land Acquisition Act, 1894.

THE AIRPORTS AUTHORITY OF INDIA (AMENDMENT) ACT, 2003

The Act was amended by the Airports Authority of India (Amendment) Act, 2003. It provided the definition of Private Airport as “an airport owned, developed or managed by- (i) any person or agency other than the Authority or any State Government or; (ii) any person or agency jointly with the Authority or any State Government or both where the share of such person or agency, as the case may be, in the assets of the private airport is more than fifty per cent.”

It inserted the provision for making a lease of the premises of an airport, including buildings and structures thereon, to carry out its functions in the public interest or in the interest of better management of airports. The Amendment Act also provided the power of Authority to levy development fees at airports only after the previous approval of the Central Government in this behalf. It also provided for the provisions relating to the eviction of unauthorized occupants etc. on airport premises.

Amended Provisions

1. Short title and commencement.-(1) This Act may be called the Airports Authority of India (Amendment) Act, 2003.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Amendment of long title. 2. Amendment of long title.-In the Airports Authority of India Act, 1994 (55 of 1994) (hereinafter referred to as the principal Act), in the long title, after the words "aeronautical communication stations", the words "for the purposes of establishing or assisting in the establishment of airports" shall be inserted.

Amendment of section 1. 3. Amendment of section 1.-In section 1 of the principal Act, in sub-section

(3), after clause (a), the following clause shall be inserted, namely:- "(aa) all private airports insofar as it relates to providing air traffic service, to issue directions under section 37 to them and for the purposes of Chapter VA;"

Amendment of section 2. 4. Amendment of section 2.-In section 2 of the principal Act, after clause (n), the following clause shall be inserted, namely:- "(nn) "private airport" means an airport owned, developed or managed by- (i) any person or agency other than the Authority or any State Government, or (ii) any person or agency jointly with the Authority or any State

Government or both where the share of such person or agency, as the case may be, in the assets of the private airport is more than fifty per cent.;'.

Amendment of section 12. 5. Amendment of section 12.-In section 12 of the principal Act, in sub-section

(3), after clause (a), the following clause shall be inserted, namely:- "(aa) establish airports, or assist in the establishment of private airports, by rendering such technical, financial or other assistance which the Central Government may consider necessary for such purpose;".

Insertion of new section 12A. 6. Insertion of new section 12A.-In Chapter III of the principal Act, after section 12, the following section shall be inserted, namely:-

"12A. Lease by the Authority.-(1) Notwithstanding anything contained in this Act, the Authority may, in the public interest or in the interest of better management of airports, make a lease of the premises of an airport (including buildings and structures thereon and appertaining thereto) to carry out some of its functions under section 12 as the Authority may deem fit: Provided that such lease shall not affect the functions of the Authority under section 12 which relates to air traffic service or watch and ward at airports and civil enclaves.

(2) No lease under sub-section (1) shall be made without the previous approval of the Central Government.

(3) Any money, payable by the lessee in terms of the lease made under sub-section (1), shall form part of the fund of the Authority and shall be credited thereto as if such money is the receipt of the Authority for all purposes of section 24.

(4) The lessee, who has been assigned any function of the Authority under sub-section (1), shall have all the powers of the Authority necessary for the performance of such function in terms of the lease."

Insertion of new section 22A. 7. Insertion of new section 22A.-After section 22 of the principal Act, the following section shall be inserted, namely:- "22A. Power of Authority to levy development fees at airports.-The Authority may, after the previous approval of the Central Government in this behalf, levy on, and collect from, the embarking passengers at an airport, the development fees at the rate as may be prescribed and such fees shall be credited to the Authority and shall be regulated and utilised in the prescribed manner, for the purposes of- (a) funding or financing the costs of upgradation, expansion or development of the airport at which the fee is collected; or (b) establishment or development of a new airport in lieu of the airport referred to in clause (a); or (c) investment in the equity in respect of shares to be subscribed by the Authority in companies engaged in establishing, owning, developing, operating or maintaining a private airport in lieu of the airport referred to in clause (a) or advancement of loans to such companies or other persons engaged in such activities."

Amendment of section 33. 9. Amendment of section 33.-In section 33 of the principal Act, after the words "other employee of the Authority", the words "or the Chairperson of the Tribunal" shall be inserted.

Amendment of section 41. 10. Amendment of section 41.-In section 41 of the principal Act, in sub-section

(2),- (a) after clause (e), the following clause shall be inserted, namely:- "(ee) the rate of development fees and the manner of regulating and utilising the fees under section 22A;"; (b) after clause (g), the following clauses shall be inserted, namely:-

"(gi) the other manner of serving notice under sub-section (3) of section 28C;

(gii) the other manner of serving notice under sub-section (4) of section 28C;

(giii) the principles of assessment of damages under sub-section (2) of section 28G;

(giv) the rate of simple interest under sub-section (3) of section 28G; (gv) any other matter under clause (c) of section 28H; (gvi) the salaries and allowances payable to, and other terms and conditions of service of, the Chairperson of the Tribunal under sub-section (7) of section 28-I;

(gvii) the procedure for the investigation of misbehaviour or incapacity of the Chairperson of the Tribunal under sub-section (3) of section 28J;

(gviii) the form of appeal under sub-section (1) of section 28K;

(gix) any other matter under clause (c) of sub-section (2) of section 28L;".

Power to remove difficulties.

11. Power to remove difficulties.- (1) If any difficulty arises in giving effect to the provisions of the principal Act as amended by this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of the principal Act as amended by this Act, as appears to it to be necessary or expedient for removing the difficulty: Provided that no such order shall be made after the expiry of the period of three years from the date of commencement of this Act.

(2) Every order made under this section shall, as soon as may be after it is made, be laid before each House of Parliament.

AIRPORT INFRASTRUCTURE POLICY, 1997

Government of India's Ministry of Civil Aviation (MoCA) is responsible for formulation of national policies and programmes for the development and regulation of the Civil Aviation sector in the country as per the various legislations. The Ministry exercises administrative control over attached and autonomous organizations like the Directorate General of Civil Aviation, Bureau of Civil Aviation Security and Airports Authority of India amongst others. Its vision is "Enable the people to have access to safe, secure, sustainable and affordable air connectivity services with world-class civil aviation infrastructure." A few of its mission statements which seek to translate this into achievable objectives and relevant to our treatise are: "to create world-class civil aviation infrastructure facilities, to establish effective regulatory framework in harmony with international standards and to ensure maximum satisfaction of users / optimize consumer satisfaction."

With a view to accelerate the integrated development, expansion, and modernization of the operational, terminal and cargo facilities at the airports in the country conforming to international standards the Airports Authority of India (AAI) was formed on 1st April 1995 by merging the International Airports Authority of India and the National Airports Authority Design, Development, Operation and Maintenance of international and domestic airports and civil enclaves.

MoCA has recognised the contribution of airport infrastructure to the national economy by stating that the quality of airport infrastructure is a vital component of the overall transportation network and it contributes directly to a country's international competitiveness and the flow of foreign investment. In India, 97% of the country's foreign tourists arrive by air and tourism is the nation's second largest foreign exchange earner. While cargo carried by air in India weighs less than 1% of the total cargo exported, it accounts for 35% of the total value of exports. Airports also represent a country's window on the world. Passengers form their first impressions about a nation from the state of its airports. They can be effectively used as symbols of national pride, if we pay sufficient attention to their quality and maintenance. Airports need to be integrated with other modes of transport like Railways and Highways, enabling seamless transportation to all parts of the country.

There are 449 airports/airstrips in the country. Among these, the AAI owns and manages 92 airports and 28 civil enclaves at defence airfields and provides air traffic services over the entire Indian airspace and adjoining oceanic areas. Airports are presently classified as International Airports, Custom Airports, Model Airports, Civil Enclaves in Defence Airports and Other Domestic Airports. Plans are now afoot to follow international classification norms of International Hubs and Regional Hubs.

PREAMBLE OF THE POLICY

In our journey towards the twenty-first century when the Indian economy is all set to integrate itself into the global economy, the upgradation and modernization of infrastructure and its efficient use have assumed critical importance. It is now increasingly recognized that aviation, far from being a mere mode of transportation for an elite group, is crucial for sustainable development of trade and tourism. In this context, it is vital that airport infrastructure grows in anticipation of the escalating needs of the air transport industry. As

this is a capital-intensive sector, there is an obvious need for perspective planning with a vision for the next twenty years and to muster the combined resources of the public and private sectors, both domestic and foreign.

ROLE OF AIRPORT INFRASTRUCTURE IN NATIONAL ECONOMY

Airports being nuclei of economic activity assume a significant role in the national economy. The quality of airport infrastructure, which is a vital component of the overall transportation network, contributes directly to a country's international competitiveness and the flow of foreign investment. While cargo carried by air in India weighs less than 1% of the total cargo exported, it accounts for 35% of the total value of exports. Better cargo handling facilities lead to enhanced levels of importation, especially of capital goods and high-value items. Likewise, 97% of the country's foreign tourists arrive by air and tourism is the nation's second largest foreign exchange earner.

1. Airports also represent a country's window on the world. Passengers form their first impressions about a nation from the state of its airports. They can be effectively used as symbols of national pride, if we pay sufficient attention to their quality and maintenance.
2. In many remote, hilly and inaccessible areas of the country, air transport is the quickest and sometimes the only mode of travel available. This is especially true of sensitive regions on the borders with our neighbors in the west, north and north-east.
3. Airports need to be integrated with other modes of transport like Railways and Highways, enabling seamless transportation to all parts of the country.

OBJECTIVES OF THE POLICY

While the Government is separately developing a policy framework for the entire civil aviation sector, this policy relates to use and development of airport infrastructure. The Policy on Airport Infrastructure should always be read along with the National Policy on Civil Aviation.

The **objectives of the policy** are:

1. To provide a boost to international trade and tourism and enhance the country's image in the comity of nations;
2. To provide airport capacity ahead of demand, in order to handle an increasing volume of air traffic and to garner the maximum share of traffic in the region;
3. To enhance airport facilities to make the airport user friendly and achieve higher level of customer satisfaction.
4. To ensure total safety and security of aircraft operations by the introduction of state-of-art air traffic, security and related services;
5. To provide multi-modal linkages;
6. To provide a market orientation to the present structure, bridge the resource gap and encourage greater efficiency and enterprise in the operation of airports, through the introduction of private capital and management skills;
7. To foster the development of a strong airport infrastructure, maintaining a balance between the need for economic viability and the objective of equitable regional dispersal of infrastructural facilities;

8. In the achievement of the above objective, to lay special emphasis on the development of infrastructure for remote and inaccessible areas, especially the North East, the hilly and island regions; and
9. To encourage transparency and clarity in the decision-making processes of Government and its public sector units. Policy has necessarily to change in response to a rapidly transforming global scenario, although the process of transformation has to be progressive, orderly and safeguarded.

AIR CORPORATIONS (REPEAL & UNDERTAKING) ACT, 1994

The Air Corporations (Transfer of Undertakings and Repeal) Act, 1994 was enacted by the Parliament which came into force on January 29, 1994. According to the Act 'company' denotes Indian Airlines Limited or else Air India Limited created and registered as per the Companies Act, 1956. The word 'corporations' means Air India or Indian Airlines constituted in accord with the Air Corporations Act, 1953. The undertakings under the control of Indian Airlines Limited and Air India Limited shall be transferred and vested in Indian Airlines and Air India respectively.

The transferred undertaking or establishment of the corporation and which is under the control of company shall be supposed to consist of assets, privileges, control, authority and rights and the entire properties of any nature and location added with lands, aircraft cash balances, investments, workshops, tenancies, capital reserves, book debts and leases that continue from such property which were directly prior to the appointed day in possession and ownership of the corporation with regard to the establishment in India or abroad, account books and other documents, loans, obligations and responsibility then prevailing connected with the undertaking. The legal agreements and working arrangements prevailing prior to the appointed day and that affects the corporation as closely as related with the establishment cease to exist or enforceable as opposed to that corporation and shall be of complete force and outcome as regards the company where the establishment has vested and enforceable completely similarly that the company is named or will become a party. During any process or cause of action instantly previous to the appointed day by or opposed to the corporation with regard to the undertaking be carried on and made effective in relation to that corporation. But it shall be done if the present legislation has not been enacted and cannot be enforced against that corporation.

Moreover, from the appointed day, the quotas, licenses, exemptions etc. given to the corporation for dealing with the affairs and industry of the corporation according to the provisions of any legislation shall be considered to be provided to the company where the undertaking is being vested. If any exclusion from assessment in relation to payment of tax has been provided or any advantage in the manner of set off or carry forward in relation to unabsorbed reduction or investment allowance including other allowance or loss is expanded or granted to the corporation as per the Income Tax Act, 1961 such exemption or benefit shall persist for the company where the undertaking is vested. Additionally, where the expenses of the corporations are excluded from deduction of tax as per Income Tax Act, 1961, the exclusion from tax shall persist with respect to the company where such undertaking is vested. The transfer as well as vesting of the establishment shall not be interpreted to transfer

for the reason of capital gain. It shall be for the purposes connected with the administrative affairs of the Corporations.

The guarantee given in relation to the corporation for any advancing of loan or lease finance shall persist to function for that company where the undertaking has vested the corporation. The Act provides detailed provision for the officers and other staff of the corporation. The officers and employees shall have the same remuneration, tenure, insurance, schemes, funds etc. as prior to the enforcement of the Act. They shall enjoy the same benefits in pension scheme, provident fund, gratuity etc. The Central Government is empowered under the Act to issue directions for the effective performance of functions and responsibilities by the Company and the Company is under the obligation to comply with such directions. The Central Government can issue orders to overcome the difficulties that arise out of the provisions of the enactment.

The Air Corporations (Transfer of Undertakings and Repeal) Act, 1994 repealed the Air Corporations Act, 1953 and The Air Corporations (Transfer of Undertakings and Repeal) Ordinance, 1994.

THE AIRPORTS ECONOMIC REGULATORY AUTHORITY OF INDIA ACT, 2008

The Airports Economic Regulatory Authority of India Act was enacted on December 5, 2008 for the purpose of constituting Airports Economic Regulatory Authority to control the tax or charges inflicted at the airdrome in the aeronautical services. The Act also aims to scrutinize the functioning of the airports and to constitute Appellate authority to settle or decide upon the disputes. The application of the Act extends to all the airdromes that provide air transport facilities or desire to provide such service except the airdromes that are under the control of army, navy or air force or any paramilitary services of the Centre. The Act also affects the airports managed by private enterprises or airports that are leased, all civil enclave and all important airdromes.

The Act defines 'airport' as the place where landing and taking off of the aircrafts generally with landing field and also include aircraft repair and maintenance and facilities to the passengers. The term aircraft also has the same meaning of 'airdrome' as provided under the Aircrafts Act, 1934. The Central Government is authorized under the Act to constitute an Airports Economic Regulatory Authority for the purpose of accomplishing the powers and functions entrusted to it by the legislation. The Authority shall have the status of a body corporate having continuous succession, right to acquire and sell off properties and the right to take proceedings in the Court.

