



**Centre for Aerospace & Defence Laws (CADL)  
Directorate of Distance Education  
NALSAR University of Law, Hyderabad**

**Course Material**

**M.A. (AVIATION LAW AND  
AIR TRANSPORT MANAGEMENT)**

**1.2.6. AVIATION SAFETY, SECURITY AND  
LIABILITY LAWS**

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**MODULE I**

**GLOBAL AIR SAFETY  
REGULATIONS: AN  
OVERVIEW**





# **MODULE I**

## **GLOBAL AIR SAFETY REGULATIONS: AN OVERVIEW**

### **INTRODUCTION**

The air transport industry plays a major role in world economic activity. One of the key elements to maintaining the vitality of civil aviation is to ensure safe, secure, efficient and environmentally sustainable operations at the global, regional and national levels. A specialized agency of the United Nations, the International Civil Aviation Organization (ICAO) was created in 1944 to promote the safe and orderly development of international civil aviation throughout the world.

ICAO sets the Standards and Recommended Practices (SARPs) necessary for aviation safety, security, efficiency and environmental protection on a global basis. ICAO serves as the primary forum for co-operation in all fields of civil aviation among its 191 Member States\*. Scheduled commercial international and domestic operations accounted for approximately 3.1 billion passengers in 2013, up from 2.9 billion passengers in 2012. Total scheduled passenger traffic included approximately 32.1 million sectors flown. The year-over-year accident statistics indicate a reduction in the overall number of accidents as well as the accident rate, a positive trend for air transportation safety. Compared to 2012, the number of accidents (as defined in ICAO Annex 13 involving aircraft with a maximum certificated take-off weight of over 5700kg and reviewed by the ICAO Safety Indicators Study Group) decreased by 10% in 2013. In addition, the global accident rate involving scheduled commercial operations decreased by 13%, from 3.2 accidents per million departures in 2012 to 2.8 accidents per million departures in 2013.

Foremost among the chief priorities for aviation administrations and airlines is the safety of passengers, general public, ground personnel and property. Indeed, the improvements in 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.

The objective of this module is to highlight the various difficulties in regulating air safety and the measures taken by international organizations, particularly the ICAO, in this direction. This module will study the causes of aircraft accidents, their investigation, liability issues involved in air disasters and evolution of security law through various international conventions.

Air safety is of paramount importance in air transport. The aircraft designer, the manufacturer, the operator and government (controlling authority) - all strive to achieve

greater air safety. 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. A set of internationally agreed standards, rules and regulations has been developed by the ICAO, through its Annexes, to achieve an optimum level of air safety. Most Annexes aim to maintain and improve safety cover. A wide range of factors -- personnel licensing, airworthiness of aircraft, standardization of aircraft operations, air traffic services, aeronautical information and telecommunication services, meteorological services and airport security -- collectively ensure the highest degree of air safety on a worldwide basis.<sup>1</sup>

### **The Concept of Aviation Safety**

While everyone agrees that aviation safety is important, opinions vary when an attempt is made to define the term "safety". The Oxford Dictionary defines "safety" as "freedom from danger or risks". It also means "the state of being protected from or guarded against hurt or injury".

Clearly, if aviation must be free from any dangers or risks, it will not exist at all. Flight is inherently a risky venture, carried out in a hostile environment at great speed. The only way to assure risk-free flight is never to allow the airplane to leave the gate. Accordingly, some commentators tend to link the concept of safety with accident prevention. They consider "safety" as meaning "no (avoidable) accidents", or more realistically, "as few accidents as possible".

From a micro and operational point of view, this definition is helpful since much of the safety concern is related to accident prevention. From a macro and policy-oriented point of view, "accident prevention" is too tight a strait-jacket to coat the much broader policy consideration underlying the safety issues. Aviation safety includes but is not limited to operational flight safety.

The tragic events of 11 September 2001, which constituted not only the most serious threat but also unprecedented damage to aviation safety, have conclusively demonstrated that aviation safety goes beyond accident prevention from a technical point of view and extends to more profound political, strategic and legal dimensions. It includes preventive, remedial and punitive measures.

Accordingly, safety is not limited to accident prevention, but should be considered in a broader term as risk management. After a period of study, the ICAO Air Navigation Commission defined "aviation safety" as "[t]he state of freedom from unacceptable risk of injury to persons or damage to aircraft and property". Risks could be at a lower or higher level. Depending on the risks involved, the scope of the aforementioned management may range from routine suspension of a license of an unqualified pilot to the temporary grounding

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<sup>1</sup>A.D. Groenewege, *Compendium of International Civil Aviation* (Montreal, 1996), p. 325.

of all civil aircraft at the time of a crisis. Sometimes, a particular safety standard is very attractive from a technical point of view, but it may not be cost-effective or may even be economically prohibitive to implement. In that case, a careful policy judgment is needed to determine what standard should be imposed. Consequently, aviation safety requires a multidisciplinary approach: technical, economic, managerial, and, obviously for the purposes of the present study, legal. Safety is also a dynamic rather than static concept. It has a strong temporal sense. What was considered safe or unsafe yesterday may not be so today.

In 1919, when two British airmen, Captain John Alcock and Lieutenant A. W. Brown, made the first flight across the Atlantic non-stop from Newfoundland to Ireland, the aircraft used was a twin-engine Vickers Vimy biplane.

Subsequently, due to the development of aviation technology and safety requirements, twin-engine aircraft were not allowed for cross-ocean flights for a long period of time. In 1984, however, this rule was again changed.

Nowadays, twin-engine aircraft are commonplace in cross-ocean flights. This example demonstrates the close relationship between the advance of technology and law-making activities as well as the dynamic concept of safety. Safety also includes security. In ICAO terminology, a distinction is made between “safety” and “security”. The former is related to the operational safety of aircraft, including personnel licensing and airworthiness, whereas the latter means “safeguarding civil aviation against acts of unlawful interference”.

While this distinction may be convenient, it should nevertheless be pointed out that aviation security is but one important aspect of aviation safety. No matter how airworthy an aircraft is, and how competent its crew members are, air travel will not be safe if it is subject to terrorist attacks, which have become the most serious threat to the safety of civil aviation. Safety requires, first and foremost, technical expertise. However, it is not the exclusive domain of the technical profession. It has a policy and legal dimension. As Wassenbergh observes: “Safety in civil aviation is a technical and operational matter, to begin with. It becomes a matter of public law as soon as the public is involved and private people participate under government control.”

Having regard to the temporal, multidisciplinary nature of aviation safety, it may be asked how safe is safe. Who will actually decide the standards of safety, or the threshold of acceptable risk? It has been said that safety, like beauty, is in the eyes of the beholder. Speaking from the perspective of the United States, Isaac, a former officer of the Federal Aviation Administration, writes:

While 100 people may have 100 different answers to that question, our democratic system itself provides the answers. In my opinion, the Congress of the United States has the greatest influence on the level of safety, or acceptable risk under which we operate. Congress, of course, writes the laws that govern the operation and development of the national aviation system. Congress also controls the budget of the Department of Transportation and, in turn, the Federal Aviation Administration.

It may be concluded, therefore, while aviation safety is a multidisciplinary matter, the legislator of a sovereign State may, subject to its international obligations imposed by the Chicago Convention and other sources of inter-national law, determine how safe is safe for aviation within its areas of competence, such as aircraft registered or operated in its territory, personnel licensed in its country and airports as well as air traffic service agencies under its jurisdiction. From this perspective, it may not be difficult to argue that aviation safety is ultimately a matter of law, namely, a matter of legislation and its implementation.

While the discussion above may provide an answer with respect to aviation safety at the national level, a further question may be asked as to who is determining aviation safety from an international perspective. This question is of considerable significance since civil aviation is virtually international by its nature. Its optimal benefit could not be realized if it were confined to national boundaries. At the same time, its risks are also shared globally. While every State retains its sovereignty within its territory, it is unable to regulate the safety of international civil aviation without the cooperation of other States.

A State may ensure the quality of aircraft registered in its country and airports located therein, but it may not do so for aircraft registered and operating in other countries and airports located therein, which may also impact aviation in the former State. In a nutshell, the risks incurred by civil aviation are global in nature. Global risks require global management and call for international concerted action. As demonstrated below, the history of civil aviation has crystallized into the establishment of ICAO

The current reality has also confirmed the ongoing need for ICAO. It is submitted that ICAO, as the specialized agency of the United Nations responsible for aviation, is the guardian of the safety of international civil aviation, the global manager of risks relating to civil aviation, and the worldwide decision-making body on behalf of sovereign States with respect to aviation safety.

### **Problems Relating to Air Safety**

A commercial airline pilot en route to San Diego International Airport looks out a window at 10,800 feet and sees a Lockheed S-3 Viking Navy jet coming right at him. “The captain quickly pulled up on the control column to avoid hitting the S3,” the co-pilot wrote in a report filed with federal officials. “He turned his head to the right, which made me look out of my window on the right. And the window was full of the S3.” The two planes passed within about 100 feet of each other. This is just one of thousands of examples of near-misses, bad communications, equipment failures, wildlife hits and sometimes just silly but dangerous errors contained in an aviation safety database collected and analyzed by NASA. A six-month examination of more than 150,000 reports filed by pilots and others in the aviation industry over the past 20 years reveals surprising and sometimes shocking safety breaches and close calls at local, regional and major airports throughout the country.

At every stage of aerial operations and in every element of its support infrastructure, aviation is more exposed and vulnerable to risks today than in the past.<sup>2</sup> The recent concern about safety record signals a fundamental change in approach to international civil aviation in the coming years. As air transport activity continues to grow, there are fears of an unacceptable spurt in air accidents.

Aviation accidents are caused by a culmination of several concurrent failures in mechanical, human and/or technological components in the air transport system. The total number of air accidents in 1996 was 57, one more than in 1955, which was the previous record year. There were 1,840 fatalities, exceeding the previous peak of 1,801. At the current rate of accidents and traffic growth, industry estimates show, there could be a major loss every seven-ten days somewhere in the world by 2015 AD.<sup>3</sup> Accident rates indicate two elements: the number of accidents occurring, and the number of air traffic movements, or hours flown. To extrapolate the present data over the next few years we need to look at air traffic forecasts. The latest forecasts for global air traffic growth give rates in the order of 5.2 per cent a year between 1994-2013, which approximates to a tripling of air traffic over the period.<sup>4</sup> Another forecast by Airbus and Boeing jets estimates the average yearly growth of world traffic at 5.1 per cent up to 2015 A.D.<sup>5</sup> The inevitable consequence of a substantially flat accident rate and air traffic growth is more 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.<sup>6</sup> In fact, safety is the minimization of dangers, risks and hazards during aircraft operations. The concept of aviation safety is broad, embracing both life and property of those engaged in aviation activities and third parties as well. Broadly stated, the five basic parameters determining air safety are: safe aircraft, safe airmen, safe navigational aids, safe air traffic system and safe airports.<sup>7</sup> The operation of aircraft presents the greatest safety challenge yet in the history of air transport. Safety has been the prime concern since the days of Kitty-Hawk, when the first aircraft made its maiden flight. All facets of aviation community are involved in this endeavor - airlines, manufacturers, pilots, mechanics, flight attendants, dispatchers, regulatory authorities, suppliers and insurance firms. The international aviation community should work together, collecting, analyzing and

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<sup>2</sup>G.S. Sachdeva, **International Transportation : Law of Carriage by Air** (New Delhi, 1987), p. 106.