The Authority shall comprise of a Chairperson and two nominees of the Central Government and an additional member to be appointed representing the Ministry of defense where the matter is relating to the civil enclave in the military airdrome. The members shall have special knowledge and proficient skill in aviation, economics, legal affairs, trade and commerce etc. The Chief Executive of the regulatory authority shall be the Chairperson. The Selection Committee shall advice the Central government in appointing the Chairperson as well as other members of the Authority. The Selection Committee shall be established by the Central Government for the purpose of selecting members of the Authority.

The Chairperson is entrusted with the power to supervise and direct the performance of the affairs of the authority. He shall also chair the meetings and execute the powers and responsibilities of the Authority. Additionally, the authority shall accomplish the following functions in a major airport:

- Determination of the tax or tariffs;
- Settle on the amount chargeable as development fee;
- Decide on the passenger service fee imposed by the Aircraft Act, 1934;
- To observe the standards of performance concerning the quality, stability and consistency of the services are according to the terms and conditions prescribed by the Central Government;
- Get hold of information for the purpose of fixing the tariff;
- Other functions necessary to determine the tariff as assigned by the Central Government.

The Authority while performing functions shall give attention to the sovereignty and integrity of the nation, defense of the state, peaceful relations with other nations, decorum and ethics. To discharge the responsibilities more effectively, the Authority is empowered to issue directions to the service providers if required.

The Act further authorizes the Central government to constitute Airports Economic Regulatory Authority Appellate Tribunal to settle disputes as provided under the Act. An application for the settlement of dispute shall be lodged by the Central or State Government, local authority or any individual to the Appellate Tribunal. The Tribunal shall be guided by the natural justice principle and follow the procedures of the Civil Procedure Code, 1908. The order of the Tribunal shall be challenged before the Supreme Court by the aggrieved person. The Act also penalizes for the willful non-compliance with the orders of the Tribunal. The Central Government shall have power to frame rules for the proper implementation of the Act.

The present Act amended The Aircrafts Act, 1934 and The Airports Authority of India Act, 1994 by adding a schedule to the Act. Hence the Act established a new authority for the determination of tariff conditions and the proper conduct of the functions at the airports.

MERGERS AND ACQUISITIONS: LEGAL ISSUES

In the sections that follow, we provide an overview of certain laws that would be of significance to M&A in India. Mergers and acquisitions are modes by which distinct businesses may combine. Joint ventures are another way for two businesses to work together to achieve growth as partners in progress, though a joint venture is more of a contractual arrangement between two or more businesses.

Mergers & Amalgamations

The term ‘merger’ is not defined under the Companies Act, 1956 (“CA 1956”), and under Income Tax Act, 1961 (“ITA”). However, the Companies Act, 2013 (“CA 2013”) without strictly defining the term explains the concept. A ‘merger’ is a combination of two or more entities into one; the desired effect being not just the accumulation of assets and liabilities of the distinct entities, but organization of such entity into one business. The possible objectives of mergers are manifold - economies of scale, acquisition of technologies, access to sectors / markets etc. Generally, in a merger, the merging entities would cease to be in existence and would merge into a single surviving entity.

The ITA does however defines the analogous term ‘amalgamation’: the merger of one or more companies with another company, or the merger of two or more companies to form one company. The ITA goes on to specify certain other conditions that must be satisfied for an ‘amalgamation’ to benefit from beneficial tax treatment.

Our laws envisage mergers can occur in more than one way, for example in a situation in which the assets and liabilities of a company (merging company) are vested in another company (the merged company). The merging company loses its identity and its shareholders become shareholders of the merged company. Another method could be, when the assets and liabilities of two or more companies (merging companies) become vested in another new company (merged company). The merging companies lose their identity. The shareholders of the merging companies become shareholders of the merged company.

The CA (Companies Act) 1956 (Sections 390 to 394) and CA 2013 (Sections 230 to 234), deal with the schemes of arrangement or compromise between a company, its shareholders and/or its creditors. These provisions are discussed in greater detail in Part II of this Paper. Commercially, mergers and amalgamations may be of several types, depending on the requirements of the merging entities. Although, corporate laws may be indifferent to the different commercial forms of merger / amalgamation, the Competition Act, 2002 does pay special attention to the forms.

- i. **Horizontal Mergers**: Also referred to as a ‘horizontal integration’, this kind of merger takes place between entities engaged in competing businesses which are at the same stage of the industrial process. A horizontal merger takes a company a step closer towards monopoly by eliminating a competitor and establishing a stronger presence in the market. The other benefits of this form of merger are the advantages of economies of scale and economies of scope. These forms of merger are heavily scrutinized by the competition commission.
- ii. **Vertical Mergers**: Vertical mergers refer to the combination of two entities at different stages of the industrial or production process. For example, the merger of

a company engaged in the construction business with a company engaged in production of brick or steel would lead to vertical integration. Companies stand to gain on account of lower transaction costs and synchronization of demand and supply. Moreover, vertical integration helps a company move towards greater independence and self-sufficiency.

- iii. Congeneric Mergers: These are mergers between entities engaged in the same general industry and somewhat interrelated, but having no common customer-supplier relationship. A company uses this type of merger in order to use the resulting ability to use the same sales and distribution channels to reach the customers of both businesses.
- iv. Conglomerate Mergers: A conglomerate merger is a merger between two entities in unrelated industries. The principal reason for a conglomerate merger is utilization of financial resources, enlargement of debt capacity, and increase in the value of outstanding shares by increased leverage and earnings per share, and by lowering the average cost of capital. A merger with a diverse business also helps the company to foray into varied businesses without having to incur large start-up costs normally associated with a new business.
- v. Cash Merger: In a 'cash merger', also known as a 'cash-out merger', the shareholders of one entity receives cash instead of shares in the merged entity. This is effectively an exit for the cashed out shareholders.
- vi. Triangular Merger: A triangular merger is often resorted to, for regulatory and tax reasons. As the name suggests, it is a tripartite arrangement in which the target merges with a subsidiary of the acquirer. Based on which entity is the survivor after such merger, a triangular merger may be forward (when the target merges into the subsidiary and the subsidiary survives), or reverse (when the subsidiary merges into the target and the target survives).

Acquisitions

An 'acquisition' or 'takeover' is the purchase by one person, of controlling interest in the share capital, or all or substantially all of the assets and/or liabilities, of the target. A takeover may be friendly or hostile, and may be effected through agreements between the offeror and the majority shareholders, purchase of shares from the open market, or by making an offer for acquisition of the target's shares to the entire body of shareholders.

Acquisitions may be by way of acquisition of shares of the target, or acquisition of assets and liabilities of the target. In the latter case the business of the target is usually acquired on a going concern basis. Such a transfer is referred to as a 'slump sale' under the ITA and benefits from favourable taxing provisions vis-à-vis other transfers of assets/liabilities (discussed in greater detail in Part VI of this Paper). Section 2(42C) of the ITA defines slump sale as a "transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales".

An acquirer may also acquire a greater degree of control in the target than what would be associated with the acquirer's stake in the target, e.g., the acquirer may hold 26% of the

shares of the target but may enjoy disproportionate voting rights, management rights or veto rights in the target.

Another form of acquisitions may be by way of demerger. A demerger is the opposite of a merger, involving the splitting up of one entity into two or more entities. An entity which has more than one business, may decide to 'hive off' or 'spin off' one of its businesses into a new entity. The shareholders of the original entity would generally receive shares of the new entity.

If one of the businesses of a company is financially sick and the other business is financially sound, the sick business may be demerged from the company. This facilitates the restructuring or sale of the sick business, without affecting the assets of the healthy business. Conversely, a demerger may also be undertaken for moving a lucrative business into a separate entity. A demerger may be completed through a court process under the Merger Provisions or contractually by way of a business transfer agreement.

Joint Ventures

A joint venture is the coming together of two or more businesses for a specific purpose, which may or may not be for a limited duration. The purpose of the joint venture may be for the entry of the joint venture parties into a new business, or the entry into a new market, which requires the specific skills, expertise or the investment of each of the joint venture parties. The execution of a joint venture agreement setting out the rights and obligations of each of the parties is a norm for most joint ventures. The joint venture parties may also incorporate a new company which will engage in the proposed business. In such a case, the byelaws of the joint venture company would incorporate the agreement between the joint venture parties.

LAWS REGULATING MERGERS AND ACQUISITIONS IN INDIA

Mergers and acquisitions in India are regulated under two major statutes. The first is the Companies Act, 1956 which requires that all proposed mergers or amalgamations obtain a sanction from the High Court. The second is the Competition Act which investigates any merger or acquisition which may result in appreciable adverse effects in the relevant market.

- 1. The Companies Act , 1956:** Section 390 to 395 of Companies Act, 1956 deal with arrangements, amalgamations, mergers and the procedure to be followed for getting the arrangement, compromise or the scheme of amalgamation approved. Though, section 391 deals with the issue of compromise or arrangement which is different from the issue of amalgamation as deal with under section 394, as section 394 too refers to the procedure under section 391 etc., all the section are to be seen together while understanding the procedure of getting the scheme of amalgamation approved. Again, it is true that while the procedure to be followed in case of amalgamation of two companies is wider than the scheme of compromise or arrangement though there exist substantial overlapping.

The procedure to be followed while getting the scheme of amalgamation and the important points, are as follows:-

- (1) Any company, creditors of the company, class of them, members or the class of

members can file an application under section 391 seeking sanction of any scheme of compromise or arrangement. However, by its very nature it can be understood that the scheme of amalgamation is normally presented by the company. While filing an application either under section 391 or section 394, the applicant is supposed to disclose all material particulars in accordance with the provisions of the Act.

(2) Upon satisfying that the scheme is prima facie workable and fair, the Tribunal order for the meeting of the members, class of members, creditors or the class of creditors. Rather, passing an order calling for meeting, if the requirements of holding meetings with class of shareholders or the members, are specifically dealt with in the order calling meeting, then, there won't be any subsequent litigation. The scope of conduct of meeting with such class of members or the shareholders is wider in case of amalgamation than where a scheme of compromise or arrangement is sought for under section 391

(3) The scheme must get approved by the majority of the stake holders viz., the members, class of members, creditors or such class of creditors. The scope of conduct of meeting with the members, class of members, creditors or such class of creditors will be restrictive some what in an application seeking compromise or arrangement.

(4) There should be due notice disclosing all material particulars and annexing the copy of the scheme as the case may be while calling the meeting.

(5) In a case where amalgamation of two companies is sought for, before approving the scheme of amalgamation, a report is to be received from the registrar of companies that the approval of scheme will not prejudice the interests of the shareholders.

(6) The Central Government is also required to file its report in an application seeking approval of compromise, arrangement or the amalgamation as the case may be under section 394A.

(7) After complying with all the requirements, if the scheme is approved, then, the certified copy of the order is to be filed with the concerned authorities.

2. The Competition Act, 2002: Following provisions of the Competition Act, 2002 deals with mergers of the company:-

(1) Section 5 of the Competition Act, 2002 deals with "Combinations" which defines combination by reference to assets and turnover

- (a) exclusively in India and
- (b) in India and outside India.

For example, an Indian company with turnover of Rs. 3000 crores cannot acquire another Indian company without prior notification and approval of the Competition Commission. On the other hand, a foreign company with turnover outside India of more than USD 1.5 billion (or in excess of Rs. 4500 crores) may acquire a company in India with sales just short of Rs. 1500 crores without any notification to (or approval of) the Competition Commission being required.

(2) Section 6 of the Competition Act, 2002 states that, no person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.

All types of intra-group combinations, mergers, demergers, reorganizations and other similar transactions should be specifically exempted from the notification procedure and appropriate clauses should be incorporated in sub-regulation 5(2) of the Regulations. These transactions do not have any competitive impact on the market for assessment under the Competition Act, Section 6.

3. **Foreign Exchange Management Act, 1999:** The foreign exchange laws relating to issuance and allotment of shares to foreign entities are contained in The Foreign Exchange Management (Transfer or Issue of Security by a person residing out of India) Regulation, 2000 issued by RBI vide GSR no. 406(E) dated 3rd May, 2000. These regulations provide general guidelines on issuance of shares or securities by an Indian entity to a person residing outside India or recording in its books any transfer of security from or to such person. RBI has issued detailed guidelines on foreign investment in India vide “Foreign Direct Investment Scheme” contained in Schedule 1 of said regulation.
4. **SEBI Take over Code 1994:** SEBI Takeover Regulations permit consolidation of shares or voting rights beyond 15% up to 55%, provided the acquirer does not acquire more than 5% of shares or voting rights of the target company in any financial year. [Regulation 11(1) of the SEBI Takeover Regulations] However, acquisition of shares or voting rights beyond 26% would apparently attract the notification procedure under the Act. It should be clarified that notification to CCI will not be required for consolidation of shares or voting rights permitted under the SEBI Takeover Regulations. Similarly the acquirer who has already acquired control of a company (say a listed company), after adhering to all requirements of SEBI Takeover Regulations and also the Act, should be exempted from the Act for further acquisition of shares or voting rights in the same company.
5. **The Indian Income Tax Act (ITA), 1961:** Merger has not been defined under the ITA but has been covered under the term 'amalgamation' as defined in section 2(1B) of the Act. To encourage restructuring, merger and demerger has been given a special treatment in the Income-tax Act since the beginning. The Finance Act, 1999 clarified many issues relating to Business Reorganizations thereby facilitating and making business restructuring tax neutral. As per Finance Minister this has been done to accelerate internal liberalization. Certain provisions applicable to mergers/demergers are as under: Definition of Amalgamation/Merger — Section 2(1B).
Amalgamation means merger of either one or more companies with another company or merger of two or more companies to form one company in such a manner that:
(1) All the properties and liabilities of the transferor company/companies become the

properties and liabilities of Transferee Company.

(2) Shareholders holding not less than 75% of the value of shares in the transferor company (other than shares which are held by, or by a nominee for, the transferee company or its subsidiaries) become shareholders of the transferee company.

The following provisions would be applicable to merger only if the conditions laid down in section 2(1B) relating to merger are fulfilled:

(1) Taxability in the hands of Transferee Company — Section 47(vi) & section 47

(a) The transfer of shares by the shareholders of the transferor company in lieu of shares of the transferee company on merger is not regarded as transfer and hence gains arising from the same are not chargeable to tax in the hands of the shareholders of the transferee company. [Section 47(vii)]

(b) In case of merger, cost of acquisition of shares of the transferee company, which were acquired in pursuant to merger will be the cost incurred for acquiring the shares of the transferor company. [Section 49(2)]

6. Mandatory permission by the courts: Any scheme for mergers has to be sanctioned by the courts of the country. The company act provides that the high court of the respective states where the transferor and the transferee companies have their respective registered offices have the necessary jurisdiction to direct the winding up or regulate the merger of the companies registered in or outside India.

The high courts can also supervise any arrangements or modifications in the arrangements after having sanctioned the scheme of mergers as per the section 392 of the Company Act. Thereafter the courts would issue the necessary sanctions for the scheme of mergers after dealing with the application for the merger if they are convinced that the impending merger is “fair and reasonable”.

The courts also have a certain limit to their powers to exercise their jurisdiction which have essentially evolved from their own rulings. For example, the courts will not allow the merger to come through the intervention of the courts, if the same can be effected through some other provisions of the Companies Act; further, the courts cannot allow for the merger to proceed if there was something that the parties themselves could not agree to; also, if the merger, if allowed, would be in contravention of certain conditions laid down by the law, such a merger also cannot be permitted. The courts have no special jurisdiction with regard to the issuance of writs to entertain an appeal over a matter that is otherwise “final, conclusive and binding” as per the section 391 of the Company act.

7. Stamp duty: Stamp act varies from state to State. As per Bombay Stamp Act, conveyance includes an order in respect of amalgamation; by which property is transferred to or vested in any other person. As per this Act, rate of stamp duty is 10 per cent.

INTELLECTUAL PROPERTY DUE DILIGENCE IN MERGERS AND ACQUISITIONS

The increased profile, frequency, and value of intellectual property related transactions have elevated the need for all legal and financial professionals and Intellectual Property (IP) owner to have thorough understanding of the assessment and the valuation of these assets, and their

role in commercial transaction. A detailed assessment of intellectual property asset is becoming an increasingly integrated part of commercial transaction. Due diligence is the process of investigating a party's ownership, right to use, and right to stop others from using the IP rights involved in sale or merger ---the nature of transaction and the rights being acquired will determine the extent and focus of the due diligence review. Due Diligence in IP for valuation would help in building strategy, where in:-

- I) If Intellectual Property asset is underplayed the plans for maximization would be discussed.
- II) If the Trademark has been maximized to the point that it has lost its cachet in the market place, reclaiming may be considered.
- III) If mark is undergoing generalization and is becoming generic, reclaiming the mark from slipping to generic status would need to be considered.
- IV) Certain events can devalue an Intellectual Property Asset, in the same way a fire can suddenly destroy a piece of real property. These sudden events in respect of IP could be adverse publicity or personal injury arising from a product. An essential part of the due diligence and valuation process accounts for the impact of product and company-related events on assets – management can use risk information revealed in the due diligence.
- V) Due diligence could highlight contingent risk which do not always arise from Intellectual Property law itself but may be significantly affected by product liability and contract law and other non-Intellectual Property realms.

Therefore Intellectual Property due diligence and valuation can be correlated with the overall legal due diligence to provide an accurate conclusion regarding the asset present and future value.

MERGERS & ACQUISITIONS OF AIRLINES IN INDIA

1. Jet-Ethiad Acquisition:

In 2012, Etihad, a company incorporated in the United Arab Emirates proposed to acquire a 24% stake in Jet Airways. The Proposal had received approval from SEBI, FIPB and Cabinet Committee of Economic Affairs. Thereafter, the investment agreement, shareholders agreement as well as the commercial cooperation agreements between Jet and Etihad were submitted to the CCI for their approval. The Jet-Etihad filing before the CCI has been considered a landmark case in the aviation sector, as CCI examined every detail of the impact caused by such a deal on the air passenger services and consequently on competition in India.

The CCI while considering the case filed before it had to consider whether the transaction between the two entities would have an Appreciable Adverse Effect on Competition (“AAEC”) in the relevant market India. The relevant market was held to be the market for international passenger air transport based on their point of origin and destination (O & D), each constituting a different route. The CCI observed that there were 38 routes to and from India to other destinations where Jet and Etihad flew and there was at least one competitor on each of such routes. There were only 7 destinations where Jet and Etihad had a combined market share of more than 50%.

The CCI observed that such a combination would result in potential efficiencies whereby the proposed transaction would generate significant synergies for both airlines in terms of network efficiencies and cost savings. The CCI also considered the importance of the proposed equity infusion, as Jet had been facing a financial crunch. The Commission therefore, vide a majority order dated November 12, 2013 approved the combination under sub-section (1) of Section 31 of the Competition Act. However, the CCI also warned that such an approval should not be construed as immunity in any manner from subsequent proceedings brought before it for violations of the Competition Act.

The approach that the CCI would appear to have been inspired from the decision in the merger between British Airways and Iberia, wherein, the European Commission had held that the merger would not affect competition till the time effective and credible competitors are present in the relevant market.

2. TATA Sons Ltd.-Singapore Airlines (SIA):

J. R. D. Tata has often been called the father of aviation in India. Which is no surprise considering that he was the man who not only conceived and funded the first air mail carrier flight from Karachi to Mumbai on October 15, 1932, but he was also the pilot. In 1937, the mail carrier airline was expanded to transport passengers as well, and after World War II, Tata Airlines, which was held 49% by the Government, 25% by Tata, and the rest by public shareholders, started flights internationally. Tata Airlines went public in 1946 and was renamed Air India. When the Government decided to nationalize all airlines in 1953, Tata was pushed out of the aviation sector. Although the Tata Group had made several attempts in the past to re-enter the aviation sector in India, including acquiring a 30% shareholding in Air Asia India, Tata's true return to the Indian skies was marked by their majority controlled (51%) airline Vistara which they formed as a joint venture with Singapore Airlines ("SIA"). Although the venture obtained FIPB approval in 2013, it took the companies nearly 2 years to obtain the remaining government clearances, including the air operating permit from the DGCA. Vistara flew its first flight from Delhi to Mumbai in January 9, 2015.

3. Air India- Indian Airlines:

Air India is the rebranded version of erstwhile Tata Airlines, while Indian Airlines was formed by merging seven domestic airlines into one. Both airlines were nationalized pursuant to the Air Corporations Act, 1953. Fifteen years after the aviation sector was liberalized, both the national flagship carriers were performing poorly due to aggressive competition. In order to address this problem, the Union Cabinet approved a merger between the two airlines on March 1, 2007. The Ministry of Corporate Affairs, vide Order dated August 22, 2007 approved the Scheme of Amalgamation of Air India Limited and Indian Airlines Limited with the National Aviation Company of India Ltd (NACIL). The resulting airline retained the name Air India.

While net synergy benefits of Rs. 2.8 billion were expected, the merged airline actually incurred a loss of Rs. 280 billion from 2007 to 2012. This was primarily due to the fact that the Air India fleet consisted of Boeing aircrafts normally used for long distance international destinations, while Indian Airlines used Airbus aircrafts

primarily for domestic destinations. As such, synergies in relation to operational crews, engineers, technicians, etc could not be efficiently maximized. Furthermore, Air India also faced aggressive competition from airlines like IndiGo, Jet Airways, and Spice Jet which were gaining substantial leverage in the market.

4. Jet-Sahara:

Jet acquired 100% stake in Air Sahara for Rs. 1,450 cores 15 months after signing the original purchase agreement. The airline was rebranded as “JetLite,” and launched as Jet Airways’s low budget carrier. Jet hoped to regain some of the market share it had lost to Indigo by entering the low cost segment, however JetLite failed to gain traction and Jet’s second attempt to keep it afloat by rebranding it as JetKonnnect also eventually failed. In 2014 Jet announced that it would disband its low cost carrier and return to a single full service airline.

5. Air Deccan-Kingfisher:

The merger between the pioneer Low Cost Carrier (“LLC”) and liquor baron was announced in May, 2007 when United Breweries picked up 26% stake in Air Deccan and proposed to buy another 20% via an open offer. In the deal, United Breweries group paid Rs. 550 crore for their 26% stake in the LCC. Subsequently, United Breweries acquired a controlling stake in Deccan and rebranded it as Kingfisher Red. Similar to Jet Airways’s launch of JetLite, Kingfisher Red was Kingfisher’s attempt to revive growth by entering into the low cost carrier segment of the market. However, by 2012, due to exorbitant debt, non-payment of employees’ salaries, default on taxes and creditor liabilities, overextension of funds, engine defects coupled with lack of manufacturer guarantees Kingfisher was forced to ground all operations. Its permits were suspended, and arrest warrants were issued against its promoter Vijay Mallya, and four other directors. Since 2012, Kingfisher’s aircrafts have been deregistered and Vijay Mallya and three of the four directors have been declared as willful defaulters by the United Bank of India. Although the three mergers mentioned above resulted in losses, it is interesting to understand why such significant mergers, clearly having anti-competitive risks, were permitted in the first place. The answer may be as simple as, timing. The mergers took place in 2007, when India lacked a proper competition regulating authority that could investigate mergers.

Prior to the establishment of the CCI, the competition regulating authority in India was the Monopolies and Restrictive Trade Practices Commission (“MRTPC”), established under the Monopolies and Restrictive Trade Practices Act, 1969 (“MRTP Act”). However, pursuant to the Monopolies and Restrictive Trade Practices (Amendment) Act, 1991, the MRTPC’s powers to investigate mergers, amalgamations and takeovers was repealed. It wasn’t until June, 2011 that the provision relating to mergers and combination under the Competition Act were notified. Thus, the MRTPC did not have the authority to investigate the Jet-Sahara and Kingfisher-Air Deccan mergers in 2007. It is also important to note that pursuant to section 3, the MRTP Act did not apply to undertakings owned or controlled by the Central Government.

COMPETITION ISSUES IN AVIATION SECTOR

The Competition Commission of India (“CCI”) is another important regulator in the sphere of the aviation industry and is empowered by the Competition Act, 2002 to ensure that participants do not indulge in anti-competitive practice. The CCI has kept a close watch and investigated a number of cases in the aviation sector under Section 3 and Section 4 of the Act. A few of the issues dealt with by the CCI are discussed below.

1. Cartels and Abuse of Dominance:

In the case of Uniglobe Mod Travels Pvt. Ltd. v. Travel Agents Federation of India & ors (“Uniglode”), The CCI found the cartelization of travel agents and penalized them for breach of Section 3 of the Act. The issue arose when foreign airlines, such as Singapore Airlines etc. and domestic airlines such as Jet, Kingfisher etc. issued notices to the travel agents to move from the “commission” based model of remuneration to “transaction” based model. This was a shift from prior practice wherein the travel agents had been getting a fixed commission by the airlines on every ticket sold by them to a transaction fee model wherein the travel agent charge the passenger according to the services rendered and the bouquet of services offered. The travel agents were reluctant to adopt the new model since the commission based model ensured that they got an assured return on each ticket sold.

Therefore, through their respective associations, travel agents formed an agreement to boycott the decision and subsequently stopped booking ticket for these Airlines. This particular action pressurized the domestic airlines operators into revoking their decision of switching to the transaction based model. The foreign airlines however maintained their stance. The Informant, Uniglobe Mod, a travel agent rendering various travel services, boycotted such an arrangement and continued to render services to the Foreign Airlines. This resulted in the informant’s expulsion from the association on account of non-adherence to the terms and conditions laid down by them. The informant therefore filed a complaint under Section 19(1)(a) of the Competition Act alleging that the travel agents had entered into anti-competitive agreements amongst themselves. The CCI, on completing an investigation, found the Travel Agents association to be in contravention of Section 3(1) and 3(3)(b) of the Act given the fact that three fourth of the tickets were booked through agents. This established the fact that they held substantial market power. The CCI therefore directed them to refrain from indulging in such anti-competitive practices in future and also imposed a penalty upon them. The parties aggrieved with the order approached the Competition Appellate Tribunal (‘COMPAT’) which upheld CCI’s order.

2. Code-Sharing Agreements:

Often, instead of entering into full-fledged mergers or acquisitions, airlines choose to achieve joint synergies by entering into mutual exchange contracts. One such contract is a Code-Sharing Agreement (CSA). CSAs have come into prominence with the advent and increase in the use of computer reservations systems on the internet. A CSA essentially allows for a flight operated by one carrier, also to be marketed by another carrier, under that other carrier’s code and flight number. For instance, Indigo

airlines (operating with flight no. IN 3204) may have a code-sharing agreement with Jet Airways (which operates with flight no.-JT 2434) for a specific route. In such a situation, Jet Airways would be permitted to market and sell the seats on Indigo airlines under its flight number for a specific route. The carrier operating the flight is known as the “operating carrier” (Indigo airlines), while the carrier marketing the flight under its own code is known as the “marketing carrier” (Jet Airways).

The underlying motivation of airlines entering into such agreements is to broaden the number of destinations and flight timings they can offer their passengers without incurring the costs and difficulties associated with investing in additional equipment, or merging with another airline. CSAs also enhance the presence of an airline in markets where it would otherwise have no profile, and hence facilitate the marketing of its services, allowing its seats to be sold via a marketing carrier which may be much better known in that market.

It is important to note that the Government has recently addressed the issue of code-sharing agreements between domestic and foreign airline operators under the NCAP 2016. Specifically, the policy provides that all domestic carriers will be free to enter into code-share agreements with foreign carriers to any point in India available under the relevant ASA. Further, designated Indian carriers will be permitted to enter into international code-share agreements without obtaining the prior approval of the MCA.

Apart from code-sharing, it is pertinent to note that airlines can form cooperative marketing alliances which cover a wide array of joint activities. In general, alliances may include cost-reduction initiatives (sharing or consolidating airport facilities such as gates, lounges, sharing the ground handling services, etc.), schedule and gate coordination to provide more convenient connections between flights of alliance partners, and frequent-flyer program and/or airport lounge reciprocity etc.

However, as in cases of mergers and acquisitions, if the purpose for entering into any of these agreements is to dominate or control and has an appreciable adverse effect on competition in the market, the CCI may pass orders directing parties to discontinue such agreements and impose monetary penalties.

LEASING AND FINANCING IN AIRLINES

Owning the “Big Bird” is an expensive deal. Purchasing new aircrafts further makes it an attentive proposition in exchange of monetary. It is a common practice in the airline business to take aircrafts on lease. Leasing not only assists in increasing the paradigm of airline sector, and more importantly, reduces the instant cost of airline operators. Universally aircraft leasing is quite prevalent and practiced. In India, There is an entire gamut of legislations dealing this business, viz. Directorate General of Civil Aviation (“DGCA”), the Reserve Bank of India (“RBI”), Taxation Department, which parties entering into aircraft leasing transaction have to consider.

Leasing of aircraft is an extensive portion of financing and accounting of airline operators in terms of both the magnitude of capital and the complexity of lease classification. Leasing is

an important instrument used by Aviation companies dealing in capital management, especially when facing financial distress. Basically aircraft leasing provides two main purposes that is to have aircraft without the financial burden of buying them, and to provide temporary increase in capacity of business and services. In this regard lease classification and the related accounting treatments are critical and necessary to the airline industry.

Leasing has become a common and important technique to acquire an aircraft, which is governed by various law and regulations. One of its prime advantages of leasing is that it helps to manage the finance investment. Leasing of aircraft is most common in private as well as in public aviation sector. Both short and long term aircraft leasing options are available to aviation industry.

Aircraft leasing are classified into finance and operating lease. Finance lease is required to meet criteria like: a lease term greater than 75% of the aircraft's estimated life, option to purchase it at less than fair market value, or transfer of ownership to the lessee when lease expires. It also enhances tax benefits and is explicit on the balance sheet of the lessee. Generally, it's for a long term period. On the other hand, an operating lease is meant for a short term period. Presently, most of the aircraft leasing is on the basis of this type of lease. According to data, there are about 12,500 commercial aircrafts over the world, among which about 2500 flying on operating lease.

It's always a constructive and beneficial deal to relish aircraft leasing service from Commercial Aircraft Sales and Leasing, a collective term given to organizations involved in marketing airliners from manufacturers of like Boeing and Airbus. A innumerable number of other providers, such as commercial banks, financial institutions, and hedge funds, are also in the scenario to provide aircraft leasing services. Of which noticeable are GE Commercial Aviation Services (GECAS) and International Lease Finance Corporation (ILFC). Besides, some companies offer leasing as well as financing packages for commercial and corporate aircrafts. Customized aircraft leasing packages are also designed to meet the demands of the market.