<sup>3</sup>See 33rd

<sup>4</sup>See Kenneth Smart, "Safety Challenges - Technological Solutions", in **World Aerospace Technology 1996** (London, 1996), pp. 16-21, at p. 16.

<sup>5</sup>See Michael Kerkloh, "Ramp Safety in the Nineties", **World Aerospace Technology 1996**, pp. 22 and 23 at p. 22.

<sup>6</sup>S.J. Corrie, "Potential Growth in Air Travel Demands Renewed Effort to Improve Safety Record", **ICAO Journal**, December 1994, pp. 7-9, at p. 7.

<sup>7</sup>K.N.S. Krishnan, "Commercial Aviation Safety", **Business INN Journal** (New Delhi), vol. 18, Issue 1, March 1997, pp. 9-14, at p. 10.

disseminating aviation safety information and collaborating to develop new tools, which would improve aviation safety worldwide.<sup>8</sup>

Safety is based on co-operative and co-ordinated network of diverse agencies. The safety of international air transport is governed primarily by two main endeavors - the development and implementation of sound regulatory standards and implementation of non-regulatory accident prevention measures.<sup>9</sup>

Aviation is a complex system and requires a precise co-ordination of human and mechanical elements for its functioning. It possesses, as a system, elaborate safety defenses. Accidents in such systems are the result of crucial factors, each necessary to the outcome, but not sufficient in itself to break the safety defense.<sup>10</sup> The crucial factors determining safety in aerial navigation are: human error on the part of pilots, introduction of new types of aircraft with which pilots and ground crew are unfamiliar, air space congestion caused by swelling aviation activity, lack of air navigation and air traffic control services, aerial violence such as hijacking and the flight of military aircraft in air space reserved for civil use, resulting in conflict between civil and military regulations.<sup>11</sup>

The majority of air accidents, the investigations reveal, are the result of human errors. Human errors in aircraft accidents are primarily caused by inadequate response to emergency situations: weather or technical defects in aircraft machinery. Human error on the part of pilots arises from heavy stress and strain imposed by the responsibility of flying.<sup>12</sup> Air crashes often result from communication problems between pilots and controllers, due to the misunderstanding or misinterpretation of messages. The introduction of newer technologies offering safety improvements and performance gains has raised questions about the effectiveness of traditional training approaches, or human ability to absorb the training required for the newer equipment.<sup>13</sup>

To overcome this problem at all levels of the organization - company, board members, senior management, flight operation management and flight crew themselves - there must be appropriate attitudes and organization structures/functions to sustain human factors awareness and promote a programme to reinforce human knowledge, understanding and skills. Organizations need to consider the ICAO Annex 1, which establishes standards for human factors licensing and the revision of the Annexes - including requirements for the promotion of human factors training.<sup>14</sup>

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<sup>8</sup>See 33rd Conference of DGs, n. 40, Paper by the USA on Global Analysis and Information Network, DGCA-97/OP/C7/3, p.2.

<sup>9</sup>See Corrie, n. 7.

<sup>10</sup>See D. Maurino, "Management Decisions Have an Impact on Flight Safety", ICAO Journal, October 1991, p. 6.

<sup>11</sup>S. Bhatt, "Safety in Air - Recent Developments", **Indian Journal of International Law** (New Delhi), vol. 14, nos. 3-4, July-December 1974, pp. 386-99, at p. 386.

<sup>12</sup>Ibid.

<sup>13</sup>John H. Enders, "New Challenges for Aviation Safety", in **Flight Safety**, July 1992, p. 4.

<sup>14</sup>See Jeremy Butler, "Human Factors : The IATA Perspective", **INSIGHT**, vol. 4, no. 4, July-August 1996, p. 6.

Better air safety, devoid of human errors, demands advance planning for disaster prevention. This implies, first, an operational job analysis, better to familiarize the pilots, ground crew and controllers with the job tools. Second, it implies a functional concept of accident, anticipatable in the light of past experiences. The third aspect is, of course, the human limitation in air safety.<sup>15</sup>

A conflict is bound to arise in the operation of aerial safety rules, which calls for a greater integration of the air safety law in both civil and military spheres. Civil rules are far too often violated on the grounds of military necessity, resulting in crashes between civil and military aircraft. This requires strategic and tactical air space management on a regional basis, taking account of the needs of airspace users and national security considerations. To this end, information on the planned movements of civil aircraft and their intended flight paths has to be made available in time to military units. Air defense is premised on the ability of military units to identify air traffic and verify that the right paths do not infringe on air space for which no entry authorization has been given.<sup>16</sup>

With the advent of supersonic aircraft, flight separation limits have increased in order to enhance safety. Moreover, air space over an airport for the arrival/departure or en route phase is getting increasingly congested. The congestion results from a number of factors, impending take-off and landing capacity: limitations of ground infrastructure and aircraft equipment limitations, and limitations forced by the interface with *en route* air traffic control.<sup>17</sup> Congestion threatens to cause danger in the air and to vehicular traffic on the ground. Congestion is a serious obstruction to the growth of air transport and underinvestment in aviation infrastructure is robbing billions of dollars from the world economy.<sup>18</sup> A recent analysis suggests that the delay resulting from on-ground holding, indirect routing and inefficient flight levels could cost the airlines industry as much as £ 4 billion (US \$ 6 billion) a year by the next millennium. In order to improve this situation a number of options are under consideration: reconstruction of airspace, associated changes and improvement to existing ATC, increased automation and development of new and better infrastructure and facilities.<sup>19</sup>

Airspace congestion is causing inexorable problems to traffic controllers. It has almost become a nightmare for them, who sometimes fail to penetrate the time barrier and delay the arrival or departure of aircraft. The stress is enormous on the controllers during high traffic intensity hours, when pilots ask for control clearance. Some airports in the world

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<sup>15</sup>See Bhatt, n. 12, p. 389.

<sup>16</sup>Marinus C.F. Heijl, "Infrastructure for Free Flight", in **Air Traffic Technology International** 1998, pp. 115-17, at 116.

<sup>17</sup>See Sofreavia, "Tackling Congestion in Air Ways", in **Air Traffic Technology International** 1997, pp. 88-93, at p. 88.

<sup>18</sup>See **The Economic Benefits of Air Transport** (Geneva, 1995), p. 6.

<sup>19</sup>See Cliff Fry, "The Future Air Traffic Service Provision", **Air Traffic Technology International** 1997, pp. 94-97, at p. 94.

have already limited the number of flights which operate daily. It has been necessitated by horizontal and vertical congestion in air space.<sup>20</sup>

When the Chicago Convention was negotiated in 1944 the parties did not envision two safety-related issues: safety oversight responsibilities and the safety of civil aircraft in flight. By 1980, it was clear that a substantial increase in the lease, charter and movement of operational bases of aircraft across national boundaries had posed real safety oversight problems. Article 83 bisx of the Chicago Convention was adopted in 1980 to end these problems and was enforced on 20 June 1997; it will solve many problems of regulation and air safety oversight, which are experienced when an aircraft registered in one state is operated by an operator based in another state.<sup>21</sup>

Another factor affecting the safety of civil aircraft in flight is interception and other coercive measures directed at civil aircraft. In 1984, a protocol amending the Chicago Convention of 1944 under Article 3 bis was adopted, recognizing the principle that states must refrain from the use of weapons against civil aircraft in flight and that the lives of persons on board the flight, and aircraft safety, must not be endangered while intercepting civil aircraft.<sup>22</sup>

Improvements in aviation safety, until the last decade or so, were achieved largely by investigations into accidents or wreckage, and the resultant evidence. This knowledge and statistical data have resulted in design changes, reliable manufacturing procedures, improved and focused training for flight crews, improvements in air traffic procedures, equipment and training and better weather information.<sup>23</sup>

### **State Sovereignty**

Under the Convention on International Civil Aviation (the Chicago Convention), each State has complete and exclusive sovereignty over the airspace above its territory. While national sovereignty cannot be delegated, the responsibility for the provision of air traffic services can be delegated. And, we are reminded by Assembly Resolution A37 15 (see Appendix) that a State which delegates to another State the responsibility for providing air traffic services within airspace over its territory does so without derogation of its sovereignty. State Sovereignty is a fundamental principle of international law. However, the term is very often used in a political sense, with differing interpretations depending on context and intention. The notion of sovereignty is dynamic, evolving with the development of the global institutional environment.

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<sup>20</sup>See Bhatt, n. 12, p. 389.

<sup>21</sup>See Address by the President of the Council of the ICAO, Dr Assad Kotaite, to the 33rd Conference of the Directors General of Civil Aviation, Asia and Pacific Regions, New Delhi, 27-31 October 1997, p. 4.

<sup>22</sup>Ibid., p. 5.

<sup>23</sup>Stuart Mathews, "Making a Safe System Safer", in **Aviation Industry Developments 1997** (London, 1997), pp. 51-52, at p. 52.



In aviation, sovereignty refers to the ownership of airspace. In other words, to the exclusive competence of a State to exercise its legislative, administrative and judicial powers within its national airspace. State sovereignty is closely connected to the definition of States' obligations under Article 28 of the Chicago Convention. The text and spirit of Article 28 do not oblige States to provide air navigation services over their territory themselves. Rather, Article 28 prescribes that when and where States elect to provide facilities and services to support international air navigation, these facilities and services must comply with ICAO Standards and Recommended Practices. In other words, States' responsibilities are of a regulatory and supervisory nature. States are required to take appropriate measures to ensure compliance in respect of safety and operational efficiency. The regulatory framework establishes overall safety and efficiency standards.

The issue of sovereignty lies at the very heart of international aviation because all aviation relations are built upon it. The purpose of this paper is to discuss the spectacular evolution of the concept of sovereignty in the air by adopting a multifaceted approach to this issue. In the first part the concept of sovereignty under general international law is briefly explained, before defining it in the more specific framework of public international air law. This discussion is followed by an analysis of the way states open their airspace for the purpose of entering into commercial agreements and conducting air transport activities. Overall, a selection of accidents that were directly linked to the notion of national security sovereignty are examined. Special reference is made to Cyprus and Gibraltar, both countries having territorial conflicts that directly affect their ability to exercise complete and exclusive sovereignty above their airspace. Particular attention is granted to some more recent commercial, technical, legal and environmental developments in the European Union that touch upon the concept of sovereignty such as the delegation of air navigation services from one state to another, the delimitation between airspace and outer space, the introduction of a European Emission Trading Scheme, insurance requirements, and the frequently updated list of airlines banned in the European Union.

#### The Concept of Sovereignty under Public International Law

The Montevideo Convention 1933<sup>1</sup> codified largely accepted principles of customary international law and defines a State as an entity having a permanent population, a defined territory, a government and enjoying the capacity to enter into relations with other States. The existence of a State appears to be a question of fact because article 3 of the Montevideo Convention provides that “the political existence of the state is independent of recognition by the other states”. The modern concept of State sovereignty is often traced back to the Treaty of Westphalia which laid down the basic principles for the recognition of a State as being a sovereign State: territorial integrity, border inviolability, the supremacy of the State and a supreme law making body within the territory. The concept of sovereignty lies at the heart of the existence of all States. It is a reflection of their “exclusive, supreme and inalienable legal authority to exercise power within their area of governance”. A sovereign State possesses legal, executive and judicial powers and has authority over its subjects within

its territory, to the exclusion of all other States. Sovereignty is the basis for the doctrines of responsibility, nationality and jurisdiction. Article 2(2) of the Charter of the United Nations recognizes that all States are equal and sovereign because they are all politically independent). The United Nations Convention on the Law of the Sea<sup>6</sup> provides that the sovereignty of States extends over 12 nautical miles, called the territorial sea (article 3). Following the theory laid down by Hugo Grotius in his *Mare Liberum*, it was established under international customary law that the high seas cannot be appropriated by any State. In other words, no State can claim sovereign rights above these regions. The right of innocent passage was recognized for all civil and military ships of all States. Moreover States must not infringe upon the rights of the coastal State or disrupt the peace or represent a security threat for this State (Convention on the law of the Sea, articles 17 and 19).

### **The Concept of Sovereignty under Public International Air Law**

*Cuius est solum, eius est usque ad caelum et ad inferos* ("for whoever owns the soil, it is theirs up to Heaven and down to Hell."), This eloquent Latin proverb was first used in the 13th century by the Roman commentator Accursius and was subsequently introduced into English law by William Blackstone in his *Commentaries on the Law of England* (1966). Under this doctrine, the owner of the land was the owner of the whole airspace above it without any limits. Obviously such conception is no valid anymore because it is incompatible with the modern needs of the air transport industry but is worth mentioning because it was largely accepted until the birth of the civil aviation.

As early as 1901, the French legal scholar Paul Fauchille wrote an article entitled "*Le domaine aerien et le regime juridique des aerostats*" in which he referred to, inter alia, the freedom of the air. Some years later, John Westlake, a British lawyer, took an opposite view. He was in favor of recognizing the principle of sovereignty in the air as the primary principle of public international air law and attempted to put an end to the transit rights of balloons and to the use of particular equipment such as wireless telegraph.

States and the aviation industry have always been connected by a particular link. The Paris Convention and the Chicago Convention have been enacted after two destructive world wars. Wars reinforce nationalism and give to the respectable principle of State sovereignty a defensive character. Numerous airlines were created by National Defence authorities of States and constituted strategic national reserves for the military forces in cases of war or armed conflict. In the same way, an important part of the airspace used to be and is still reserved for military activities. This separation of the airspace between civil and military users is a reflection of the national security priority lying behind the concept of sovereignty.

Article 1 of the Paris Convention 1919 provided that each contracting party recognized that every Power had complete and exclusive sovereignty over the airspace above their territory. Article 1 of the Chicago Convention reproduces this formula in an identical way. Article 2 defines territory as "the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State". Some of these terms

are nowadays outdated or obsolete. Indeed, protectorates and mandates ceased to exist even before the entry into force of the Chicago Convention.

A minority of authors, such as Nicolas Matte, argue that the airspace belongs to the “physical space” in which the world community interacts and therefore no parts of it can be made subject to sovereignty claims from any nation, even for a limited period of time. Matte believes that the airspace is a common good that must be used in a peaceful way by humanity. Hence such a conception must be predominant over ‘egoistic’ claims of individual States that seek their own interests and immediate economic benefits.

The International Air Services Transit Agreement was signed in 1944<sup>17</sup> and since then greatly contributed to the development of the legal framework regulating international civil aviation. It was signed by 122 countries and gives to the airlines of the signatories’ over flight rights and the right to land in the territory of other contracting States for non-traffic purposes such as refueling. Its provisions are in accord with the provisions of the Chicago Convention on sovereignty over the airspace (the drafters of this legal instrument being the same as the drafters of the Chicago Convention).

### **Sovereignty in the Air and the Exchange of Traffic Rights**

Nowadays, States cannot seek their own profit without having regard for the interests of the other States because any political action of one State has political and economic repercussions at a regional or world scale. Smaller nations can hardly survive without interacting with more developed countries. In the same way, powerful countries need to trade with developing countries. Aviation was a crucial tool that led to the globalization of economy and trade liberalization.

Article 6 of the Chicago Convention provides that ‘no scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or authorization of that State, and in accordance with the terms of such permission or authorization’. In other words, this provision means that the airspace of all contracting States is closed *de iure*, until States decide to open it *de facto*. Until recently, bilateral air service agreements remained the traditional and preferred mode for States to open their airspace to other States, for the purposes of entering into international air transport operations and regulating the economic aspect of these exchanges. The most famous model bilateral air service agreement was signed between the United States and the United Kingdom in 1944 and is commonly referred to as the Bermuda I agreement. This agreement was a compromise between the opposing views of the parties and gave birth to a regime based on fair and equal opportunities to compete, a double approval of tariffs and capacity possibilities based upon the needs of the public for air transport operations. It can be said that at the time of the signature of this agreement, States were still strongly intervening into the regulation of air transport and thus still attached to the concept of sovereignty. Naveau argues

that the principle of sovereignty in the air explains why the air industry is one of the very few areas of trade where bilateralism survived.

As written by Naveau in his articles, in developed countries the economic sovereignty of States on the economic regulation of air transport is now fading away in the wake of the liberalization of the aviation market. This trend that started in the USA in 1978 and that was gradually introduced into the EU altered the institutional framework of air operations. Before 1987, national markets within the EU were fragmented and bilateral agreements were still governing the exchange of traffic rights between EU countries. With the full liberalization of the internal market of the European Union in 1997, any EU carrier can operate on any EU route, including purely domestic routes. Full cabotage rights within the EU are an astonishing development and a great step away from the traditional conception of sovereignty. There are now more international routes, new airlines and many airports are on the way to privatization. The EU and the US signed Open Skies agreements under which airlines in the EU are able to fly to the US, from any airport in the EU, without having regard to their nationality. These changes involve renouncing to the nationalistic conceptions that inspired the drafters of the major legal instruments public international air law after the Second World War.

Sovereignty is however still expressed by the need to comply with the requirements of national ownership and effective control. Under article 6 of the Chicago Convention, a State granting an authorization to the airline of another contracting State to operate flights to and from this country, must be convinced that the relevant airline is substantially owned and controlled by the State and / or the citizens of the other party. If this condition is not satisfied, the agreement in force between the two countries may be suspended. Under Article 28 (a) of the Chicago Convention, “ 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”.

Under Article 28 the provision of air navigation services is clearly a State responsibility deriving from the concept of sovereignty in the air. However the State can fulfill its obligation directly or decide to delegate this task to a private body that may be established within its territory or in a neighboring state. Delegation of these services is possible and even encouraged by ICAO because international cooperation has always been one of the main objectives of the drafters of the Chicago Convention. The government then retains a supervisory authority. Delegations between countries are necessary for technical and operational reasons. This happens regularly for airports close to national boundaries such as Geneva, Zurich or Lugarno in Switzerland or located in the vicinity of congested areas. In the case of an international conflict between States emanating from the provisions of air navigation services, solutions must be found in national law. This delegation can be done by States only and in the view of Kost, does not mean loss of sovereignty.

On the contrary, Naveau is of the opinion that such delegation inevitably implies to some extent a loss of sovereignty over the airspace by the delegating State to the benefit of the providing State. He elaborated his argument by arguing that the Chicago Convention itself, while recognizing the concept of sovereignty over the airspace, at the same time, laid down the legal basis for such ‘‘abandonment’’ of sovereignty by creating the International Civil Aviation Authority, which is working towards a maximum uniformity of rules and norms governing international civil aviation worldwide and thus restraining the freedom of States to enact their own set of rules concerning air operations in their airspace.

### **National Security**

One of the major issues of air law since the beginning has been sovereignty in airspace. Sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state.<sup>24</sup> In early times the question arose over the right of balloons and aircraft to cross national borders safely. In the beginning of the 20th century several scholars propounded theories on sovereignty and jurisdiction over airspace. One group supported the freedom of air, and the other national sovereignty over airspace.<sup>25</sup> The impetus for a public international law to tackle the issue of airspace rights was given by the August 1904 aerial incident, when Russian guards shot down the German balloon *Tschudi* while flying outside Russian territory. Two other unrelated but similar incidents occurred in 1908 and 1910 respectively.<sup>26</sup>

The Paris Convention 1910, for the first time, recognized air space as belonging to individual states on the basis that the upper airspace was a national heritage common to all people, and that its reasonable use ought not to be hampered by an ancient artificial maxim of law (i.e. *cujus est solum ejus est usque ad caelumi et ad inferos*).<sup>27</sup> See also N.M. Matte, *Treatise on Air-Aeronautical Law* (Carswell, 1981), p. 21.

A consensus of European states followed in 1910, offer a landmark US court decision in the *Erickson vs Crookston* case in 1907. "Common law rules", the US Court declared, "are sufficiently flexible to adapt themselves to new conditions arising out of modern progress and it is within the legitimate province of the court to so construe and apply them."<sup>28</sup>

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<sup>24</sup>The Island of Palmas Case (US and the Netherlands) Permanent Court of Arbitration, 1928, 2 UN Rep. Int. Arb. Awards 829, at p. 838.

<sup>25</sup> There are four theories: (1) Free Air Theory - States claimed and acquired rights in the interest of self-preservation and national safety - was propounded by Fauchille; (2) The Complete Sovereignty Theory was supported by English lawyers, notably Coke and Blackstone; (3) Every state has absolute sovereignty in the air up to, but not beyond certain height; (4) A state has sovereign rights in the superjacent air space subject to a right of free passage of all foreign non-military aircraft.

<sup>26</sup>See R.I.R. Abeyratne, "The Air Traffic Rights Debate - A Legal Study", *AASL*, vol. 18, no. 1, 1993, pp. 3-37, at p. 21.

<sup>27</sup>W.J. Davis, *Aeronautical Law* (Los Angeles, 1930), p. 43.

<sup>28</sup>100 Minn (1907) at p. 484, cited in Abeyratne, n. 45, p.22.

Thus, the 1919 Paris Convention recognized two basic principles of sovereignty:

(a) The principle of the full and absolute sovereignty of each state over the air above its territory and territorial waters, carrying with it the right to exclude foreign aircraft and impose its jurisdiction over the air.

(b) The recognition of the greatest freedom of international air navigation subject to the principle of sovereignty insofar as the freedom is consistent with the security of the state, enforcement of reasonable regulations relative to the admission of the aircraft of contracting states, and the domestic legislation of the state.<sup>29</sup>

National sovereignty was equally the dominant consideration in matters of aviation safety in the Chicago Convention 1944. Today, the Chicago Convention virtually regulates all the safety aspects of international civil aviation, laying down standards and recommended practices in its Annexes. The state where an aircraft is registered is responsible for the safety and conduct of that aircraft. The Chicago Conference had also drafted two other multilateral agreements: the international air services transit agreement and the international air transport agreement. The first one - a technical and operational agreement dealing with safety aspects of civil aviation - was successful.<sup>30</sup>

Other issues on the safety of civil aviation of the convention included standardization of human resources and equipment by certificates and licenses - whether for aircraft or their crew - to be granted by the state of aircraft registry and required to be recognized by all other member states. The rules of air traffic control in air space were to be those established by that state. Accidents occurring in the airspace of a state were to be investigated by that state, even in cases involving foreign registered aircraft.<sup>31</sup>

How could different national states ensure sufficient uniformity in international civil aviation necessary for safety? Would there be a nightmare of different and possibly conflicting requirements applied as an aircraft entered the airspace of a state? This dilemma was resolved due to the voluntary acceptance by the member states of the technical Annexes to the Chicago Convention adopted by the ICAO Council in accordance with Articles 37, 38 and 54(1). These Articles established a sound and workable progress of (1) collaboration by states working in the ICAO to establish international standards and procedures; (2) the incorporation by sovereign states of such standards and procedures into their national legislation and regulations; and (3) an immediate notification to the ICAO of any departure from such international standards and procedures. Each sovereign state is, moreover, expected to establish and follow its own oversight procedures related to safety.<sup>32</sup>

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<sup>29</sup>See Groenewege, n. 1, p. 39.