Despite the high growth of the Indian aviation market, the legal, tax and regulatory environment continues to be a challenge for lessors and financiers of aircraft –both at domestic and international levels. A variety of issues comes to non-Indian lessor or financier of an aircraft to an Indian operator.

Meaning, Definition and Concepts

Aircraft leasing is a contract whereby the owner (lessor) of an asset agrees to another party (lessee) the exclusive rights to the use of asset (aircraft) for an agreed period of time, in return for of rent or premium which is to be paid periodically.

In Indian context the word 'lease' is defined under section 107 of Transfer of Property Act, 1882 which deals with only immovable property only. Aircraft being the movable property so the appropriate word to be used is 'Bailment' of an Aircraft which is defined under section 148 of Indian Contract Act, 1872.

In foreign context the word 'lease' could be used as the ICAO document (Manual of procedures for operations inspection, certificate and continued surveillance) and Regulation

(EC) No. 1008/2008 (common Rule for the operation of Air service in community defines following¹⁰⁵:

Lease: a “...contractual agreement whereby a properly licensed air operator gains commercial control of an entire aircraft without transfer of ownership¹⁰⁶,”

Lessor: “...the party from which aircraft is leased¹⁰⁷,”

Lessee: “...the party to which aircraft is leased¹⁰⁸,”

Concepts of Aircraft Leasing:

The nature of leasing is a contract between the lessor and lessee where lessor provides the right to use asset to lessee. The contract has its own specified time, referred to as the lease term for which the lessee is obliged to pay the installment as agreed between the lessor and lessee. Generally, a lease contract may not be cancelled by either party unless certain terms and conditions specified in the contract switch to its termination. A lease automatically terminated on the completion of the lease term unless renewed. At the expiry of the lease term, the lessee is usually required to return the asset (aircraft) to the lessor, unless the lessor provides an option to the lessee to purchase of the asset (aircraft). No separate act exit to do aircraft leasing. Neither the aircraft Act nor the Aircraft Rules contain any specific provision in this regard. As with leases in general, therefore, the provisions of the contract act will apply. In order for there to be a valid lease there must be an offer and acceptance together with consideration¹⁰⁹. The parties must be competent to contract¹¹⁰.

Most airlines increasingly rely on aircraft leasing to large up front capital requirements and efficient way to purchase the aircraft. According to report¹¹¹, major airlines across the world had accumulated approximately 13,458 aircraft. The international Lease Finance Corporation (ILFC), estimates that one out of every three commercial aircraft is leased one. Thus the leasing is becoming more prevalent in the airline sector.

Types of Aircraft Leasing

Basically there are two types of Aircraft Leasing:

- 1) Dry lease;
- 2) Wet lease.

Dry Lease:

¹⁰⁵ <http://www.caa.co.uk/default.aspx?catid=1434&pagetype=90&pageid=13035>

¹⁰⁶ ICAO Doc 8335

¹⁰⁷ *Ibid*

¹⁰⁸ *Ibid*

¹⁰⁹ Basic requirement of Indian Contract Act, 1872

¹¹⁰ Section 11 : Capacity to Contract, Indian Contract Aft,1872 and have the right to transfer the aircraft on a lease basis.

¹¹¹ Frost and Sullivan,2004.

A dry lease agreement is "... an agreement between undertakings pursuant to which the aircraft is operated under AOC¹¹² of the lessee..."¹¹³,

In Dry lease, an aircraft is leased without insurance, crew, ground staff, supporting equipments, maintenance etc. Airlines enter into dry lease agreement which has its own flight and maintenance department and need aircraft only and no other services. Dry lease is used by the leasing companies and banks, requiring the lessee to put the aircraft on its own AOC and provide aircraft registration i.e. Aviation Regulation becomes the responsibility of the lessee. The tenure of the aircraft lease is more than two years and consist certain conditions regarding depreciation, maintenance, and insurance etc. and also depending upon the geographical and political circumstances etc.

Requirements of Dry lease in India¹¹⁴

Registration of aircraft: - Operation of foreign aircrafts on dry lease requires registration of aircraft in India. The leased aircraft ought to have a valid Certificate of Registration ("CoR") and must be entered in the operating permit of the operator. According to Civil Aviation Requirement ("CAR") regulations¹¹⁵, registration of aircrafts can be done either in Category A or B. For leased aircrafts, the registration¹¹⁶ falls under Category A. the registration of the aircraft is valid as long as the lease is in force and the aircraft is maintained in accordance with (i) the DGCA¹¹⁷ Regulations; (ii) the terms and conditions specified in the operator's permit; and (iii) the operator's maintenance control and operations manuals. The operator can apply to DGCA for extension of validity of the CoR.

Airworthiness of the aircraft- once the aircraft is registered, the owner of his authorized representative has to apply to DGCA in a prescribed form together with the requisite fees prescribed in rule 62 of Aircraft Rules 1937 for obtaining CoA¹¹⁸. An application for issue of Aircraft Noise Certificate is also to be made along with the CoA application. CoA is valid for a period of Twelve months. In case of imported aircraft, the validity begins from th date of issue of Export Certificate of Airworthiness and is restricted to the validity specified in the standard certificate of Airworthiness issued by the country of export.

Two types of Dry lease: There are two types of dry lease:

(a) An Operating lease; and

(b) A finance lease.

An Operating lease: In case of an operating lease, the aircraft is leased for short period of time as compared to its total economic life. An operating lease is commonly used to acquire aircraft for a term of 2-8 Years. For instance, if the total economic life of aircraft is 20 years then under operating lease it may be leased upto 8 years, upon the end of the lease period, the

¹¹² "Air Operator Certificate"

¹¹³ Article 2(24) of EC Reg. 1008/2008.

¹¹⁴ CAR Section 3, Air Transport Series "C" Part I, December 30, 1993

¹¹⁵ CAR Series F, Part I, Section 2- Airworthiness dated September 10, 1998

¹¹⁶ The procedure for obtaining CoR has been covered in detail in Aviation Bulletin- VIII, which can be Accessed at <http://psalegal.com/pdf/Aviation%20Bulletin%20-%20Issue%20VIII.pdf>.

¹¹⁷ "Director General Of Civil Aviation"

¹¹⁸ Idem.

lessee returns the leased aircraft to the lessor and there is no option of purchasing the aircraft. The lessee does not show aircraft into his balance sheet under operating lease.

Finance lease: The finance lease is also known as Capital Lease. Finance lease is long term lease and the lessee has the option to purchase the leased aircraft upon the expiration of leasing date and also includes:

- Lease payment more than 90% of the market value of the aircraft.
- The term of the lease is over 75% of the aircraft's usage life.

Wet lease: "... an agreement between air carriers pursuant to which the aircraft is operated under the AOC of the lessor..."¹¹⁹.

A Wet lease provides the aircrew, maintenance, aircraft logs and other support function with the leased aircraft to lessee. A wet lease is beneficial to a company that wants an aircraft at its disposal but does not want the burden of hiring a flight department to fly and maintain aircraft.

Over the years the aircraft leasing terminology has gone through many changes which may not reflect the service provided; for instance, in U.K wet lease use to mean, quite logically, 'including fuel'.

Requirements of Wet Lease in India¹²⁰: Operation of foreign aircraft leased by Indian operators is normally permitted on dry lease basis. Import of aircraft for domestic air transport operations on wet lease basis is not permitted except in emergency situations and in the following circumstances such as the existing aircraft of an operator is grounded for maintenance/inspection checks or due to any other unforeseen reasons.(in such cases, wet leasing is permitted only for the duration of grounding of aircraft);¹²¹ or the existing aircraft is involved in some accident/ incident or due to expiry of existing lease and delay in finalization of new lease agreement, there is a reduction in capacity of the operator; or for revival of sick operators who should have an agreement with the lessor initially for wet lease for a period not exceeding six months and, thereafter, automatic conversion to dry lease for the remaining period of lease; or short term induction of capacity required to meet emergency situation such as natural calamity, industrial unrest or any other similar situation¹²².

Other important provisions pertaining to operation of aircrafts on wet lease are discussed below:

- The state of registry has to confirm that their legislation enables them to divest themselves of the functions and duties which are the object of the transfer agreement, agree for surveillance of aircraft operations and maintenance by DGCA , and should furnish a letter from the concerned regulatory authority in this regard;

¹¹⁹ Article 2(25) of EC Reg. 1008/2008.

¹²⁰ CAR, Series C, Part I, Section 3 Dated 30, 1993 and AIC 03/1998.

¹²¹ The period of the lease includes transportation period required to and fro for replacement aircraft.

¹²² *Ibid* 8

- There should be well stated agreement between the lessee and lessor stipulating that the Indian operator and DGCA will have the authority to exercise airworthiness and operational control on the wet lease aircraft operation:
- The lessee and the lessor must have a valid and effective operation permit or AOC for the type of operations.

Terminology: The term 'lease' using wet or dry terminology were introduced by the Civil Aeronautics Board before the Federal Aviation Administration was created and are commonly used in the aviation industry.

Type of Wet Lease: Damp Lease: a "...wet leased aircraft that includes a cockpit crew but not cabin attendants"¹²³. Under Damp lease, the lessee will provide cabin crew. However, in order to give initial guidance to the crew of the lessee, sometimes, the lessor provides a trainer on board for a limited period of time to give SEP (Safety and Emergency Procedure) training to the cabin attendants.

General requirements applicable to both dry and wet leases: For leased aircraft operations in India, the aircraft should have been type-certificated by Federal Aviation Administration of USA or Joint Airworthiness Authority of Europe or Civil Aviation Authority of UK or any other authority acceptable to DGCAA. It is operator's responsibility to confirm that the lease agreement does not contain any provision which will be binding on the DGCA. The lessor, on his part, has to give an undertaking in the lease agreement that he would comply with all the application accordance to "CAR"¹²⁴ rules.

Tests for lease classification In terms of criteria for lease classification, the following four tests are generally applied.

- Transfer of ownership test
- Bargain Purchase option test
- Economic life test: 75% rule.
- Rule of investment test: 90% rule.

ADVANTAGES AND STRUCTURE OF AIRCRAFT LEASING

Advantages: The advantages of aircraft leasing is as follows:

1. Full financing at fixed rates: The lessee is entitled to use an asset (aircraft) without paying full cost-up-front which helps to conserve scarce cash.

2. Protection against Obsolescence: Leasing an asset reduces risk of obsolescence, and in many cases passes the risk in residual value to the lessor. If the asset value changes in a short period of time, lease is effective way to avoid such risk from lessee's end.

3. Less costly financing: Tax benefits that accrue to the leasing company or financial institution may sometimes be transferred to the lessee in lower rent payment form.

¹²³ ICAO Doc 8335

¹²⁴ "Civil Aviation Requirements".

4. Flexibility: The agreement of lease may less restrictive provision as compared to other debt agreements. For e.g., a lease payment schedule can be structured to meet financial condition of the lessee. If you own the aircraft, you may have virtually complete control over its use. Depending upon the resale market for the aircraft and how long you are willing to hold it, you may be building equity. However, there is less flexibility with ownership. The aircraft you purchase may become obsolete or the company's aircraft needs may change over time. A substantial down payment may be required to purchase an aircraft, depleting the company's working capital and adversely affecting your debt-equity ratio. In addition, payments towards purchase may be higher than available lease arrangements. Some companies may be subject to requirements prohibiting aircraft ownership due to shareholder or insurance liability concerns.

A lease arrangement may be more flexible than purchase of an aircraft. A lease can enable a company to get in and out of aircraft use more easily through shorter-term commitments and without the prepayment penalties that might be triggered upon sale of a leased aircraft and the risks and responsibilities of aircraft ownership.

5. Attractive minimum tax problems: As the ownership of equipment results in an increase in tax liability under alternative minimum tax rules, companies can avoid the onerous alternative tax provisions by way of leasing equipment.

6. Off Balance Sheet Financing: depending on the type of leases, the lessee can treat lease transactions as off-balance sheet. This is critical to those companies wishing to increase borrowing capacity. Companies can avoid increasing balance sheet liability by leasing equipment instead of purchasing. One reason to choose a lease over purchase is that it can minimize the cash flow required to provide what is, in effect, a service (transportation), rather than an asset, necessary to company operations. In most cases, the company has no inherent interest in owning aircraft, only in using aircraft. Even companies in business directly involving aircraft, such as the airline industry, often lease. Currently, about half of the commercial aircraft operating worldwide are leased.

7. Tax-Advantage: Ownership of an aircraft will generally give you the right to depreciate it for tax purposes. However, only interest, not principal, will be deductible. For some companies facing potential Alternative Minimum Tax issues, a lease with fully-deductible payments could present advantages. Or, if the company has insufficient tax liabilities to take advantage of depreciation deductions, leasing might provide a cheaper method of acquiring use of an aircraft. Also, a company with international operations may have options, in terms of structuring the acquisition of aircraft that make the option of leasing more desirable than purchase.

8. Since lessors assume a residual value to the aircraft being leased, they can typically offer a lower rental payment. However, to optimize the cash flow benefit, leases usually must be for a longer term. In addition to freeing up cash, leasing also may help keep your lines of credit open.

9. Leasing also can remove long-term debt from the balance sheet. Under many lease agreements, lease rental payments will qualify as an expense, not debt, under applicable accounting rules. Companies looking to clean-up their balance sheets may prefer leasing to

purchase of aircraft. You may, however, have to reflect your lease obligations in the footnotes to your financial statements.

Aircraft leasing Structure: Aircraft leasing transaction include:

1. Lessor: It includes:

- Leasing companies.
- Special purpose companies established by financial institutions.
- Subsidiaries of aircraft manufacture.

2. Lessee: It includes:

- Airlines companies.

3. Others: It includes:

- Aircraft manufactures,
- Insurance companies,
- Governments.

Charges and Taxes¹²⁵ under Aircraft Leasing

Fees and Charges: There are no fees or charges payable in respect of the creation of an aircraft lease. Registration of the lease (in case it gives rise to a charge) with the Registrar of Charges will entail a nominal fee. So too, will registration of the lease with the Sub-registrar of assurances.

Taxes: The usual taxes and duties on aircraft leases are described below:

VAT: This was introduced in April 2005 and has replaced Sales Taxes in all 29 States and six Union territories of India. However the following sales are exempt:

- a) If made in the course of inter -state trade or commerce;
- b) If made outside the state;
- c) If made in the course of import of the goods into or export of the goods out of India.

Custom Duty: No customs duty is payable on import of aircraft by Scheduled/ Non-Scheduled Operators, Flying Clubs and Training Institutes into India.

Capital allowances: Capital allowances are in the nature of tax depreciation allowances arising on the purchase of certain plant and machinery, including aircraft. Capital allowances may be claimed in respect of aircraft by the owner.

¹²⁵ Aircraft Finance Registration, Security and Enforcement By Graham McBain, Thomson sweet & Maxwell 2009

Corporation tax: In the case of a non-resident assessee, engaged in the business of operation of aircraft, the income chargeable to tax in India under the head “Profits and gains of business or profession”, is calculated at the rate of 5 per cent of the aggregate¹²⁶.