<sup>30</sup>See Henri Wassenbergh, **Principles and Practices in Air Transport Regulations** (Paris, 1993), p. 5.

<sup>31</sup>Arnold Kean, "Air Law Past and Future : The Challenges of the XXIst Century", **AASL**, vol. 17-1, 1992, pp. 7-13, at p. 10.

<sup>32</sup>Assad Kotaite, "Is there a Lessening of State Sovereignty or a Real Will to Co-operate Globally?", **Air and Space Law**, vol. 20, no. 6, 1995, pp. 288-92, at p. 289.

Professor Bin Cheng addresses the principles governing post-war sovereignty over airspace as enunciated in Article 1 of the Chicago Convention and concludes: "Now firmly established rule of law that each state possesses complete and exclusive sovereignty over the airspace above its territory means that international civil aviation today rests on the tacit acquiescence or express agreement of state flown over."<sup>33</sup>

Shawcross and Beaumont define sovereignty in international law as "the right to exercise the function of a state to the exclusion of all other states in regard to a certain area of the world". In international aviation the concept of sovereignty is the fundamental postulate on which other norms and virtually the whole of air law are based. The post-1944 attitudes towards sovereignty in airspace and the philosophy of air law range between the unlimited public right of a state to exercise sovereignty over its air space and the idea of free air traffic movement.<sup>34</sup>

Professor Lissitzyn analyses the sovereignty concept in its modern development in terms of three basic principles: each state has exclusive sovereignty over its air space; each state has complete discretion on the admission of any aircraft into its air space, and air space over the high seas and other areas is not subject to a state's jurisdiction in *res nullius* and is freely accessible to the aircraft of all states.<sup>35</sup>

## **The ICAO and Aviation Safety**

Fifty-two states met in Chicago from 1 November through 7 December 1944 and produced six important documents forming the core of the Chicago Convention.<sup>36</sup> The Chicago Convention laid the foundation for the development of international civil aviation and established principles, structures and procedures for the working of the International Civil

International Civil Aviation Organization (ICAO). Under Article 44 of the Convention, the ICAO aims to develop the principles and techniques of international air navigation and air transport so as to:

- (a) Ensure a safe and orderly growth of international civil aviation throughout the world;
- (b) Encourage the art of aircraft design and operation for peaceful purposes;
- (c) Encourage the development of airways, airports and air navigation facilities for international civil aviation;

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<sup>33</sup>See Ben Cheng, **Law of International Air Transport** (London, 1962), p. 3.

<sup>34</sup>Peter B. Keenan, ed, **Shawcross and Beaumont on Air Law. Volume I** (London, 1977), p. 15.

<sup>35</sup>O.J. Lissitzyn, **International Air Transport and National Policy** (New York, 1983), p. 365.

<sup>36</sup>(1) The Convention on International Civil Aviation; (2) An Interim Agreement on International Civil Aviation; (3) The International Air Service Transit Agreement; (4) The International Air Transport Agreement; (5) Draft of 12 Technical Annexes to the Convention and (6) A Standard Form of Bilateral Agreement. For details see Proceedings of the International Civil Aviation Conference, Chicago, Illinois (Washington, D.C., 1945).

- (d) Meet the needs of the world for safe, regular, efficient and economical air transport;
- (e) Prevent economic waste caused by unreasonable competition;
- (f) Ensure that the rights of contracting states are fully respected, and that every contracting state has a fair opportunity to operate international airlines;
- (g) Avoid discrimination between the contracting states;
- (h) Promote flight safety in international air navigation; and
- (i) Promote generally the development of all aspects of international civil aeronautics.

The ICAO seeks to develop regulations for international air transport. In so doing, it guides the development of aircraft technology and has set standards for international civil aviation safety and efficiency. The ICAO has harmonized technical requirements imposed on aeroplanes, developed air transport rules and resolved customs-related issues.

### **(1) The ICAO and Aviation Safety Regulation**

Air safety is of paramount importance in air transport. A set of internationally agreed standards, rules and regulations have been developed by the ICAO, as manifest in the Chicago Convention 1944, to achieve the optimum level of safety.

The Chicago Convention serves as the main repository of principles for the development of international civil aviation. The convention states in its preamble that the abuse of international civil aviation can become a threat to the general security and recognizes the desirability to develop international civil aviation in a safe and orderly manner. The ICAO derives its legitimacy and legal sustenance from the Chicago Convention, which sets the ICAO's chief objective as the safe and orderly development of international civil aviation throughout the world. The Chicago Convention also stipulates two other objectives for the ICAO:

- (a) That the ICAO promotes flight safety in international civil aviation, and
- (b) that the ICAO, through the development of its standards and recommended practices (SARPs), meets the needs of safe, regular, efficient and economical air transport.

Article 54 entrusts the amendment of these Annexes to the ICAO Council. Article 90(a) further prescribes a special meeting of the Council followed by a two-thirds vote for the adoption of new annexes.

The ICAO Annexes, most of which aim to maintain and improve safety, cover personnel licensing, airworthiness of aircraft, aircraft operations, air traffic services, aeronautical information, telecommunications, meteorological services and airport security. They collectively ensure the highest degree of air safety on a worldwide basis. These technical specifications are kept up-to-date in the 18 Annexes of the Chicago Convention, covering all the specialized sectors of air navigation. The Annexes are supplemented by procedures of worldwide or regional application and technical manuals. The ICAO also



establishes regional plans, specifying ground facilities and services required for international air navigation.<sup>37</sup>

The ICAO continually works towards improving every aspect of civil aviation safety. The ICAO involves in active search to eliminate hazards in aviation - whether in equipment, operational conditions or methods and procedures. Prevention is the cornerstone of its air safety policy. The ICAO's policy includes safety surveys and rigorous training programmes for crew and ground personnel conducted across the world. It has also published an Accident Prevention Manual, which sets out proven prevention techniques. The databank and the manual are highly valuable for developing countries, which lack resources to set up major training programmes.<sup>38</sup>

The President of the ICAO Council, Assad Kotaite, presenting the annual report of the Council for 1992-95, said: Safety is always uppermost in our minds as we work to build an even better future for international civil aviation. In scheduled air services over the entire world there were 28 fatal aircraft accidents last year. However, for each tragic loss of life, an average of two billion revenue passenger kilometers flown safely. We are striving to increase the safety of flight even more.<sup>39</sup>

The ICAO is further developing its Airworthiness Manual. It is developing a comprehensive programme to prevent controlled flight into terrain, a repetitive accident type, which results in more fatalities and destroyed aircraft in air transportation than any other. ICAO is helping to develop criteria for the evaluation and qualification of flight simulators for training purposes. World Area Forecast Centres produce global upper wind, temperature and significant weather forecasts for transmission directly to states by satellites. It is publishing guidance on aircraft ground de-icing and anti-icing operations; and the ICAO established a programme for the oversight of states on a voluntary base by an ICAO team.<sup>40</sup>

Given the projected growth of aviation worldwide and forecast on aircraft accident rates, the need for increased global aviation safety has become greater. The ICAO has taken

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<sup>37</sup>See Walter Binaghi, "The Role of ICAO" in McWhinny, ed, **The Freedom of the Air** (Leyden, 1961), p. 17. The Final Act of the Chicago Convention contains the drafts of technical Annexes. It did not require signature. It covers the different phases of technical fields of civil aviation, which include (1) personnel licensing; (2) rules of the air; (3) meteorological services for international air navigation; (4) aeronautical charts; (5) units of measurement to be used in air and ground operation; (6) operation of aircraft; (7) aircraft nationality and registration marks; (8) airworthiness of aircraft; (9) facilitation; (10) aeronautical telecommunications; (11) air traffic services; (12) search and rescue; (13) aircraft accident investigation; (14) aerodromes; (15) aeronautical information services; (16) environmental protection; (17) security - safeguarding international civil aviation against acts of unlawful interference; and (18) the safe transport of dangerous goods by air.

<sup>38</sup>Frank A. Campbell and Gray W. Salewicz, "Accident Investigation", in Mark Blacklock, ed., **ICAO 50 Years : Global Celebrations, 1944-1994** (Montreal, 1995), pp. 274-7 at p. 276.

<sup>39</sup>See Assad Kotaite in the ICAO Assembly, 31st Session (Plenary meeting), Montreal, 19 September to 4 October 1995. See ICAO, Doc. 9661, A 31 min P/1-11, p. 89.

<sup>40</sup>The chief delegate of the USA to the 29th Assembly Session (Plenary Meeting), Montreal, 22 September- 8 October 1992, ICAO Doc. 9601, A29-Min Pl1-14, p. 47.

the lead in encouraging all the contracting states not only to enhance their current safety efforts but also to identify and develop new safety initiatives.<sup>41</sup>

Directors of civil aviation from the ICAO contracting states were invited to ICAO headquarters in Montreal from 10-12 November 1997 to discuss the enhancement of the organization's safety oversight programme. This first-ever world conference of the ICAO, devoted exclusively to the issue of air safety, produced specific conclusions and recommendations to reduce airline accidents worldwide and maintain civil aviation as the safest mode of transport, while reaffirming the ICAO's leadership role in air safety. Under the safety oversight programme, assessments evaluate the degree of implementation of SARPs stated in the Chicago Convention and its Annexes. They also recommended action plans to remedy deficiencies. The current programme is limited to assessing the licensing of personnel, air worthiness of aircraft and operation.

The conference made five recommendations:<sup>42</sup>

- (a) that regular, mandatory, systematic and harmonized safety audits should be introduced, which involve all contracting states and are carried out by the ICAO;
- (b) that greater transparency should be ensured and that assessed states should have reasonable time to remedy deficiencies before such information is disclosed;
- (c) that the ICAO safety oversight programme should be expanded to all areas of civil aviation which have an impact on safety, initially including ATS, aerodromes and support facilities and services;
- (d) that safety oversight activities of countries or regions should be co-ordinated with the ICAO safety oversight programme; and
- (e) that donors and funding organizations should be encouraged to co-operate with the ICAO in utilizing the ICAO's technical services and implement their assistance programme for civil aviation.

Another major achievement of the Conference was a memorandum of understanding (MoU) signed between the ICAO and European Civil Aviation Conference. The MoU formalizes a longstanding co-operation between the two bodies in safety oversight and services as a model for other regions.<sup>43</sup>

Aviation safety is at the core of ICAO's fundamental Objectives. The organization is constantly striving, in close collaboration with the entire air transport community, to further improve aviation's successful safety performance while maintaining a high level of capacity and efficiency. This is achieved through:

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<sup>41</sup>33rd DGs Conference, n. 4, Paper by the USA on "Implementation of the ICAO Safety Action Plan", See DGCA-97/1p/c7/4.

<sup>42</sup>See Vayu Aerospace Review (New Delhi), vol. 6, 1997, pp. 16-17.

<sup>43</sup> Ibid.

1. The development of global strategies contained in the Global Aviation Safety Plan and the Global Air Navigation Plan;
2. The development and maintenance of Standards, Recommended Practices and Procedures applicable to international civil aviation activities which are contained in 16 Annexes and 4 PANS (Procedures for Air Navigation Services). These standards are complemented by more than 50 Manuals and Circulars which are providing guidance on their implementation.
3. The monitoring of safety trends and indicators. ICAO audits the implementation of its Standard, Recommended Practices and Procedures through its Universal Safety Oversight Audit Programme. It has also developed sophisticated tools to collect and analyze a vast array of safety data which allows to identify existing and emerging risks
4. The implementation of targeted safety programmes to address safety and infrastructure deficiencies; and
5. An effective response to disruption of the aviation system created by natural disasters, conflicts or other causes.

In all of its highly coordinated safety activities, ICAO strives to implement practical and achievable measures to improve safety and efficiency in all sectors of the air transportation system. This approach ensures that aviation's complimentary achievements of a remarkably safe and efficient air transport network continue to serve a fundamental role in supporting global social and economic priorities.

The emergence of aeroplane as a major means of transport has brought in its wake international problems: the co-ordination of techniques and laws and the dissemination of technical and economic information were far beyond the ability of individual governments. Safety and security regulations in air transport involve the creation of aerodromes, navigational aids, effective communication networks and weather reporting systems.<sup>44</sup> The standardization of operational practices for international services is of fundamental importance, enabling elimination of error caused by misunderstanding or inexperience. The establishment of standards for air traffic control, personnel licensing, aerodrome design and infrastructure development, etc., all require more than a national action.<sup>45</sup>

Doubtless, it is the responsibility of each individual sovereign state to provide an effective system of aviation security for flights leaving its territory, but aviation security is essentially an international issue affecting each state which operates international flights. An

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<sup>44</sup>See K. Hammarhjold, "Introductory Lecture on the Law and Growth of International Air Transport", in *Recueil Des Cours*, vol. 135, no. 1, 1972, pp. 413-30.

<sup>45</sup>See Krishnan, n. 8, p. 10

international forum is, thus, deemed crucial to develop and implement effective measures, standards and recommended practices.<sup>46</sup>

The Chicago Convention 1944 established the ICAO as the competent watchdog to deal with all problems relating to civil aviation safety. The ICAO's main function is to effect standardization - the establishment of international SARPs and procedures covering the whole technical needs of civil aviation: the licensing of personnel, rules of aeronautical meteorology, aeronautical charts, measurement units, operation of aircraft, nationality and registration marks, aircraft airworthiness, aeronautical telecommunications, aircraft noise and its impact on the environment and the security and safe transport of dangerous goods by air.<sup>47</sup> No less than 190 states are members of the ICAO. The SARPs prescribed by the ICAO are enforced by each member state, which makes its own regulations. These are regularly updated as aviation technology continues to grow. The ICAO, thus, assists in the promotion of safety and security for air transport.

The safety management SARPs is intended to assist States in managing aviation safety risks, in coordination with their Service Providers. Given the increasing complexity of the global air transportation system and its interrelated aviation activities required to assure the safe operation of aircraft, the safety management provisions support the continued evolution of a proactive strategy to improve safety performance. The foundation of this proactive safety strategy is based on the implementation of a State safety Programme (SSP) that systematically addresses safety risks, in agreement with the implementation of the safety management systems (SMS) by the service providers.

To ensure continuous safety improvement, ICAO has developed a strategic approach that measures progress in the area of safety. The Global Aviation Safety Plan (GASP) specifically establishes targeted safety objectives and initiatives while ensuring the efficient and effective coordination of complementary safety activities between all stakeholders.

Find herein below an executive summary of the new version of GASP, focusing on the safety management strategic objectives. The full document will be presented for endorsement by the Assembly, scheduled end of September 2013 (A38-item 27); it will be available on the ICAO public website, once endorsed. Guidance material on safety management principles and concepts, State Safety Program and Safety Management System are contained in the ICAO Safety Management Manual (SMM)-Doc 9859.

The Regional Aviation Safety Groups (RASGs) have been invited to identify activities, included required resources, to support the Annex 19 roll-out plan and the effective and continuing implementation of SMS and SSP provisions. The States, through their RASGs are strongly encouraged to report progress, regarding the implementation of SSP and

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<sup>46</sup>Alan Pangborn, "How far has Europe Come since Pan Am 103?" **INTERSEC** (Surrey, UK), vol. 6, Issue 5, May 1996, p. 195.

<sup>47</sup>See generally, The Convention on International Civil Aviation : Annexes 1-18. ICAO, 2/9, E.P1/8000.

SMS provisions, which is essential to guide the future development of safety management provisions.

### **The ICAO and Safety Oversight Programme**

Safe and efficient international civil aviation requires a heightened commitment of the ICAO contracting states to implement effective safety oversight systems based on the ICAO standards and is dependent on the concerted efforts of the global aviation industry as a whole. The contracting states, individually or as a group, have the responsibility to ensure that an effective and efficient safety oversight system prevailed worldwide. This can be best achieved through the adequate harmonization and pooling of individual and regional safety oversight initiatives and the implementation of a global strategy for safety oversight. The ICAO's vision of safety oversight is a uniform, internationally standardized programme, aimed at ensuring the adequacy of each state's oversight of civil aviation. It is founded on the premise of an expanded safety oversight programme, properly implemented, harmonized and supported by safety audits of the states.<sup>48</sup>

Article 83 bis of the Chicago Convention, unanimously approved by the ICAO Assembly at the 23rd session, in Montreal, on 6 October 1980, and being enforced from 20 June 1997, will materially advance the cause of global aviation safety. It will facilitate the transfer of responsibility for the regulation and oversight of air safety, when an aircraft registered in one state is operated by an operator based in another state. This amendment was necessitated by aviation deregulation, air traffic growth and high costs involved in aircraft purchasing, particularly for many developing countries. It was clear by 1980 that a substantial increase in the lease, charter and movement of operational bases of aircraft across national boundaries posed a real problem. The ICAO has taken up the task of developing an action plan for global aviation safety in view of increasing airline disasters and negative public perception. In October 1994, the ICAO Council established the ICAO safety oversight programme to confirm and ensure that all civil aviation authorities provided the aviation safety oversight of their carriers as set out in the ICAO Annexes.<sup>49</sup> Article 83 bis is a milestone in ensuring the safety of leased aircraft by solving regulatory and legal problems. It is the first substantive amendment to the Chicago Convention, giving a basis and legal framework for bilateral agreements on transferring responsibilities under the following articles of the Chicago Convention.<sup>50</sup>

Article 12 - The Rules of the Air - makes the states responsible for (1) ensuring 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; and (2) ensuring

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<sup>48</sup>See Report of the Directors General of Civil Aviation Conference on a Global Strategy for Safety Oversight, Montreal, 10-12 November 1997, ICAO Doc. 9707, DGCA/97, pp. ii-3.

<sup>49</sup>See 33rd DGs Conference, Paper by the USA on "Transfer of Oversight Responsibilities for Leased aircraft will yield significant Safety Benefits", See DGCA-97/1p/A1/4.

<sup>50</sup>33rd DGs Conference, Paper by ICAO on "Aircraft Leasing under Article 83 bis", See DGCA-97/DP/A1/3.

that an aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and manoeuvre of aircraft there in force.

Article 30 - Aircraft Radio Equipment - provides that aircraft radios must be licensed by the state of registry if they are to be carried in or over the territory of other contracting states. The state of registry must ensure that the use of radio apparatus is in accordance with regulations of the state flown over, and that radios are to be used only by members of the flight crew licensed for that purpose by the state of registry.

Article 31 - Certificate of Airworthiness - provides that every aircraft engaged in international navigation must be provided with a certificate of airworthiness issued or rendered valid by the state of registry. Article 32(a) - Licences of personnel - stipulates that the pilot and crew of an aircraft engaged in international navigation must be provided with certificates of competence issued or rendered valid by the state of registry.

With Article 83 bis now in force, states of registry are, thus, free to transfer responsibility to operators' states ensuring compliance with rules and regulations, licensing of aircraft radio, issuance and renewal of airworthiness certificates and licensing of pilots and crew.

When the Chicago Convention was negotiated in 1944 the parties did not envision the need to provide for an aircraft to be operated by an operator belonging to a state other than the state of registry. The licensing of aircraft used in international aviation has, however, since become extensive. When an aircraft registered in one state is leased to an operator in another state, the state of registry may experience great difficulty in discharging its flight safety responsibilities under the Chicago Convention. The Convention vests safety oversight responsibilities with the state that is in a better situation to discharge them; in this case the state where the aircraft or operator is based will substantially improve flight safety. All parties involved - the state of registry, the state of operation, air carriers and the general public in any state in which an aircraft operates - will directly benefit by way of increased safety and renewed confidence in commercial air travel.<sup>51</sup>

Article 83 bis was adopted unanimously in 1980, and both the ICAO Council and the Assembly have since repeatedly urged all the states to ratify the amendment.<sup>52</sup> The ratification of the amendment does not compel a state to bilaterally transfer oversight authority. Bilateral agreements for the transfer of oversight authority are possible without Article 83 bis, but a state or agency not party to the agreement is not obliged to recognize them. Article 83 bis guarantees that such agreements shall be recognized by all the ICAO member states.

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<sup>51</sup>Ibid.

<sup>52</sup>See the ICAO Assembly Resolutions A21-22 and A22-28 on lease, charter and interchange of aircraft in international operations adopted on 6 October 1980 at Montreal.

Article 83 bis has become an important feature of international aviation law. Now that it has received the necessary global endorsement, there are no uncertainties about its acceptance by the civil aviation world. The full implementation of this system has two components (1) altering the domestic regulatory framework as necessary and appropriate; and (2) developing a strategy for negotiating the bilateral transfer of safety oversight authority with significant trading partners.<sup>53</sup>

### **Air Safety: Some Legal Issues**

Aviation safety and liability are interrelated because tougher safety measures enhance the confidence in air travel and reduce accidents involving liability to damages. Of the different aspects of aviation liability - the carrier's liability, the operator's liability, the liability to third persons in collisions on the surface, and the liability of air traffic controllers and manufacturers the main focus shall be on the passenger's liability as under the Warsaw system.

Phenomenal rise in aerial navigation, globalization of air transport, privatization of government air services, liberalization of economic regulations and increasing environmental controls have significant implications for safety and security. Added to these, profound changes in aircraft design, engineering and speed, and the surging competition among airlines all point to an inexorable need for legal and other measures for safety in the air.<sup>54</sup>

Civil aviation rests on the solid foundation of laws and regulations, mainly aimed at maintaining or improving safety. In the interest of public safety, all activities of civil aviation, right from its inception - aircraft design, manufacture, airworthiness, performance, operation, and maintenance - have come under the close control and supervision of governments all over the world. Every country has its own legislation to regulate and codify different facets of civil aviation.<sup>55</sup>

The Civil Aviation Authority's safety responsibilities cover all the aspects of flying - men, machine and environment. Its basic safety role is to set standards and satisfy itself that aircraft operators are competent, adequately trained and physically fit and that the aircraft are designed, constructed, operated and maintained in a continuous state of airworthiness i.e. fit to fly. The policies and procedures adopted by the manufacturers and airline operators are expected to follow government regulations rigidly.<sup>56</sup>

### **(A) Aircraft Accidents**

In the jet age, air travel has quietly overshadowed other modes of transport. Luxury liners, which were the pride of yester years, have been replaced by Boeings, Airbus and

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<sup>53</sup>Ibid.

<sup>54</sup>See Report of the Directors General of Civil Aviation Conference on a Global Strategy for Safety Oversight, Montreal, 10-12 November 1997. See ICAO Doc. 9707, DGCA/97, pp. ii-2.

<sup>55</sup>Krishnan, n. 8, p. 10.

<sup>56</sup>Ibid.