Stamp duty: Stamp Duty is levied in India on instruments in accordance with the Indian Stamp Act. If the instrument is executed overseas and relates to a property located overseas, there is no stamp duty.

Conventions Relating To Aircraft Leasing

The Advantages that States may expect to derive from becoming Contracting States to the Cape Town Convention and Aircraft Protocol:¹²⁷ States may expect to derive both legal and economic advantages from becoming Parties to the Convention on International Interests in Mobile Equipment (the Convention) and the Protocol to Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (the Aircraft Protocol).

The problem addressed by the Convention, The Convention is designed to overcome the problem of obtaining secure and readily enforceable rights in items of high-value mobile equipment which by their nature do not have a fixed location and, in the case of space assets (such as satellites) are not on Earth at all. This problem derives essentially from the widely-differing approaches taken by legal systems to security, title reservation and leasing rights, engendering uncertainty amongst intending financiers as to the efficacy of their rights. The result is to inhibit the extension of finance in respect of such categories of high-value mobile equipment, particularly to developing countries, and to increase borrowing costs.

Legal advantages through the creation of a uniform international regimen governing the taking of security in high-value mobile equipment, based on the creation of an international interest in such categories of equipment that is to be recognized in all Contracting States and on the establishment of an electronic international registration system for the registration of such interests, the Convention and its protocols will greatly improve predictability as to the enforceability of security, title reservation and leasing rights in the various categories of high value mobile equipment covered by its terms, and in the first place aircraft objects.

Economic advantages The establishment of the international regimen facilitating the creation, perfection and enforceability of security, title reservation and leasing rights in the categories of high-value mobile equipment covered by the Convention and its protocols, and in the first place the Aircraft Protocol, will provide confidence to lenders and institutional investors, making it possible to convert illiquid loans into liquid securities and to attract domestic and foreign capital in respect of such equipment. It will improve opportunities for asset-based financing of high value mobile equipment. By virtue of the improved legal predictability that it will permit, it should reduce risks for creditors and consequently borrowing costs for debtors and facilitate the extension of credit for the acquisition of high-value mobile equipment, particularly in developing countries the existing legal regimes of which may not

¹²⁶ Income Tax Act, s.44BBA

¹²⁷ Secretariat of UNIDROIT, as Depositary

currently be sufficiently responsive to the need of creditors to feel secure. In respect of aviation credit it is to be noted that, in so far as financing is typically a condition to the acquisition and use of aircraft and aircraft engines, the Convention and the Aircraft Protocol will contribute to improved safety by assisting airlines in many jurisdictions in their efforts to modernize and upgrade their fleets.

Director General of Civil Aviation's (DGCA) Requirements in India

DGCA Permission: For leasing an aircraft in India DGCA's permission is mandatory. A lessee can either take an aircraft on lease from a) foreign operator b) Indian operator.

Aircraft Lease from a Foreign Operator: Where the Indian operator intends to take a foreign registered aircraft on lease, charter or any similar arrangement for a person holding Air Operator Certificate (AOC) issued by another State, the following information has to be provided by the Indian Operator to the DGCA at least 45 days prior to the proposed date of operation with the leased aircraft. I.e. Name and Address of the Indian Operator and the lessor, aircraft details, AOC details along with operations specifications, if any, of the lessor, name and contact information of the State of Registry, a copy of the letter of intent, planned arrangements for operation and maintenance of aircraft during the lease period, proposed date of import into India.

Aircraft Lease from an Indian Operator: In the event an Indian Operator intends to borrow an aircraft on lease from an Indian Operator the following information has to be provided to the DGCA at least 45 days prior to the proposed date of operation with the leased aircraft, i.e. The name and address of the operator from whom the aircraft is intended to be leased, AOC details along with operations specifications of the lessee and the lessor, aircraft type, registration number and its main base, maintenance agency with scope of approval, a copy of the draft lease agreement and maintenance agreement, any amendment proposed to be made in the Operations Manual or other relevant documents, a document giving details of the respective responsibilities of compliance with regulatory requirements such as arrangements for Flight Operations Quality Assurance, Flight dispatch and responsibilities of the lessor and the lessee with regard to operation, maintenance and quality system of the aircraft.

Upon receipt of the aforesaid information, the DGCA finalizes the modalities for operation of the leased aircraft at a meeting with the Indian Operator. Where the aircraft is taken on lease from a foreign operator, the representatives of the foreign operator and the regulatory authority are also allowed to participate in the meeting. The DGCA can conclude an agreement under Art. 83 with the State Registry and the State Operator for transfer of certain regulatory functions. It has also the discretion to impose conditions while granting permission to the Indian Operator for operations with the leased aircraft.

Lease agreement and stamp duty

Pursuant to the DGCA permission, the Indian operator can conclude a formal lease agreement with the lessor. The agreement should include the conditions decided by the State of Registry and the State of Operator and the ones imposed by the DGCA. A copy of the lease agreement has to be, thereafter, filed with the DGCA at New Delhi (the DGCA usually asks for a notarized copy from the airlines). The copy of the lease agreement does not attract stamp duty

in the State of Delhi but it is necessary to stamp the lease agreement in the relevant state, (the state in which the airline is incorporated or has its operational base), prior to filing with the DGCA. Stamping is necessary to ensure that the lease agreement is enforceable in a court of law. In India, the stamp duty rates vary from state to state.

Drafting of Lease of Aircraft

While drafting a Lease Agreement of an Aircraft the following are considered at the time of execution of the deed between the parties. Information to be given regarding Aircraft which includes Aircraft Make and Model, Aircraft Manufacturer's Serial Number, Aircraft Registration Mark, Make and Model of Engines, Serial Number of Engines etc., Summary of the Transaction, Place and Date of Delivery, Lease Term, Security Deposit, Transaction Fee, Rent, Reserves and other payments, Involvement with Aircraft Manufacturer, Pre-Delivery, Delivery and Post-Delivery Documentary and other requirements, Disclaimers, Manufacturers and Vendors' Warranties, Operation of Aircraft, Subleases, Maintenance of Aircraft, Use of Reserves, Title and Registration, Identification Plates, Taxes, Indemnities, Insurance, Loss, Damage and Requisition, Representation, Warranties and Covenants of Lessee, Representations, Warranties and Covenants of Lessor, Financial and Related Information, Return of Aircraft, Assignment, Default of the Lessee, Notices, Governing Law and Jurisdiction and Miscellaneous.

Aircraft Leasing by Air India

Leasing aircraft on loss-making routes cost Air India Rs. 4,234 crore¹²⁸: An investigation by Air India's internal vigilance department found the airline lost a staggering Rs. 4,234.28 crore between 2005 and 2010 because it leased 16 aircraft to enhance capacity on routes that were already making losses, documents obtained by *The Hindu* show

The investigation, whose findings were submitted for review by Air India's Board on November 29, 2011, shows the leasing losses accounted for a third of the airline's total losses of Rs. 13,835 crore.

Earlier, a report by the Comptroller and Auditor-General said the airline had also lost Rs. 68,000 crore because it committed itself to purchasing aircraft far beyond the recommendations of its own feasibility studies.

Air India officials declined to comment on the report. However, in a leaked communication to the Cabinet Secretary that became public earlier this month, the former Air India chief, Sunil Arora, alleged that key decisions had been colored by "unprecedented" interference by the former Civil Aviation Minister, Praful Patel.

In his May 28, 2005 letter, Mr. Arora said Air India's Board had been steamrolled into purchasing more jets than required. In some cases, Mr. Arora alleged, even seat configuration requirements had been changed to suit particular manufacturers. Indian Airlines, similarly, had been pulled out of profitable routes to make way for private operators.

¹²⁸ THE HINDU, NEW DELHI, August 23, 2012

Air India's Board, a briefing note on the investigation prepared for it states, was told a variety of reasons were assigned for leasing aircraft despite the negative returns on the routes, such as protecting slots at airports and maintaining schedule integrity. However, "no viability study was carried out of these futuristic issues vis-a-vis the loss that was going to be caused, which would justify taking the aircraft on dry lease at an estimated loss."

"From the actual operating results, it is seen that revenue earned by operating leased aircraft was about 50 per cent lesser than the revenues estimated in the Economic Viability Report," the report states.

"In a particular case," the note states, "[an] aircraft was taken on fresh dry lease five months before the lease period of the then operating dry leased aircraft came to a close, and that too when this route was making loss. Subsequently, operations on the same route were terminated."

The note also records that key documents on the decision-making process are missing.

Criticism to Aviation management: The concept Aircraft leasing is very efficient and successful for the aviation industry, but inspite of having so good mechanism due to mismanagement and lack of forecasting the aviation industry in India bears losses. The aviation industry should study the concept and nature of market before investment because aircraft leasing sector is very flexible concept it can give you good fruits if managed well and on the contrary can take it in huge loss if mismanaged.

The aircraft leasing & financing industry essentials to develop to a complete new level in India. Considering the prompt growth of the aviation industry, it is forecast that aircraft flotilla would nearly twofold in the coming years as India holds the rank of having the ninth largest aviation market in the world, showing the capability of international aviation traffic to reach a breath-taking value of 50 million & the domestic traffic reaching to more than three folds of international traffic. This would require more fleet than ever needed in the past, which can very efficiently be conceived by proper leasing & financing. Proper leasing & financing definitely requires extremely non-complicated procedures & solutions. The role of the Cape Town Convention & the Aircraft Protocol ratified by India has been of immense significance in ensuring security for both lessor & the lessee.

One very prominent reason for the lack of involvement from foreign investors to India & vice versa is the complexity of laws & policies governing the aircraft leasing in the country. Preservation of the domestic as well as international interest of parties by International Registration System is possible via enactment of the Cape Town Convention. Basic priority rule, which protects the right of first lessor or lessee, is applied. A few issues have still been left to the Contracting Parties, i.e. Court's decision upon any default committed by any party. This, & many other issues discussed previously in the paper have to be addressed if India is to become a prominent leader in aviation sector by executing flawless leasing & financing processes to feed the surge in requirement of aircraft in the coming years.

CONSUMER PROTECTION AND CIVIL AVIATION

Healthy competition encourages the players in the industry to provide services that are of the highest quality so that customers remain loyal. However, in spite of all efforts, in many cases deficiency in services becomes an issue. It is up to the consumer courts then to adjudicate upon issues emanating from such deficiency in services, thereby setting a benchmark for the minimum standard of services that should be guaranteed to the customers. The Consumer Protection Act, 1986 (“Consumer Act”) provides that a consumer as defined in section 2 (d) of the Consumer Act can file a complaint in relation to a dispute with manufacturer or service provider. There is some overlap between the Consumer Act and the Competition Act as the Consumer Act also regulates unfair trade practices. A key area regulated by the Consumer Act is deficiency in services provided by service providers. Service providers such as airlines and airports can be covered – and have been covered by these provisions.

In the case of Air Deccan (Deccan Aviation Ltd.) Vs. Dinesh B.V. & Anr, a complaint was filed against Air Deccan before the district forum due to deficiency of service on account of Air Deccan misplacing baggage of passengers. The District Commission directed Air Deccan to pay USD 400 (Rs. 15, 804/-) along with Rs. 1,000/- as litigation cost. The National Commission upheld this decree in favor of air passengers.

In Saroj Dikshah & Ors Vs. International Airport Authority of India, the complainant filed a complaint before the Delhi State Consumer Disputes forum alleging that the respondent had failed to provide adequate medical facilities on the airport premises resulting in her husband’s death on the way to the hospital. The State Commission found the respondent to have made an administrative error by not providing adequate medical facilities and therefore awarded a compensation of Rs 35,000/- . In appeal, the National Commission did not enhance the compensation but observed that the presence of more than one doctor and somewhat more upgraded facilities had become necessary in view of the increasing air travel by a very large number of passengers.

A case of wrongful denial of service is Kingfisher Airlines Ltd. Vs. Lata Sikri, where the complainant wasn’t allowed to board the aircraft in spite of having a confirmed ticket. While the airlines provided the complainant her next flight, return journey free of cost and paid for travelling expenses, the district forum awarded a compensation of Rs. 30,000/- . The National Commission upheld this order.

The cases discussed above are indicators of the fact that industry players cannot take issues such as delay and cancellation of flights, denial of boarding and airport services lightly. Companies will need to be vigilant about its obligations to consumers as air passengers.

Regulatory Authority

Directorate General of Civil Aviation is an attached office of the Ministry of Civil Aviation. The Directorate General of Civil Aviation is the regulatory body in the field of Civil Aviation primarily dealing with safety issues. It is responsible for regulation of air transport services to/from/within India and for enforcement of civil air regulations, air safety and airworthiness standards. It also co-ordinates all regulatory functions with International Civil Aviation Organisation. The headquarters are located in New Delhi with regional offices in the various parts of India.

Delay and Cancellation of Flights

With the increase in per capita income and development of service sector in India there is rapid expansion of air services within India and on international routes to/from India and with the increase in the volume of passenger traffic, so it has become necessary for the Government to take appropriate action to ensure appropriate protection for the air travelers in case of flight disruptions and, in particular, denied boardings, flight cancellations and delays without due notice to the passengers booked on the flight(s). Steps taken by the government in the aviation department, helps to strengthen the rights of the passenger and also helps to create an environment of harmony between the one taking the service and the one providing it. Office of the Director General of Civil Aviation has issued Civil Aviation Requirements, where in Series M Part IV, issued on 6th August 2010 and came into force on 15th August 2010, gives the requirements to be followed for facilities to be provided to passengers by airlines due to denied boarding, cancellation of flights and delays in flights.

Situations where is no obligation to pay:

The rules specify that the operating airline would not have the obligation to pay compensation in cases where the cancellations and delays have been caused by an event(s) of *force majeure* i.e. extraordinary circumstance(s) beyond the control of the airline, the impact of which lead to the cancellation/delay of flight(s), and which could not have been avoided even if all reasonable measures had been taken by the airline. Such extraordinary circumstances may in particular, occur due to political instability, natural disaster, civil war, insurrection or riot, flood, explosion, government regulation or order affecting the aircraft, strikes and labour disputes causing cessation, slowdown or interruption of work or any other factors that are beyond the control of the airline. Additionally, airlines would also not be liable to pay any compensation in respect of cancellations and delays clearly attributable to Air Traffic Control (ATC), meteorological conditions, security risks, or any other causes that are beyond the control of the airline but which affect their ability to operate flights on schedule.

Facilities to be provided in cases of cancellation or delays:

Passengers shall be offered free of charge the following:

1. Meals and refreshments in relation to waiting time,
2. Hotel Accommodation when necessary (including transfers).

Denied Boarding:

It may happen some of the cases where the number of passengers, who have been given confirmed bookings for travel on the flight is more than the number of seats available. In this situation the airline must first ask for volunteers to give up their seats so as to make seats available for other booked passengers to travel on the flight, in exchange of such benefits/facilities as the airline, at its own discretion, may wish to offer, provided airports concerned have dedicated check-in facilities/gate areas which make it practical for the airline to do so.

If the boarding is denied to passengers against their will, the airline shall as soon as practicable compensate them in accordance with the provisions of in addition to refund of air ticket.

Cancellation of Flight

In order to reduce inconvenience caused to the passengers as a result of the cancellations of the flights on which they are booked to travel, whenever possible, airlines should endeavour to invariably inform the passengers of cancellations of their flights as far in advance as possible of the scheduled time of departure provided at the time of effecting his/her reservation, the passenger has given relevant contact information e.g. telephone number (landline or mobile), and/or fax number and/or e-mail id or in any alternate reasonable form requested for by the airline.

Passengers who have not been informed at least three hours in advance about the cancellation of the flight on which they were scheduled to travel,

1. Airlines shall provide compensation for the inconvenience caused
2. Refund the ticket prices in the event they do not wish to travel instead on an alternate or subsequent flight of the carrier concerned or on another carrier's flight or if so desired by the passengers, provide them alternate travel opportunities at no additional cost; and
 - Additionally provide them facilities at the airport.

In the following cases, passengers are denied of the right to have compensation:

1. They do not accept the alternate travel arrangements made by the airline; or
2. The cancellations occur due to extraordinary circumstances beyond the control of the airline (as described above) even if all reasonable measures had been taken by the airline.

Delays in Flight

The airlines shall provide facilities in accordance with:

(a) If the passenger has checked in on time, and if the airline expects a delay beyond its original announced scheduled time of departure or a revised time of departure of:

1. a) 2 hours or more in case of flights having a block time of up to 2 ½ hrs; or
2. b) 3 hours or more in case of flights having a block time of more than 2 ½hrs and up to 5 hours
3. c) 4 hours or more in case of flights not falling under sub-para (a) and (b)

When the reasonably expected time of departure is more than 24 hrs after the scheduled time of departure previously announced, the airline shall provide the facility to the passengers in accordance with the provisions mentioned above

An operating airline shall not be obliged to adhere to above-mentioned facilities if the delay is caused due to extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

The burden of proof concerning the questions as to whether and when the passenger has been informed of the delay of the flight shall rest with the operating airline.

Compensation

The act gives in the financial compensation; it is indicated below that what amount shall be given only if the amount of tickets costs is higher than the compensation amount:

1. a) Rs. 2,000/- or the value of the ticket whichever is less for flights having a block time of upto and including one hour
2. b) Rs. 3,000/- or the value of the ticket whichever is less for flights having block time of more than one hour and upto and including two hours.
3. c) Rs. 4,000/- or the value of the ticket whichever is less for flights having a block time of more than two hours.

If the cost of the ticket is less than the amount of compensation indicated above, the airline will be liable to compensate an amount equivalent to the ticket cost in addition to refund of air ticket.

Additionally, the passenger shall be offered the choice between the following:

1. a) Refund of air ticket at the price it was purchased.
2. b) A flight to the first point of departure.
3. c) Alternate transportation under comparable/alternate mode of transport (whenever applicable), to the final destination.
4. d) Alternate transportation under comparable/alternate mode of transport (whenever applicable), to their final destination at a later date at the passengers' convenience, subject to availability of seats.

The affected passenger shall be the compensation alternatives listed in above para. Once the option has been selected the affected passenger will not have the option to switch to another form of compensation.

Refund of Tickets

Direction issued by Office of the Director General of Civil Aviation has issued Civil Aviation Requirements, where in Series M Part II, issue 1, DATED 22 May, 2008 effective forthwith deals with Refund of Airline Tickets to Passengers of Public Transport Undertakings. The act provides:

A large number of complaints are regularly received which can broadly be divided into the following categories: (a) Delay in refund of unused ticket (b) The amount which is refunded by the airlines against cancelled tickets. (c) Policy of not to refund the ticket amount but to

adjust against tickets to be purchased by the passenger for future travel in the same airline that too valid for a limited period of time.

These are some of the common problems faced by the consumers when their tickets get cancelled. To overcome these problems, some guidelines have been issued, which are:

- In case of credit card payments, refund shall be made by the airlines within seven days of the cancellation to the account of credit card holder.
- In case of cash transactions, refund shall be made immediately by the airlines office from where the ticket was purchased.
- In case of purchase of ticket through travel agents, the arrangement for refund be left to the passenger and the travel agent.
- Airlines shall necessarily return the PSF collected by them from the passengers on non-utilization/ cancellation of tickets.
- Airlines shall refund any charges such as congestion charge, fuel surcharge etc., alongwith the refund of the ticket, unless these are clubbed with basic fares. Note: For the charges, surcharges levied by the airlines, the word 'tax' or 'taxes' should not be used.
- When being offered tickets for future travel, passengers shall be allowed an option for refund of money instantly.
- The airlines should indicate in an unambiguous manner the amount of refund of money admissible on cancellation of a ticket. For this purpose, the amount and its break-up may be indicated on the ticket itself or through separate form used for the purpose, and the policy and amount of refund shall also be displayed by the airlines on their respective websites.
- In case of lost ticket coupons, the airlines shall take prompt action to refund the ticket amount after verification from their records.

IMPORTANT CASES

1. Air Deccan (Deccan Aviation Ltd) Vs. Dinesh B.V. & Anr -01/10/2013

Brief facts of the case are that Complainant no. 1/Respondent no. 1 and his mother, Complainant no. 2/Respondent no. 2 booked tickets with OP/petitioner for 19.11.2006 from Bangalore to Chennai. Complainants got checked their luggage and got boarding pass. After arriving in Chennai, they were unable to get their bag and on inquiry came to know that it was misplaced and accordingly airport authorities issued endorsement in that regard. The said bag was containing valuable clothes and other articles, but could not be traced. Alleging deficiency on the part of OP, complainant filed complaint. OP-petitioner resisted complaint and denied allegation of missing of the bag and further alleged that complainant has not mentioned the weight of the alleged baggage and prayed for dismissal of the

complaint. Learned District Forum after hearing both the parties allowed complaint and directed OP to pay 400 US\$ (Rs.15,804/-) along with Rs.1,000/- as litigation cost.

2. Saroj Diksha & ors v International Airport Authority of India – 01/02/2013

The case was filled by the petitioner before the Delhi State Consumer Disputes Redressal Commission before which the appellant alleged that the respondent failed to provide adequate medical facilities on the airport due to which her husband died on the way to AIIMS. After listing to the arguments from both the sides, Commission came to the conclusion that there was no medical fault on the part of respondent, but there was administrative fault on the part of the respondent where they were not able to provide adequate facilities on the airport to deal with such type of cases and also they provided with just one doctor. The compensation awarded was Rs. 35000.

3. Kingfisher Airlines Limited v Lata Sikri- 11/10/2012

Despite of having an OK/confirm ticket respondent was not allowed to board the ticket, the reason cited by the appellant was over booking. Appellant took care of the all the guidelines issued by DGCA(as discussed above) and provided her with next flight tickets, offered her return journey free of cost and paid for travelling expenses from airport to her home. Yet the respondent was allowed compensation of 30000/-. The reason cited for the order was:

“From the above, it is evident that the consumer fora are well within its rights to award compensation not only for the monetary loss or injury suffered by the complainant but also for injustice suffered by the consumer. In the case in hand, going by the entirety of the facts and circumstances, we find that the fora below have done no wrong in awarding a compensation of Rs. 30,000/- to the respondent-complainant for the mental agony and harassment faced by her, besides, the return domestic ticket, which was offered by the petitioner-Airlines itself to the complainant in the very beginning.”

4. Air India v Dr. Mary Ramasamy & Ors. – 12/04/2012

In the present case respondent booked tickets of the flight from Chennai to Melbourne. By the time they reached airport, they came to know that their name does not appear on the list. To this appellant replied that the tickets were booked by the travel agent few days back. A confirmation mail was sent to the travel agent but agent did not reply to that. To this the authority cancelled the tickets. It was held under the judgment given by the consumer court that:

“In the case in hand, the complainants all of whom were women including minors had O.K. tickets in their possession and they could not imagine that on reaching the airport, they will be confronted with a situation that their tickets had been cancelled leaving them in a lurch because they did not belong to Chennai City and had come to Chennai from some interior part from Tamil Nadu and they had to travel further to Melbourne from Singapore by a connecting Qantas flight. Information about the cancellation of their tickets must have come as a life time rude shock to them. As a result of which they were on the streets of Chennai upto the next flight which was 24 hours later. It is not difficult to visualize the kind of mental harassment and torture complainants would have suffered during those hours. They were certainly entitled for a better treatment from a National carrier like the

Petitioner. From a conspectus of the entire circumstances, there is no escape from the conclusion that the petitioner/Airlines has not only committed grave deficiency in service by cancelling the O.K./confirmed tickets of the complainants but the said act would also amount to adoption of malpractice or what is called unfair trade practice. We wish that the petitioner/Airlines would stop such a practice forthwith.”

The respondent was allowed compensation of Rs. 25000/- with Rs. 5000/- litigation expenses.

USE OF DRONES/UAVs IN INDIA: LEGAL ISSUES AND CHALLENGES

Technological advancements are changing human lives in numerous ways – be it the way wars are fought or businesses are conducted. Drones, also known as Unmanned Aircraft System (UAS), Unmanned Aerial Vehicles (UAVs) or Remotely Piloted Aircraft System (RPAS), reflect this change most aptly. The military is no stranger to drones as forces have been using them for a variety of applications, such as surveillance and reconnaissance, in unknown or hostile territories, to track enemy movements, for border patrols, search and rescue missions, and emergency services. Armed versions of drones have been used to protect the lives of men and women in uniform as well as to target and kill enemy forces including terrorists. In the Indian neighbourhood, unmanned combat aerial vehicles (UCAVs) have been put to significant use in fighting al-Qaeda and Taliban in Pakistan and Afghanistan. In fact, in the late 1990s, as the hunt for Osama bin Laden intensified, Afghanistan became the laboratory for the US’ development of armed drones. However, it was only after the 9/11 terrorist attacks in the US did Washington sanction the use of armed drones. Since then, drones have been increasingly used for targeted killings and air support for ground troops across both Afghanistan and Pakistan. As former Director of the Central Intelligence Agency (CIA) Michael Hayden once wrote, “Targeted killing using drones has become part of the American way of war.

UAVs have penetrated the commercial sphere as well, with businesses deploying drones in increasingly diverse roles. One of the world’s largest online suppliers, Amazon, said in 2013 that it wants to use drones to deliver packages and has been testing the platform accordingly. The company obtained permission to test drones in the US in April 2015, and in the UK in July 2016. Thereafter, Amazon did its first delivery legally in December 2016 in the UK in the university town of Cambridge. Though still experimental, such commercial uses are expected to soon become a reality. Already, drones are being used for developmental purposes, including aerial mapping, and for monitoring critical infrastructure such as ports and power plants. The geospatial market using drones for surveying, mining, construction, to name a few, could possibly see a phenomenal increase in the coming decades. A recent report from Goldman Sachs put the global spending on drones over the next five years at approximately US\$100 bn; a significant share in the commercial/civil sector is set to be focused on the construction industry.

Explaining the emerging scenario, Mathew Wade, Marketing Director, sense Fly, has said, “We have seen very big growth in the field of agriculture and that is going to be one of the

strongest sectors in the future. I think the upcoming sectors can also be ‘infrastructure’ and ‘inspection’. Think about bridges, dams and railways across the world and the figures are astronomical. All these need maintaining and checking regularly and that is a big opportunity for drones to grow big.” Information gathered using drones is a huge market. Intel UAV official, Anil Nanduri, states that the use of drones whether for “inspecting a bridge, a tower, inspecting any area after a natural disaster, the damage they do to buildings and surroundings... are all very intense work and are often even unsafe for human visits. Drones can be much quicker, faster and capture a lot of data — one drone flight can get you gigabytes of data, which needs to be processed.” He cites the example of the US and says there are around 600,000 bridges that need to be inspected; as infrastructure gets older, the need for monitoring intensifies, adding to the huge economic opportunities.

Given the potentially large-scale use of drones in the civilian and security domains, there appears to be a growing global drone industry as well. According to a study from Statistics MRC, a US-based consultancy firm, the global drone market was worth US\$5.93 bn in 2015 and is estimated to grow to US\$22.15 bn by 2022, representing a growth rate 10 of 20 percent. As the global market for drones has grown, so too, have the debates on the legal, regulatory, and even moral issues around their use. So far, there are no clear global mechanisms yet present to regulate drone activities. There are also issues around accidents, air collision, safety and security of the use of drones. Each of these issues requires a comprehensive framework for effective regulation in the civilian airspace for domestic security, privacy and legal concerns to be addressed effectively.

Use of Drones in India: Evolution of Policy

Much like in other countries, drones have multiple applications in India in the civilian domain such as in the commercial sector for mapping and information gathering, in addition to the military domain where its uses include surveillance and intelligence collection. However, the use of drones has been fraught with problems and uncertainties in the absence of well-laid out standards, regulations and operating procedures. One of the first Indian notifications on the subject came in the form of a Public Notice issued by the Office of the Director General of Civil Aviation (DGCA), India’s civil aviation regulator, on 7 October 2014. The document was useful for informing potential operators that “The civil operation of UAS will require approval from the Air Navigation Service provider [Airport Authority of India], defence, Ministry of Home Affairs, and other concerned security agencies, besides the DGCA. DGCA is in the process of formulating the regulations (and globally harmonize those) for certification & operation for use of UAS in the Indian Civil Airspace.”

Two years later, the DGCA released a set of draft guidelines on 21 April 2016 on the use of UAVs for civilian or recreational purposes. The DGCA invited comments on this circular from various stakeholders for a period of 21 days as decided by the Ministry of Civil Aviation. After a year and a half of inaction on the previous guidelines, in October 2017, the DGCA released a new set of guidelines. The civil aviation regulator has invited comment on the new guidelines with the aim of finalizing them by 31 December 2017. The guidelines appear, though, to be a mere product of dire necessity; they do not exhibit enough foresight. There have been several incidents in the past few years that show the dangers of unregulated use of drones for all stakeholders including the general public. Despite the near-blanket ban

on drones, there has been a worryingly high number of sightings of UAVs in different areas across the country, which further highlights the need for effective regulations to be enforced at the earliest. It cannot be emphasized enough that there is a need for a more nuanced regulatory framework with appropriate recommendations including tackling issues such as liability in case of mid-air collisions. India must lay out a policy framework that would address the regulatory, legal, operational, licensing and liability issues around the use of drones.

Draft DGCA Guidelines

On 30 October 2017, the DGCA announced a set of draft regulations for the use of UAVs in the civilian airspace. The circular came a year and a half after the last set of draft regulations on the same subject, which never came into effect. These regulations have incorporated the articles from the April 2016 circular along with a few additions. Even as it is hoped that these regulations will come into effect and remove the blanket ban, the track record does not look promising.

In the past year and a half, since they invited comment on the last draft Guidelines, little seems to have changed in the outlook of the DGCA towards the use of drones by civilians. The new draft does little to cover a range of vital topics left out in the 2016 Guidelines, and still fails to cover issues such as legal liability and import controls. These guidelines appear to have come as a stop-gap measure due to widespread criticism of the ban on UAVs for civilians and lobbying efforts by e14 commerce brands. Areas such as privacy and trespass, which require a larger legal debate, have been left entirely unaddressed by the DGCA in its guidelines. The guidelines appear shortsighted and do not attempt to predict or account for the rapid developments brought to the drones domain by Artificial Intelligence, miniaturization and robotics. It is evident that the objective of the guidelines is to prevent any disturbance to the operation of commercial aircraft due to UAVs. A lot of the rules, therefore, are intended at ensuring that commercial flights operate without any interference from UAVs. However, the regulations do not address the threat, for instance, posed by two UAVs to each other nor the loss of life and property that might result from any accident between two drones.