Concords. Increase in air traffic has also resulted in the incidence of air disaster, although percentage wise, it is minimal and less alarming. Nevertheless, in view of the costs in terms of death toll and loss of aircraft, it is necessary to study the problems involved in air disasters and make suggestions, which further help reduce air disasters. The disasters are caused due to a number of factors, which include operators' lapses, the negligence of airport and air traffic controlling authorities, unlawful interference with aircraft, environmental hazards and original mechanical defects by manufacturers.<sup>57</sup>

Several influences which have contributed to this trend are visible. First, air traffic is one of the major growth industries in many parts of the world. Airbus and Boeing estimate the average yearly growth of world air traffic at 5.1 per cent up to 2015 AD. But the necessary growth in infrastructure does not always keep pace with the traffic in the air and on the ground. Airports - especially the major hubs - increasingly are congested. As ramp congestion increases, the potential for accidents also grows.

Second, the liberalization of air traffic has not only led to cheaper travel; it also points to the importance of cost control in all elements of the production chain. This results directly in a higher time pressure in combination with a growing risk for the operating staff on the ramp. Additionally, the direct and indirect costs of accidents and incidents are considered decisive in the profitability of the operation of routes and airports.

Third, liberalization and increased competitiveness of ramp handling are challenging the traditional concepts of "rampmanship" and raising the question of what level of professionalism training and experience is sufficient in a price-competitive environment to prevent the staff "producing" accidents.<sup>58</sup>

Accidents have commercial consequences, too. The overall annual cost of all aircraft damage in the world has been put at \$ 20 billion. Average direct costs (repair, flight crew, and passenger and charter costs) of each incident are estimated at around \$ 75,000. In addition, indirect costs (capital costs, loss of production and revenue) can be four to ten times as high. The mere foreign object damage (FOD) costs per departure in 1992 (1993) were calculated to be \$ 30 (\$ 21) in the US.<sup>59</sup>

There is no doubt that numerous factors influence safety performance on the ramp; the "hard" factors include physical conditions [visual and weather conditions, ramp design and respective markings and signs on it], traffic volume, suitability of equipment, and equipment ergonomics. The "soft" factors comprise ramp management and organization, ground traffic management and resource management of human factors.<sup>60</sup>

The ICAO Accident Prevention Manual provides guidance material to develop and maintain accident prevention programmes, which complement existing safety-related

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<sup>57</sup>See R.C. Hingorani, "Air Disasters", *Air Law*, vol. 8, no. 2, 1984, pp. 100-105, at p.100.

<sup>58</sup>See Kerkloh, n. 6, p. 22.

<sup>59</sup>Ibid.

<sup>60</sup>Ibid.



procedures in airworthiness, operations, personnel licensing, training, communications, etc. It covers accident prevention concepts and methods, examples of practical applications and emphasizes the importance of actively searching for hazards to be eliminated. The prime objective of the manual is to enhance awareness, among aviation authorities of the ICAO contracting states and the aviation community as a whole, of the need for improved accident prevention efforts and to foster an exchange of accident prevention ideas.<sup>61</sup>

## **(B) Aircraft Accident Investigation**

Every aerial accident is followed by an inquiry into its causes. Accident investigation has come a long way since aircrafts were built of cloth and wire. As the flying machines have become more complex, so, too, have the means and methods of probing what goes wrong. The new state-of-the-art hardware and software technologies are vastly helping in accident investigation.<sup>62</sup> Aircraft accident investigation may be seen on two aspects, the legal and technical. On the legal side most of the countries have their aerial codes, which envisage the mode of inquiry. The inquiry is normally held with the help of aviation experts, led by judicial or legal experts. A court examines air crash witnesses, air crew [if there are any survivors], operators' and manufacturers' representatives [over mechanical defects], the certifying authority which clears airworthiness, representatives of the air traffic control authority, other persons having personal knowledge about the accident, or technical experts whose evidence is relevant in the inquiry.<sup>63</sup>

Aircraft accident investigation, from a data analysis perspective, requires a unique talent in analyzing and integrating a variety of disparate sources, such as flight data recorders, quick access recorders, cockpit voice recorders, radar recordings air traffic control tapes, video tapes, and testimonies from witnesses. Expertise is needed in many fields, particularly in the areas of flight mechanics, aerodynamics, electronics, and digital data. The process used to sample the data, its storage in a recorder and extraction of information must also be well understood. An air safety investigator should be familiar with these technicalities and possess the qualifications and skills to make judgments on the quality of information.<sup>64</sup>

The 1919 Paris Convention does not contain any provision directly on the investigation of aircraft accidents. But the ICAN, established by the convention, has adopted resolutions emphasizing the predominant role of the state in whose territory the accident occurs.<sup>65</sup> The Chicago Convention of 1944 lays down under Article 26, the following procedures for aircraft accident investigation.

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<sup>61</sup>See ICAO Doc. 9156 (1995).

<sup>62</sup> Campbell and Salewicz, n. 57, p. 274.

<sup>63</sup>See Hingorani, n. 98, p.102.

<sup>64</sup>See Elias Politis and John Barker, "Improving Flight Safety with New Technology", in **World Aerospace Technology 1996**, pp. 87-89, at p. 87.

<sup>65</sup>M. Milde, "Aircraft Accident Investigation in International Law", **Air Law**, vol.9, no. 1, 1985, pp. 61-65.

In the event, Article 26 states, of an accident to an aircraft of a contracting state occurring in another contracting state, and involving death or serious injury or indicating serious technical defect in the aircraft or air navigation facilities, the state in which the accident occurs will institute an inquiry into the circumstances of the accident in accordance, so far as its laws permit, with the procedure recommended by the ICAO. The state in which the aircraft is registered shall be given the opportunity to appoint observers to be present at the inquiry, and the state holding the inquiry shall communicate the report and findings to the state of registry.

In sum, Article 26 postulates that the inquiry is to be conducted subject to the laws of the state where the accident occurs. Due consideration is to be given to the procedures recommended by the ICAO. The state in which the aircraft is registered will be represented on the inquiry by its observers, and the state holding the inquiry shall communicate its findings to the state of aircrafts registry. As an international body overseeing the safe and efficient development of civil aviation, the ICAO has adopted Annex 13 - [Aircraft Accident Investigation]<sup>66</sup> under Article 37 of the Chicago Convention; it has become applicable since December 1, 1957. The foreword to Annex 13 asks the ICAO Council to study the possibility of initiating a uniform procedure for accident investigation, to make available promptly the reports of aircraft accident investigations and inquires for better dissemination to the contracting states, to study whether the state of manufacture could provide competent experts for service and consultation, and to give timely notification of aircraft accidents to the manufacturer. The foreword to Annex 13 also explains: "Article 26 does not preclude the taking of further action in the field of aircraft accident investigation and the procedures set forth in this Annex are not limited to an enquiry initiated under the requirements of Article 26."<sup>67</sup>

The general recommendations for procedures to be adopted during an accident investigation are outlined in chapters 1 to 6 of Annex 13. These provisions state that the state in which an aircraft accident occurs shall take necessary measures to ensure the protection of evidence, including the safe custody of the aircraft (chapter 3). Chapter 4 stipulates: "...the state in which an accident occurs shall notify the state of registry and the state in which the aircraft was manufactured with the minimum delay and by the most suitable and quickest means available".<sup>68</sup>

Chapter 5 of Annex 13 outlines the procedures for the inquiry covering the actual accident investigation, which must obviously begin in the state of accident site; that state usually conducts the investigation, but may delegate all or part of its conduct to the state of registry, or the state of operator. These states can appoint representatives or advisors in the investigation process.<sup>69</sup> Chapter 6 stipulates that a report on the findings of the inquiry,

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<sup>66</sup>See Annex 13 - Aircraft Accident Investigation, 8th edition, July 1994.

<sup>67</sup>Ibid.

<sup>68</sup>Ibid.

<sup>69</sup>Ibid.

together with the substantiating information on which the conclusions are based, shall be sent with minimum delay by the state instituting the inquiry to the state of registry, the state in which the aircraft is manufactured and any other state that may have furnished information relating to the accident of aircraft.<sup>70</sup>

In general, Annex 13 prescribes that the accident investigation authority shall have independence in the conduct of the investigation and have unrestricted authority over its conduct. The investigation is to include the gathering, recording and analysis of all the relevant information, if possible the determination of the cause, or causes, and the completion of the final report in the prescribed format followed by safety recommendations for the purpose of accident prevention. Annex 13 clarifies the distribution of responsibility, necessary notifications to different authorities, the form of the preliminary report, accident data report and the final report.<sup>71</sup>

Accident investigation of aircraft incorporated into Annex 13 is a mandatory reporting system. It requires that states record all accidents and send the results of investigations to the ICAO. It has enabled the organization to amass the records of more than 20,000 accidents and investigators' recommendations in one of the most comprehensive databases in civil aviation. The information available to all the states allows them to improve safety standards and incorporate measures into their own civil aviation programmes.<sup>72</sup> In June 1995, the ICAO Assembly passed a resolution on improving accident prevention in civil aviation. The resolution calls on all the contracting states to reaffirm their commitment to the safety of civil aviation. The relatively unchanging trend might, it recognizes, lead to an increase in the number of accidents. The resolution goes on to urge the states to co-operate with the ICAO in the development and implementation of accident prevention measures designed to integrate skills and resources to achieve consistently high levels of safety.<sup>73</sup>

More details on the procedures for investigation are given in the ICAO's Manual of Aircraft Accident Investigation. The manual states: "...the fundamental purpose of the inquiry into an aircraft accident is to determine the facts, conditions and circumstances pertaining to the accident, with a view to establishing the probable cause thereof, so that appropriate steps may be taken to prevent a recurrence of the accident and the facts which led to it." The nature of the inquiry into an aircraft accident should not be accusatory, it states, as the object is to take remedial rather than the punitive action. Similarly, the assessment of blame or responsibility should not be included in the duties or prerogative of the judicial authorities of the state concerned.<sup>74</sup> The manual consists of five parts:

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<sup>70</sup>Ibid.

<sup>71</sup> Milde, n. 106, p. 62.

<sup>72</sup>Campbell and Salewicz, n. 57, p. 276.

<sup>73</sup>Smart, n. 5, p. 16.

<sup>74</sup>See ICAO Doc. 6920. Also see C.O. Miller, "Aviation Accident Investigation : Functional and Legal Perspectives", *JALC*, vol. 46, 1981, pp. 237-93, at p. 266.

Part 1 [general considerations and notification of accidents] covers the purpose of the inquiry and notification of accidents.

Part - 2 [the organization of investigation] deals with the investigator, and magnitude and scope of the investigation.

Part 3 [initial action at the scene of the accident] focuses on investigation into wreckage, operations, flight records, structures, power plants, systems, maintenance, human factors, evacuation, search, rescue and fire-fighting measures and sabotage explosives.

Part 4 [reporting of occurrences] deals with the accident/incident data report and the summary of the final report.

Part 5 [accident prevention] covers the study of accidents, safety publications and engineering aspects.<sup>75</sup>

### **(C) Liability for Aviation Accidents**

Aviation safety and liability are inter-related, for, tougher safety measures enhance the confidence in air travel and reduce accidents involving liability to damages. [The notion of air travel risks has made the law prefer absolute liability to fault liability]. The operator of an aircraft and agencies providing navigational aids are responsible for aircraft safety. They are also liable to damages if they failed to maintain minimum standards of air safety. Of the different aspects of aviation liability - they include the carrier's liability, the operator's liability, the liability to third persons in collisions on the surface, and the liability of air traffic controllers and manufacturers - the main focus shall be on the passenger's liability under the Warsaw system.<sup>76</sup>

The private international law rules applicable to accident compensation in commercial aviation govern the contractual relationship between carriers and passengers. Generally, the basic interests involved in liability are (a) the interests of passengers or of their dependents to receive full financial compensation, (b) the carrier's interest to be protected against being forced into bankruptcy by the claims arising out of a catastrophic event, and (c) the public interest in maintaining and developing an economically sound and viable air transport industry.<sup>77</sup> In other words, the objective of any compensation formula, whether national or international, is to provide (1) adequate, certain and prompt compensation to all accident victims, and (2) a fair distribution of the compensation costs among all the parties concerned, including operators and carriers, manufacturers, insurance underwriters, and government organizations.<sup>78</sup>

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<sup>75</sup>See ICAO Doc. 6920; also see William H. Tench, **Safety is no Accident** (London, 1985), p. 34.