Further, the guidelines do not account for a mechanism ensuring the safe operation of drones at low altitudes; nor do they have provisions for ensuring that there is no interference by two drones in each other's operations. As the number of drones populating Indian skies rapidly increases, this gap will become alarmingly glaring in the future and will have to be addressed soon.

According to the guidelines, drone operators will need to obtain a Unique Identification Number (UIN) for their UAV and security clearance from the Ministry of Home Affairs (MHA) before they can get their drone in the air. This UIN must be obtained by the operator following the submission of documents that provide the purpose of operation, drone specifications including manufacturer name, type, year of manufacture, weight and size, type of propulsion system, flying capabilities in terms of maximum endurance, range and height, and equipment capabilities. The operator will also have to provide a copy of the flight manual and the maintenance guidelines as issued by the manufacturer, as well as verification proofs. While this makes it simpler for authorities to trace the ownership of a drone that they may

recover in case of an accident, the UIN must be only physically present on the drone with no form of electronic or digital identification currently required. The UIN will be assigned subject to security clearance; however, it is not specified what the basis of this clearance will be, as the circular simply mentions that it will be dealt with on a “case-to-case basis”. Operators flying UAVs over 200 feet above ground level also need to obtain an Unmanned Aircraft Operator Permit (UAOP) from the DGCA. This permit does put the operator under stringent scrutiny, but it is one of the segments in the guidelines that is quite comprehensive and can be effective if implemented effectively. It ensures that operators are fully aware of all the restrictions on their use, thus protecting users from possibly violating a regulation of which they are unaware. However, regarding operators flying drones below 200 ft. in controlled airspace, permission needs to be sought only from local administration. The new regulations have been regressive in the requirement for Visual Line of Sight (VLOS) operations. In the 2016 guidelines, only Mini and Micro drones needed to be flown with VLOS. The 2017 regulations stipulate that all UAVs, irrespective of weight category are to be flown maintaining VLOS. While most other countries impose such a limit on lighter drones, the blanket imposition of VLOS is going to stifle several uses of drones. It is clear that regulators are uncomfortable with operators relying on visual aids for the operation of these drones. These aids, while already quite developed, are only going to become more advanced and reliable in the near future. It seems unfair to clamp down on their use entirely.

All UAVs have to observe the rules on restricted, controlled airspaces and any danger areas as defined by the Aeronautical Information Publication as notified by the DGCA or the Ministry of Civil Aviation. The new guidelines however, have drastically reduced the no-fly zone area around Rashtrapati Bhavan, New Delhi, from 30 km in the 2016 guidelines to five km in the 2017 issuance. The radius of the no-fly zones around strategic locations as prescribed by the MHA as well as military installations has been reduced to 500 metres. These changes are certainly a positive step by the DGCA in the 2017 guidelines.

The Directorate General of Civil Aviation (the “**DGCA**”) released the much awaited National Drone Policy, 2018 version 1 (Drone Policy)_on 27th August 2018. The subject matter of the regulation is ‘Requirements for Operation of Civil Remotely Piloted Aircraft System (RPAS)’. The policy is set to come to effect from 1st December 2018. This regulation succeeds two other draft regulations that were issued by the DGCA in April 2016 and November 2017. Both these drafts were open to stakeholders for comments but they never got formalized into anything until now. A task force called the *drone task force* has also been set up that will provide for further recommendations when needed and may even modify the current regulation or create new ones. The current article will try and make a detailed analysis of the Regulations.

Background

Before the draft regulations, drones were not allowed to be used in India due to lack of proper regulations and security concerns. For the first time in 2016, DGCA asked for recommendations but they were not formalised. Finally a year later in 2017, another draft regulations were released which have now been formalised. The Regulations provide a very detailed framework for licensing and other requirements for use and operation of drones in India. As stated under Regulation 1.3 ‘*the Civil Aviation Requirements (CAR) is issued under*

the provisions of Rule 15A and Rule 133A of the Aircraft Rules, 1937 and lays down requirements for obtaining Unique Identification Number (UIN), Unmanned Aircraft Operator Permit (UAOP) and other operational requirements for civil Remotely Piloted Aircraft System (RPAS)'. The process through which all the initialisations, submissions of applications and clearances will take place will be an all-digital process. The process will be carried out through an online platform called Digital Sky. The Ministry of Aviation through a press release called Digital Sky "first of its kind national Unmanned Traffic Management (UTM) platform that implements 'no permission, no take-off'".

Requirements and Eligibility

According to the Drone Policy, every drone user will now have to register the owner of the drone, the drone that is being used and the person who is flying the drone. Permission will have to be taken from the authorities through the Digital Sky app before flying any drone and only after the permission is granted, the drones will be allowed to fly. To be eligible to fly the RPAs, a person has to be over 18 years of age, must have passed 10th exam in English and has undergone ground/ practical training as approved by DGCA. To make regulations more clear and manageable, the drones have been divided into five categories:

1. Nano : Less than or equal to 250 grams.
2. Micro : From 250 grams to 2kg.
3. Small : From 2kg to 25kg.
4. Medium : From 25kg to 150kg.
5. Large : Greater than 150kg.

Every category of the drone will need to get the UAOP except for a few exceptions which are any Nano category flying below 50 feet in uncontrolled airspace / enclosed premises, Micro RPA operating below 200 feet (60 m) AGL in uncontrolled airspace / enclosed premises and RPA owned and operated by NTRO, ARC and Central Intelligence Agencies but except Nano, the other two have to intimate the police according to the provisions. This UAOP will be granted within 7 days and will be valid for 5 years after which one will have to renew it. But during renewal fresh security clearance will be required from Ministry of Home Affairs. The UAOP shall be non-transferable. The DGCA is mandated to grant UIN within two days of the receipt of the application with completed documents. Currently, foreigners are not eligible to fly drones in India and will have to lease RPAS to an Indian entity who in-turn will obtain Unique Identification Number (UIN) and UAOP from DGCA. Not everyone category has to obtain the UIN like:

- a. RPAs in the Nano category with intent to fly up to 50 feet above ground level (AGL)
- b. RPAs owned and operated by Government security agencies.

Restrictions

The regulations also state certain restrictions on the operation of such drones. Flying area has been divided into three zones:

1. Red zones : It is a no-fly areas (which include regions close to airports, national borders and military bases);
2. Yellow zones: Flying in this area will require approvals before flying,
3. Green zones: They are unrestricted areas.

Flying drone upto 400 ft. AGL and visual line of sight are allowed. All operators, except for Nano drone operators, are required to file their flight plans at least 24 hours before their operations and also have to obtain clearances from the Indian Air Force, Air Traffic Control and the Flight Information Centre. Cancellation of any flight plan also has to be notified to proper authorities immediately. Similarly, all drone operators except Nano, have inform the local police authorities in writing before commencing any type of operations. If a pilot is flying any drone in a controlled airspace, continuous contact has to be maintained with the Air Traffic Control. Specific areas have been laid down under Regulation 13 where flying of drones is restricted. Some of the areas are: Within a distance of 5 km from the perimeter of airports at Mumbai, Delhi, Chennai, Kolkata, Bengaluru and Hyderabad; Within 5 km radius from Vijay Chowk in Delhi. However, this is subject to any additional conditions/ restrictions imposed by local law enforcement agencies/authorities in view of the security; from a mobile platform such as a moving vehicle, ship or aircraft, etc. No person can act as a remote pilot for more than one drone operation at a time. A drone is also not permitted to discharge or drop substances, unless it has been specially permitted by the DGCA and such permission is mentioned in the UAOP. The Drone Regulations also state that no drone shall transport any hazardous material and animal or human payload.

Penalties

The UIN or UAOP issued by the DGCA may be suspended or cancelled in case of any violation of the provisions of the Drone Regulations. Falsifying any information or non-adherence with any provisions of the Regulations may also lead to penal actions under the Indian Penal Code.

The Aircraft Act, 1934 imposes a penalty of imprisonment for a term which may extend up to two years, or a fine which may extend up to INR 1 million (approximately USD 14,500), or with both, for anyone:

- i. who “*wilfully flies any aircraft in such a manner as to cause danger to any person or to any property on land or water or in the air*”; or
- ii. who “*wilfully fails to comply with any direction issued [by the DGCA] under section 5A*” of the Aircraft Act, 1934.

The Aircraft Rules, 1937 also state that “*the doing of any act prohibited by or under any rule, or failure to do any act required to be done by or under any rule, not specified elsewhere in this Schedule*” shall constitute an offence punishable with imprisonment for a term not exceeding 3 months or with a fine not exceeding INR 100,000 (approximately USD 1,450) or with both.

Before the introduction of these Regulations, usage of drones was either prohibited or restricted by commercial users. The Drone Regulation was a much require and awaited

regulation in India which has finally legalized usage of drones by private and commercial users. The regulation along with the FAQ's and Do's and Don'ts released provide for quite a comprehensive data which cleared a lot of doubts and provided clarity to the people. The introduction of Digital Sky through which almost every step can be done online is also a very thoughtful and well managed technique. But getting approvals and clearances from so many authorities and following so many steps might prove to be cumbersome for many users who then might not use them. Even commercial users might not be totally happy with the regulations and they don't allow for delivery of food/ other items, or to carry passengers. With so many online portals that could have made use of these drones on a large extent might be disheartened with this rule. Even restriction on foreigners from using drones directly in India and investing in them could prove to be a setback for the growth of the sector in India. But it is difficult to ascertain anything so early as the Regulations may get modified and changed in the future which might bring new changes that could provide relief to these players in the market. If the Regulation and rules are properly implemented then, these regulations might even boom the technological ecosystem of the country. However, irregularity and a weak policy may also prove to be a threat to security too.

Policy Gaps

While the DGCA has taken the first step of framing draft guidelines for the use of UAVs, there remain several gaps that must be addressed, keeping in mind the need for balance between security concerns and legitimate uses of drones in a variety of civilian sectors.

Quality Control

The most striking absence in the regulations is that of import standardization. As a sizable percentage of India's drones continue to be imported, there is a need to ensure their quality control and standardization. No legislation addressing this aspect has been passed by the DGCA. The Department of Customs recently issued a notification placing drones on the list of dutiable items, making it mandatory to declare these at the time of import. However, when drones continue to be banned for civilian use by non-governmental entities, it still is not clear why Customs allows them to be imported. This again underscores the lack of coherence in policy on the subject between various state authorities and the DGCA.

Adding to the failure to address import quality standardization of drones is the lack of policy on quality control of indigenously manufactured and -built drones. There is no focused regulation regarding domestically-produced drones and the industry is left to its own standards, if at all it has any. Alarming is the fact that there are no guidelines in ascertaining the very airworthiness of a UAV.

The lack of policy on quality control and standardization for both indigenously manufactured and imported drones presents several challenges. The legal liability for a drone comes under question as it is difficult to ascertain whether the device malfunctioned or if it was incorrectly handled or operated in the absence of these guidelines. The absence of guidelines for imports also poses a massive threat to national security. There is also the heightened risk of air accidents due to malfunctioning of drones, which can be dangerous to both life and property. Another peril of not having such regulations is the vulnerability of these UAVs to hacking. For instance, just as malicious software and spyware can be placed on any number of mobile

instruments procured from outside the country, the same can be easily implanted in drones. Without quality control, it is impossible to test the digital security mechanisms of these drones, thus giving operators no assurance of a secure link between operator and vehicle. The DGCA needs to act urgently on plugging these security gaps to prevent any untoward incidents from occurring.

Standard Operating Protocol for Incidents

While there are no guidelines in force, there has been no protocol formulated by authorities for incident management in the event of an accident. In 2015, for example, an unidentified man was spotted flying a drone close to the residence of the President (the Rashtrapati Bhavan) and the Indian Parliament. The police, clearly in a confused state, launched an uncoordinated and ineffective response to the alarming situation. The man reportedly was confronted by a person from the media, after which he left on his own accord; he has not been identified since. Media reports say the Delhi Police has issued standard instructions to its personnel in this area in responding to similar situations, making the Indira Gandhi International (IGI) Airport a no fly zone and sanctioning police officers to shoot down any UAVs sighted in its vicinity. However, this paper argues, while it is dangerous to allow drones to fly in the vicinity of an airport, there should be a better way to ground them rather than simply shooting them down.

Surprisingly, potential operators and regulators have been reluctant to seek advice from the Armed Forces for the operation, maintenance and regulation of UAVs. The Armed Forces have been successfully operating drones for some years now and have gained considerable experience and expertise in not only flying these vehicles but also dealing with emergencies and contingencies. They have also instituted robust procedures to ensure the safe operation of drones even in harsh conditions and have accumulated knowledge in this regard. It seems wasteful that civilian authorities are not engaging the Armed Forces on tapping their vast repository to develop better informed policies on UAVs.

The Privacy Question

When it comes to UAVs, the question of privacy becomes an intricate problem, bringing with it the controversial debate of security versus privacy. Drones operated by non-governmental agencies pose a major threat to existing privacy laws. Most UAVs have constantly transmitting cameras that often operate in high definition. Intended infringement of privacy is quite easy as it is, but drones also present the case of unintended invasions. This aspect makes it more difficult to ascertain infringement of privacy under existing laws in India.

Drones present another interesting paradigm shift in the way questions of privacy are viewed. While visual infringement is often believed to be the only incursion on privacy when it comes to UAVs, they present a far more complicated issue considering that advancements in both sound recording and data capture enable a drone to be used for far more invasive snooping. A hovering UAV can be used to record sound from a room even at normal conversational levels. It can also be used as a network jammer to block wireless communication in an area. Given the strides in reducing drones to the size of a small bird, it has become easy to overhear private conversations and block all forms of wireless communication from an enclosed space.

The Indian government has so far made no attempt to address concerns of privacy infringement by drones. The Draft Guidelines of the DGCA includes a single line on the importance of privacy; it is vaguely worded and appears inadequate in tackling such an integral issue. The United States, for instance, had acknowledged the importance of the issue when former President Barack Obama published a memorandum calling on various American governmental agencies to explore solutions to the question of protecting privacy while allowing drones to operate freely. For its part, the Australian Parliament has also pondered the issue and has made a case for the application of existing laws to the situation. Australia being another common-law country, its model could be adapted for India effectively.

The Indian government is reportedly in the process of considering the revision of certain sections of the Information Technologies (IT) Act. The IT Act currently covers various questions of privacy and technology including concepts of data protection and distribution. The only other law that can be applied to this case is Article 21 of the Indian Constitution, which covers the Right to Privacy. However, while these laws define the idea of privacy in India, they cannot be applied directly to the UAV case. The government needs to open a dialogue on defining certain parameters of privacy related to UAVs; otherwise, the prosecution of breaches of privacy could become more convoluted.

Terrorist Threat Management

With rapid advances in the variety of functions that a drone can undertake, there have been several instances of known terrorist organizations using them to carry out their activities. Policymaking needs to be robust in this sphere as well, to ensure that security agencies are prepared to deal with threats of this nature. Worryingly, the ISIS has started using drones in their operations. Its fighters in Iraq recently used a drone as an explosive to attack Kurdish forces. The drone was shot down by Kurdish forces, who initially believed it to be a surveillance drone, but realized when it exploded that it was embedded with most materials that would be required to make a conventional bomb. Terrorists can also use drones for a variety of purposes such as surveying security arrangements, jamming networks 24 at integral locations, and even executing bombings, as seen in Iraq.

In many places across the world, law enforcement agencies have started developing increasingly innovative techniques to bring down rogue drones. To start with, a background check or police verification mechanism like the ones used for gun licenses can be employed. While this might seem tough to implement on a large scale, it is necessity to stem proliferation. Agencies across the world have been working on equipment like nets, frequency jammer guns and anti-drone rays to bring down rogue drones. Indian security agencies also need to acquire such equipment. This will ensure that they do not have to resort to banning drones in order to deal with their potential security threats.

Air Traffic Management

Drones present a new dimension in the management of air traffic as they are neither as easy to track as conventional aircraft nor as easy to communicate with. The questions in this sphere are many. Can existing air traffic management infrastructure be used to manage the traffic of drones as well? Are the authorities equipped to monitor the movement and chart the

flight paths of drones? Is there a need to track low-flying UAVs? If yes, how can this be done effectively?

Legal Liability

The draft DGCA Guidelines assigns the legal responsibility of UAVs on their operators. The assumption is that the operator would ensure that the vehicle is airworthy and is functioning as expected. However, this might not always be the case. Even though users should ideally be able to ascertain if their drone is functioning properly, this is an expectation that cannot realistically be met in all cases. Not every operator has the technical expertise to judge the condition of their UAV. In the event of an accident due to malfunctioning of the vehicle itself, it would be unfair to hold the operator responsible and carry out legal proceedings against them. With other such cases involving vehicular accidents, a third-party liability mechanism is used, limiting the liability of either party. Aspects of third-party liability have not been addressed in the DGCA circular. There will be a need for provisions to be made for third-party liability in case of drones. Third-party liability will also give way to third-party insurance mechanisms, which will make it easier to resolve liability cases.

Issues of Trespass

Another aspect of legal liability is the rules governing trespass of private property by drones. Important questions arise relating to factors that will determine whether the operation of a drone over private property constitutes a case of trespassing. This is a question that has not been addressed in the DGCA circular. At what point can a citizen claim a case of nuisance on private property attributable to drone operations?

Global Governance of Drones

Given the growing demand for drones especially in the non-military sector, the need for policies and regulations has become more urgent. Thousands of drones and UAVs are already in use in many developed countries and yet governments and multilateral organisations have not developed a framework regulating this sector. The UAV landscape is changing much faster than the governments' ability to keep up with the changes. The net result is a policy void.

Global Governance

Globally, rules and regulations around the use of drones are still in its infancy. Even though India is still a small player as compared to the US and China, New Delhi could take the initiative in framing rules of global governance partly because the evolution of drone technology could have serious security implications for India, but equally because it is better for India to lead the initiative and protect its interests.

So far, at the multilateral level, the International Civil Aviation Organisation (ICAO) is the lead platform for framing rules of the road for drone operations. Although it began its work on UAVs back in 2007, the first set of rules in the form of Circular 328 was issued only in 2011. Subsequently, it developed the Remotely Piloted Aircraft Systems (RPAS) Manual. Circular 328 became the first step towards regulating the sector. It called on "states to provide comments, 'particularly with respect to its [drone] application and usefulness'" with the aim

of developing ‘the fundamental international regulatory framework through Standards and Recommended Practices (SARPs), with supporting Procedures for Air Navigation Services (PANS) and guidance material, to underpin routine operation of UAS throughout the world in a safe, harmonized and seamless manner comparable to that of manned operations.’” However, the more comprehensive set of standards and regulations is set to be promulgated in 2018. Currently, the ICAO in addition to the Circular has amended three UAS-related amendments to its Annexes – Amendment 13 to Annex 13: Defining accident to include reference to unmanned aircraft (March 2010), Amendment 6 to Annex 7: Registration and identification requirements for remotely piloted aircraft (April 2012) and Amendment 43 to Annex 2: High level requirements relating to remotely piloted aircraft systems (April 2012). The ICAO must also look at best practices from other countries that could be added to the basket of norms and standards that might evolve in a gradual manner.

A handful of agencies around the world have begun contemplating on the regulatory aspects of drone operations. Recognizing the enormous growth potential, the European Aviation Safety Agency (EASA) has been tasked by the European Commission to frame 35 regulations for drone operations. The EASA published a comprehensive proposal in May 2017 covering the technical and operational aspects of operating drones. According to the proposal, all UAVs above 250 gm need to be registered. The EASA had sought comments and feedback from all interested parties and it will submit a final version of the proposal to the European Commission end of 2017 before it is formalized into a law. The more dynamic aspect of the proposal is that it has been developed in consultation with members of drone industry, UAV operators, aviation representatives and aero modeling associations, in addition to all the EASA member states. Even as EASA firms up the proposal into a law, it is the responsibility of individual member countries to set more operational restrictions such as air space limitations, in terms of, for instance, how many kilometres above the ground they can operate. Different European countries have different regulations – for instance, one can fly drones commercially in Switzerland if line-of-sight can be ensured, within certain altitude limitations and not flying near protected areas such as airports. On the other hand, France has somewhat more restrictive regulations in place and it is mandated that any drone operation over the city of Paris needs to be authorized by aviation authorities.

US Regulations

The US has by far the most commercial-friendly regulations in place. The New Small UAS Rule (107) of the Federal Aviation Administration (FAA) that came into existence in August 2016 regulates most operations of drones, especially those that fall under commercial or work purposes. Part 107 rule specifies that an operator can apply for a waiver of Part 107 rule if the drone weighs less than 55 lbs, however, the waiver application must specifically state how the operator plans to safely conduct the operation, including emergency risk mitigation strategies. Drones weighing 0.55 lbs to 55 lbs must be registered with the FAA and most significantly, the UAV must be within the visual line-of-sight. The line-of-sight principle is not particularly pleasing to the industry and it is of the view that rules could become further relaxed once the sector reaches full automation. The FAA is believed to have relaxed the rules for drone operations in the commercial sector keeping in mind that the drone applications are estimated to generate an additional US\$82 bn to the US economy. Many industry giants including DJI Innovations (China headquartered (Dajiang), the world’s largest

drone manufacturer, Pix4D attest to this potential. For UAV operations other than for work or commercial purposes, and specifically for recreational activities and hobbies, there are specific laws such as Public Law 112-95 Section 336 which states that UAVs must operate within visual line-of-sight, give way to manned aircraft, provide advance notification to the airport and air traffic control tower, when flying within five miles of an airport, and also the UAV must not weigh more than 55 lbs.

Regulations in Australia

Australia was one of the first few countries to establish a regulatory framework in the area of drones, with the first set of regulations coming out as early as in 2002. The Australian Civil Aviation Safety Authority has the primary responsibility of ensuring safety and regulating drone operations under different categories such as drone operations for fun, hobbies or commercial ventures. New rules regulating drone operations were issued in September 2016, which have been framed particularly from a risk-reduction and safety perspective. The new regulations accordingly are meant to be less restrictive from a legal and regulatory perspective, thereby facilitating low-risk operations. The new rules also exempt small commercial drone operators from paying the US\$1,400 in regulatory fees as well as avoid the lengthy documentation and paper work. Also, property holders are allowed to operate drones up to 25 kg on their properties without any approval. There are still grey areas that require more clarity in the regulation. For instance, a drone operation that does not seek any “commercial gain” can operate without any certification but the concept of “commercial gain” can be interpreted in multiple ways. If an operator is using UAVs to advertise a product or if an operator seeks to shoot videos and upload onto YouTube, these may not see a direct commercial benefit but they go to publicize a certain industry or an activity.

Japan's Drone Regulations

Japan came up with its first set of regulations only after a serious incident where a small drone was found on the roof of the prime minister's office building in Tokyo in April 2015. The incident brought about the urgency to regulate drone use and, accordingly, the ruling Liberal Democratic Party (LDP) proposed a bill to the Diet (Japanese Parliament) in June 2015. A separate bill, which proposed amendments to the Aviation Act was submitted in July 2015 and both the bills were passed in the Diet subsequently. Under the new regulations, an operator can fly a UAV only after obtaining permission from the Ministry of Land, Infrastructure and Transportation (MLIT) where there is air traffic such as airports and other approach areas, or areas above 150 metres. There are also restrictions for drone use in the hours of dawn and dusk, in addition to the requirement to maintain more than 30 metres of distance from people and objects. Violations are subjected to a fine of upto (US\$4,000 approximate) 500,000 yen. Japan's regulations relating to drones have been drawn, keeping in view the function of drones in the commercial context. Nevertheless, terrorism and other security-related concerns have pushed for stronger regulations for drones for hobby and recreational activities.

China's Regulatory Framework

China has in recent years emerged as a major hub for manufacturing of drones. Some of the industry majors in drones such as DJI (Dajiang) Innovations, Zero Zero Robotics, Yuneec,

and Hubsan belong to China. Five out of 11 global venture-capital funded drone companies are in China and foreign companies are beginning to have a larger presence in the country. China's use of drones for commercial purposes including in agriculture is likely to pick up greater momentum, even as the legal and regulatory architecture is yet to be clearly defined. Also, there are safety issues that need to be dealt with. In December 2015, the online commercial giant Alibaba's drone out on a test crashed into a landing military jet, demonstrating the safety issues that are far from settled.

Current regulations, as they exist today, differ across regions— Beijing and Shanghai appear to have far stricter policies regarding when and where drones can be flown – given the densely populated nature of these cities. Regulations also make a distinction between small consumer drones and large commercial-use drones. Following a series of accidents involving drones, the Civil Aviation Administration of China (CAAC) began putting in place stricter laws in June 2017 that mandate civilian drones above a certain size to be registered under real names in order to strengthen the safety measures associated with use of drones. China's lead role in the drone market and the potential for large-scale use of drones in commercial and non-commercial sectors are significant but the regulatory and legal frameworks are yet to take firm roots.

There are various questions concerning ethics, regulation and implementation that exist in the domain of drones. These questions need to be carefully addressed, keeping in mind the extant legal and moral principles and adapting them to the rapid technological advances to create an effective governance regime for UAVs in India. India must also examine prevailing policy mechanisms in other countries to adopt their best practices as it formalizes its regulatory framework. However, a point to be underlined is that guidelines alone are not sufficient; key is ensuring implementation and compliance. This would essentially mean that guidelines and circulars issued by governments and multilateral agencies like ICAO need to be converted into legal and policy instruments that would have a binding effect on governments. However, standards and norms of responsible behavior relating to drones are essential first steps in this regard.

ⁱ Hereinafter referred to as the UKCAA

ⁱⁱ P.P Craig, *Administrative Law*, Second Edition (London: Sweet and Maxwell, 1994), 96.

ⁱⁱⁱ The Edwards' Committee Report; see R. Baldwin, *A Quango Unleashed: The Abolition of Policy Guidance in Civil Aviation Licensing*, (1980) 58 Pub. Adm. 287.

^{iv} R. Baldwin and McCrudden, *Civil Aviation Regulation: From Tribunal to Regulatory Agency*, 164, quoted in P.P Craig, *Administrative Law*, Second Edition (London: Sweet and Maxwell, 1994), 96.

^v This problem formerly existed in the United States, with regard to the accountability of the Federal Aviation Agency for acts committed by its subordinate organs and the manner of exercise of the discretion granted; see Jack London, *When Air Traffic is out of Control*, 43-JUL Trial 62. Further, it would be pertinent to point out that the progression from the Board system of administration to the Ministerial occurred primarily due to the inability of the Ministry to apply checks on the exercise of discretion by the body, resulting in a lack of accountability of such body to Parliament.

^{vi} *Laker Airways Ltd. v. Department of Trade*, [1977] Q.B. 643.

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- vii R. Baldwin, *A British Independent Regulatory Authority and the Skytrain decision*, [1978] P.L. 57; see also P.P Craig, *Public Law and Democracy in the United Kingdom and United States of America*, First Edition (Oxford: Oxford University Press, 1990), 167.
- viii Miranda Anger, *International Aviation Safety: An examination of the US, EU and developing world*, 72 JALC 141, 144.
- ix *A Brief history of the Federal Aviation Administration*, http://www.faa.gov/about/history/brief_history/, [Last visited October 7 2007, 4:00 pm].
- x Miranda Anger, *International Aviation Safety: An examination of the US, EU and developing world*, 72 JALC 141, 145.
- xi *A Brief history of the Federal Aviation Administration*, http://www.faa.gov/about/history/brief_history/, [Last visited October 7 2007, 4:00 pm].
- xii *A Brief history of the Federal Aviation Administration*, http://www.faa.gov/about/history/brief_history/, [Last visited October 7, 2007, 4:00 pm].
- xiii I.P. Massey, *Administrative Law*, Ninth Edition (Lucknow: Eastern Book Company, 2005), 102.
- xiv dgca.nic.in/dgca/func-ind.htm, [Last visited October 2, 2007].
- xv *Report of the Committee on a road map for Civil Aviation Sector*, (2003), <http://civilaviation.nic.in/moca/nccommittereport.pdf>, [last visited September 30, 2007]
- xvi Civil Aviation Policy, 2000 is available civilaviation.nic.in/moca/civ_pol.html, [last visited 2 October 2007, 11:00 am].
- xvii *Ibid.*
- xviii Civil Aviation Policy, 2000 is available civilaviation.nic.in/moca/civ_pol.html, [last visited 2 October 2007, 12:45 am].
- xix Usha Balasubramaniam, *Market Access and the GATS Air Transport Annexure: Possible approaches for India*, 72 JALC 45, 62.
- xx *India open sky policy and dog fight*, http://www.jeefoo.com/archives/2005/02/more_delayed_jo.php, [Last visited October 7 2007, 5:00 pm].
- xxi *Report of the Committee on a road map for Civil Aviation Sector*, (2003), <http://civilaviation.nic.in/moca/nccommittereport.pdf>, [last visited September 30 2007, 11:00 am].
- xxii *State of Kerala v. K.M.C. Abdullah & Co.*, AIR 1965 SC 1585.
- xxiii See *In Re: Delhi Laws*, [1951] 2 SCR 747 and *Hamdard Dawakhana v. Union of India*, AIR 1960 SC 554, where the court has stated that the delegation of legislative power must be coupled with sufficient guidelines, in terms of policy formulation, to prevent delegation of essential legislative function, in order to be *intra vires* the constitution.
- xxiv *Assam Small Scale Ltd. Dev. Corporation Ltd. v. J.D. Pharmaceuticals*, AIR 2006 SC 131.
- xxv See *R.D Shetty v. International Airports Authority of India*, (1979) 3 SCC 489 and *Ajay Hasia v. Khalid Mujeeb*, AIR 1981 SC 487, where the court proposed that if the functions exercised are of public importance and closely relate to governmental functions, the body may be classed an instrumentality of the State, and thus would be within the ambit of ‘other authorities’ as contemplated by Article 12. In this regard, the CAA exercises the governmental function of regulating the civil aviation sector.