<sup>76</sup>K.H. Bockstiegel, "Some Recent Efforts for a Fundamental Reconsideration of the International Aviation Liability System", **AASL**, vol. 5, 1980, pp. 17-34, at p.18.

<sup>77</sup>See L.S. Kriendler, **Aviation Accident Law, Volume I** (New York, 1976), pp.1-8.

<sup>78</sup>John V. Allen, "Air Disasters : The Case for Rationalisation", **JALC**, vol. 43, 1977, pp. 555-65, at p. 555.

With the blossoming of commercial air transport in the 1920s, governments and transport industry alike began to inquire into the ramifications of an aviation accident. The French government, in response to this concern, convened the first international conference on private air law, in 1925, primarily to consider the creation of a uniform system of aviation law. The second international conference on private air law was held in Warsaw from October 4 to 12, 1929.<sup>79</sup> Its main purpose was to unify the rules on the international transport of persons and property by air, fix the damages for loss or injuries sustained and create a presumption of liability against the carrier on the happening of an injury to or death of a passenger, or damage to or loss of property.<sup>80</sup>

The Warsaw Convention of 1929, formally known as the Convention for the "unification of certain rules relating to international carriage by air", was signed in Warsaw on 12 October 1929 and came into force on 13 February 1933.<sup>81</sup> This convention established the international liability of air carriers and the monetary limits of damage, delay or loss. The legal regime governing the liability of air carriers in the carriage of passengers, baggage and cargo comprised a number of international instruments, collectively known as the Warsaw system. The Warsaw system consists of the original Warsaw Convention of 1929, a series of protocols amending the Warsaw Convention provisions, as well as one supplementary convention to the Warsaw Convention, commonly known as the Guadalajara supplementary convention of 1961.<sup>82</sup> In its practical application, the Warsaw Convention has been amended *de facto* by a private agreement of air carriers operating to, from or via the territory of the US. Some components of the Warsaw system are in force for a considerable number of countries; the other instruments have not yet been enforced, although they were adopted by a diplomatic conference many years ago.<sup>83</sup> Guadalajara Convention 1961 are in force; Guatemala City Protocol, Additional Protocols nos. 1-4 are not in force.

The Warsaw Convention of 1929 is a basic document on an air carrier's liability, although it has been amended by other subsequent treaties too. According to Article 17, an air carrier is liable to death or injury sustained in an accident on board the aircraft unless, under Article 20, the carrier establishes that he has taken all necessary measures to avoid the damage, or that it is impossible for him to do so.<sup>84</sup> A condition precedent to the carrier's responsibility to the passengers is that the damage must take place on board the aircraft, or in the course of any of the operations of embarking or disembarking ([Article 17(1)]).

Under Article 21, if the carrier proves that the damage has been caused by or contributed to by the negligence of the injured person, Court may, in accordance with the provisions of its own law, exonerate the carrier wholly, or partly, from liability.

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<sup>79</sup>See the Warsaw Convention 1929.

<sup>80</sup>See Rowland W. Fixel, **The Law of Aviation** (Virginia, 1967), p. 38.

<sup>81</sup>For text of the Warsaw Convention, see 137 LNTS 11, ICAO Doc. 601.

<sup>82</sup>ICAO Doc. 8181.

<sup>83</sup>The Warsaw Convention 1929, The Hague Protocol 1955,

<sup>84</sup>Articles 17 and 21 of the Warsaw Convention 1929.

The central underpinning of the Warsaw Convention is Article 22, which places a maximum ceiling on the damages recoverable from an air carrier when a passenger has been injured, or killed, in an international air travel. The internationally established rule is that subscribing air carriers are liable to damage sustained by a passenger during the course of international transport up to an amount not exceeding 1,25,000 *princare* francs (at that time equal to about \$ 8,300).<sup>85</sup>

The wilful misconduct exception to the liability limitation, under Article 25 of the Warsaw Convention, has been a cause of concern and extensive debate since its promulgation. According to the original draft of the treaty written in French, the carrier cannot invoke liability limitation provisions if the damage has been caused by *dol* or by such default on the carrier's part as considered equivalent to *dol* (or "wilful misconduct" for French). However, even this translation does not seem to conform to the original intent of the treaty draftsmen, who selected the word *dol*. Even so, the conflict emerging over the years in those Warsaw Convention cases, where "wilful misconduct" is alleged against a carrier, has not focused so much on the question of translation as it did on the case-by-case factual issues of what constitutes a "wilful misconduct".<sup>86</sup>

Special contracts, ticket conditions or other provisions designed to reduce or limit this liability were declared void by Article 23. Under Article 24 all sanctions arising out of the convention, were subject to the terms of the convention.<sup>87</sup>

The Hague Protocol, 1955, has changed those provisions of the Warsaw Convention which were found incompatible with the changed situation of international air transport, or were unclear or subject to different interpretations. It doubles the original Warsaw limits of liability by amending Article 22, to increase the gold franc limit from 1,25,000 to 2,50,000 (approximately \$ 16,000 in 1955).<sup>88</sup> This was accompanied by a revision of Article 25. Under the original text, a claimant could recover unlimited damages if he established that the accident was the result of "wilful misconduct". [*Dol* in the original French text is an admittedly loose term, which has been subject to widely differing interpretations]. The Hague Protocol changed this to a more precise standard, permitting unlimited recovery if the plaintiff could establish that "the damage resulted from an act or omission of the carrier, his servants or agents done with intents to cause damage or recklessly and with knowledge that damage would probably result". It also simplified documentation, provided for more adequate "notice" to passengers and permitted the attorney's fees and other costs of litigation to be awarded separately from the limit if permitted by the law of the forum.<sup>89</sup>

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<sup>85</sup>Ibid., Article 22.

<sup>86</sup> See Edward Charles De Vivo, "The Fatal Passage: Exemplary Relief and the Human Instinct for Self-Preservation", *JALC*, vol. 51, 1986, pp. 303-413, at p. 321.

<sup>87</sup> See Robert P. Boyle, "The Warsaw Convention - Past, Present and Future", in Arnold Kean, ed, *Essays in Air law* (The Hague, 1982), pp. 1-15, at p. 2.

<sup>88</sup> See A. Tobolawski, *Monetary Limitations of Liability in Air Law* (Montreal, 1986), p. 28.

<sup>89</sup> See Groenewege, n. 1, p. 81.

The so-called Montreal Agreement of 1966, which is not an intergovernmental agreement but only an arrangement on liability among air carriers operating passenger transport, to, from or with an agreed stopping place in the United States, was adopted on 13 May 1966. This was necessitated by the withdrawal of the denunciation of the Warsaw Convention by the US which was to take effect on 16 May 1966. By this agreement, the parties have *de facto* amended the application of the Warsaw Convention as changed by the Hague Protocol, 1955, by providing for a limit of liability for each passenger in the case of death, or bodily injury, of US\$ 75,000, inclusive of legal fees and costs and \$ 58,000 exclusive of legal fees and costs.<sup>90</sup>

The rapidly changing nature of international air transport necessitated the Guatemala City Protocol in 1971, which effected a far-reaching revision of the Warsaw Convention, 1929, as amended by the Hague Protocol, 1955, particularly the provisions on the concept of liability and the limitation of the air carrier's liability. The Guatemala City protocol mainly provides for a regime of absolute liability of the air carrier; an unbreakable limit of the carrier's liability at the maximum amount of 1,50,000 *poincare* francs (US \$ 100,000) per person; a domestic system to supplement, subject to specified conditions, the compensation payable to claimants under the convention in respect of the death or personal injury of passengers; a settlement inducement clause, conferences for the purpose of reviewing the passenger limit; and an additional jurisdiction for suits pertaining to passengers and baggage.<sup>91</sup>

The 1975 'diplomatic conference on air law' drafted and adopted four protocols to the Warsaw Convention. The protocols did not raise the limit of liability, but changed the expression from *poincare* francs to special drawing rights (SDRs) as defined by the International Monetary Fund (IMF). Additional Protocol No. 1 establishes the liability limit at 8,300 SDR, or 1, 25,000 monetary units (MU) per passenger. Additional protocol No. 2 limits the liability at 16,600 SDR, or 2, 50,000 MU, per passenger. Additional Protocol No. 3 establishes 100,000 SDR, or 1, 50,000 MU, per passenger in the case of injury or death. Additional Protocol No. 4 revises various provisions relating to air cargo regulations.<sup>92</sup>

To protect third parties on the ground, the Rome Convention of 1933 and the additional Insurance Protocol of Brussels, 1938, were drafted to establish the absolute but limited liability of an aircraft operator with respect to damage caused to third parties on the surface of the earth. These agreements did not receive sufficient adherence. Today they have been replaced by the Rome Convention of 1952, amended by the Montreal Protocol of 1978. The difference between the Warsaw system and the Rome Convention is that while the Warsaw Convention relates to the liability of the carrier with a contractual relationship to the passenger, the Rome Convention sets the liability of carrier to persons with whom they

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<sup>90</sup>See R.H. Mankiewicz, "The 1971 protocol of Guatemala City to further amend the 1929 Warsaw Convention", *JALC*. vol. 38, 1972, pp. 519-45 at p. 525.

<sup>91</sup>Tobolawski, n. 129, p. 29.

<sup>92</sup>*Ibid.*, pp. 31-33.

have no contractual relationship. The operator of an aircraft is liable to damage claims, on the proof by the injured person that the damage has resulted and is attributable to the aircraft. These are in force, but with a rather limited adherence.<sup>93</sup>

Current airline liability limits for international air passengers range from about US \$ 10,000 under the Warsaw Convention, 1929, to a maximum of US \$ 1,500,000 depending on the circumstances, such as where the ticket is bought. For the past two decades, governments have been seeking agreement through the ICAO to increase the protection of passengers travelling by air internationally, but are unable to agree on amending the applicable law. To review the current situation and formulate recommendations for a maximum harmonization of this area, the IATA convened a world-wide Airline Liability Conference between 19-23 June 1995.<sup>94</sup> The conference examined the possibility of developing a uniform world-wide system, to be put into effect by conditions of carriage and applicable tariffs pursuant to a new inter-carrier Agreement, which would replace the Montreal Agreement of 1966 covering only service to, from and through the United States. The main conclusions reached by the conference are the following:

- (a) that the Warsaw Convention system must be preserved; however, the existing passenger liability limits for international carriage by air are universally low in many jurisdictions and should be improved as a matter of urgency;
- (b) that the governments should, through the ICAO and in consultation with airlines, act urgently to update the Warsaw Convention System, including liability issues; and
- (c) that the governments should act expeditiously to bring into force Montreal Protocol No. 4, dealing with cargo and postal items independently of the Montreal Additional Protocol No. 3.<sup>95</sup>

Furthermore, the conference established two working groups to address and report on (a) the cost impact on the airlines of an enhanced liability package, and (b) appropriate and effective means to secure complete compensation for passengers, if required.

The working groups met jointly in London and Washington in July and August 1995 respectively and, after examining possible options, concluded that a new inter-carrier agreement should provide *inter alia* for a single universal system without specified limits, full recoverable compensatory damages to be awarded in accordance with the law of domicile of the passengers, and constitute an umbrella accord which would give the carriers a maximum flexibility to adjust their conditions of carriage, taking into account applicable government regulations.<sup>96</sup>

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<sup>93</sup>See ICAO Doc. 7364 and 9257.

<sup>94</sup>See Groenewege, n. 1, p. 49.

<sup>95</sup>Ibid.

<sup>96</sup>Ibid.



The Draft Convention for the Unification of Certain Rules for International Carriage by Air, 1997, is aimed at the modernization and consolidation of the Warsaw system of air carriers' liability.<sup>97</sup>

The most significant feature of the draft convention is the removal of outdated limits of air carrier liability, in cases involving personal injuries or accidental death of passengers. Under the proposed instrument, the passenger or the person entitled to claim on the passenger's behalf will be able to obtain full economic restitution with respect to proven damages sustained. For damages of up to 100,000 SDRs (about US \$ 1,40,000), the liability of the air carrier is based on the principle of strict (no-fault) liability. Above this financial threshold in the so-called second tier, a regime of fault-based liability, which has no numerical limits, will apply.<sup>98</sup> In both tiers of liability, to obtain full compensatory damages, the claimant would only have to prove negligence on the part of the carrier, his servants or agents.<sup>99</sup>

The above mentioned system of liability, therefore, substantially modifies the legal position of the claimant and respondents to concern about providing adequate protection to the air transport user. Unlike under the current rules, full compensation is no longer predicated upon the requirements for the claimant to prove "wilful misconduct" of the air carrier. On the other hand, the interests of the air carrier are also taken into account, since the defence of contributory negligence remains available to the carrier in both tiers of liability. Finally, the draft instrument clarifies that only resitutory compensation may be awarded, a fact which alleviates the airlines' fear of being faced with claims for so-called punitive damages.<sup>100</sup>

It was generally agreed that the major stumbling block in all the efforts to modernize the Warsaw system had been a low level of passenger liability limit. Moreover, such limits had eroded due to inflation and a substantially high standard of living. The liability limits were a controversial issue, and a compromise is imperative. However, such compromise should be progressive, fair and equitable to all parties and acceptable to the largest number of states.

The global aviation system continues to be fundamentally safe. However, there is a need to further improve aviation safety through coordinated action by all Contracting States and the aviation industry. This will help to maintain public confidence in the safety of air transport, which is essential for the aviation industry to flourish. The significant variation in

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<sup>97</sup>The 30th session of the ICAO Legal Committee, held from 28 April to 9 May 1997 at ICAO headquarters in Montreal was attended by 61 contracting states and observers from four international organizations. See, **Report of the 30th Session of the Legal Committee**, Montreal, 28 April-9 May 1997, ICAO Doc. 9693-LC/190.

<sup>98</sup>See Article 20 of the Draft Convention for the Unification of Certain Rules for International Carriage by air 1997. See above ICAO Doc.

<sup>99</sup>Ibid., pp. 4-2.

<sup>100</sup>See Ludwig Weber & Arie Jacob, "Draft Convention seeks to Consolidate and Modernize the Elements of the Warsaw System", **ICAO Journal**, October 1997, pp. 5-7, at p. 6.

the level of safety from one region to the other, the challenges created by the increase of traffic and the globalization of the industry, the continuing difficulties of States in establishing and maintaining an efficient safety oversight system, and the limitations of an oversight system exclusively based on compliance are examples of topics that should be addressed to ensure that aviation safety continues to improve.

International cooperation is the key to building a safer air transport system and to maintaining the public's confidence in its safety. States and industry have a shared interest in seeing the air transport system flourish and have taken many initiatives aimed at safety enhancement. However, there are numerous occasions in which the initiatives benefit only a single State or grouping of States at one time and the products of the work are not shared beyond that. To achieve optimum results, significant duplications in effort, inefficiencies and instances in which safety-related materials are not available to States in need, should be avoided.

Aviation safety can be increased by maintaining transparency and sharing of safety information. Substantially improving safety levels, while using existing regulatory approaches in an environment in which resources are limited. Transparency and sharing of safety information are among the fundamental tenets of a safe air transportation system. It should be recognized that the sharing of safety-related information between Contracting States would assist each State in effectively performing its safety oversight functions. Compliance with safety-related Standards and Recommended Practices (SARPs) is the cornerstone of international civil aviation safety. A rapidly expanding industry and resource limitations within oversight authorities make it increasingly difficult to efficiently and effectively sustain an approach to the management of safety exclusively based upon regulatory compliance. It is essential to complement the regulatory approach to the management of safety with a performance-based approach. This approach is best exemplified by safety management systems (SMS) and, based on the maturity achieved by the SMS concept, its implementation on a global basis should be promoted.

Many States are in need of assistance to strengthen their safety oversight capabilities. The ICAO unified strategy to resolve safety-related deficiencies, established through Assembly Resolution A35-7, aims to harness the resources of ICAO, the donor community and Contracting States to strengthen safety oversight globally and resolve safety-related deficiencies through technical cooperation and commitment. The unified strategy is focusing much of its work on facilitating regional and sub-regional cooperative efforts to implement sustainable solutions to assist States in this regard.

The safety-related deficiencies identified through the ICAO Universal Safety Audit Programme (USOAP) will be analyzed under the Unified Strategy Programme to assist States that are not able to adequately resolve their safety-related deficiencies. Assistance may be provided by identifying individual States or groups of States that may lead to the

establishment and management of regional or sub-regional safety oversight organizations with the support of various stakeholders. This will require the commitment of States to support these initiatives for effective and sustainable safety oversight remedies. Assistance will also be available through the Technical Cooperation Programme of ICAO. Thus, ICAO facilitates the resolution of safety oversight shortfalls in States and promotes compliance with safety-related provisions.

### **Enhancing Safety Oversight**

One of the main pillars of ensuring and enhancing safety depends considerably on the ability of States to establish and maintain effective safety oversight over the industry. With an expanding industry, it is important that regulatory safety oversight keeps pace with its growth. Efficiency and effectiveness of safety oversight has benefited from the conduct of mandatory safety oversight audits by ICAO. With the expansion of USOAP to address all safety-related provisions in all safety-related Annexes, its optimum functioning depends upon the commitment of Contracting States to fully participate and to accept on-site audits as scheduled by ICAO.

In the case of a State with significant safety oversight shortfalls, in particular in the areas of continued surveillance and resolution of safety issues, there is an increased risk that air operators authorized by such a State do not comply with the requisite safety provisions and that aircraft registered in that State are not maintained in an airworthy condition. If the safety oversight shortfalls cannot be remedied in the short term, transfer of safety oversight duties from the State of the Operator or State of Registry to another authority may be arranged on the basis of a bilateral agreement which should be registered with the Council. This approach could be taken to ensure that essential international air services can be safely maintained until such time as the State concerned can overcome its safety oversight shortfalls. It aims to meet the needs of the world for safe, regular, efficient and economical air transport and at the same time, ensure that the rights of contracting States are fully respected and that every Contracting State has a fair opportunity to operate international airlines.

### **Effect of Liberalization**

Liberalization has become one of the defining features of modern-day aviation and it requires that the relationship between the industry and its governmental authority be redefined. Under such a regime of increasing liberalization, all parties, governments, service providers and airlines alike must fully understand and fulfill their respective obligations for safety and security oversight and compliance. This is particularly important in situations where an airline operation involves multiple parties from different States, or where an aircraft is based and operated from States other than the State of Registry or the State of Operator of that aircraft. Yet the ultimate responsibility for safety and security remains with States,

irrespective of changes in economic regulatory arrangements. In that context, it is important to ensure that the safety framework continues to meet the evolving needs of international civil aviation.

### **Role of ICAO in Improving Safety**

The International Civil Aviation Organization (ICAO), a United Nations specialized agency, is the global forum for civil aviation. ICAO works to achieve its vision of safe, secure and sustainable development of civil aviation through cooperation amongst its Member States.

### **Strategic Action Plan**

Recently ICAO has framed a Strategic Action Plan which it reviews regularly according to the advancements in the industry. The first two strategies are related to safety and security.

### **Strategy Objective**

Enhance Global Aviation Safety:-Enhance Global Aviation safety through the following measures-

1. Identify and monitor existing types of safety risks to civil aviation and develop and implement an effective and relevant global response to emerging risks.
2. Ensure the timely implementation of ICAO provisions by continuously monitoring the progress toward compliance by States.
3. Conduct aviation safety oversight audits to identify deficiencies and encourage their resolution by States.
4. Develop global remedial plans that target the root causes of deficiencies.
5. Assist States to resolve deficiencies through regional remedial plans and the establishment of safety oversight organizations at the regional or sub-regional level.
6. Encourage the exchange of information between States to promote mutual confidence in the level of aviation safety between States and accelerate the improvement of safety oversight.
7. Promote the timely resolution of safety-critical items identified by regional Planning and Implementation Groups (PIRGs).
8. Support the implementation of safety management systems across all safety-related disciplines in all States.

9. Assist States to improve safety through technical cooperation programmes and by making critical needs known to donors and financial organizations.

## **Safety Oversight Manual**

This manual provides guidance on the establishment and management of a regional safety oversight organization (RSOO) and outlines the duties and responsibilities of ICAO Contracting States, individually and/or collectively, with respect to the establishment and management of a regional safety oversight system. It is addressed to high-level government decision makers, as it highlights States' obligations as signatories to the Convention on International Civil Aviation (Chicago Convention) signed in Chicago on 7 December 1944, and provides information and guidance on the establishment and management of an RSOO to assist Contracting States in fulfilling part or all of their safety oversight-related obligations.

In accordance with the Convention, a State has complete and exclusive sovereignty over the airspace above its territory. Nevertheless, on adhering to the Convention, States agree to certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner. The safe and orderly development of international civil aviation requires that all civil aviation operations be conducted under internationally accepted minimum operating standards, procedures and practices. That States must collaborate to the highest degree to achieve standardization and harmonization in regulations, rules, standards, procedures and practices is thus a requirement of the Convention (Articles 12 and 37 refer).

This manual, therefore, presents guidance to States on how to establish and manage a regional safety oversight system within a particular region or sub-region, should they wish to fulfill their safety oversight obligations through such a system. The effectiveness of a regional safety oversight system, like that of an individual State's safety oversight system, depends highly on the effective implementation of the critical elements of a safety oversight system.

Critical elements of safety oversight in general address issues related to:

- Primary aviation legislation;
- Specific operating regulations;
- state civil aviation system and safety oversight functions;
- Technical personnel qualification and training;
- Technical guidance, tools and provision of safety critical information;
- Licensing, certification, authorization and/or approval obligations;

- Surveillance obligations; and
- The resolution of safety concerns.

Consequently, guidance on the establishment and implementation of a regional safety oversight system should include a comprehensive plan that applies a systemic approach and focuses on both the oversight capability of Contracting States and the effective implementation of the safety oversight critical elements as part of the permanent activities of a regional safety oversight system. The critical elements of safety oversight are described in detail in Part A of this manual — The Establishment and Management of a State's Safety Oversight System, and are used extensively in this part of the manual to ensure the effectiveness of a regional safety oversight system.

Under its Technical Cooperation Programme, ICAO has implemented a large number of projects over several decades to improve civil aviation safety in many developing States. However, despite these efforts as well as numerous initiatives designed to help States meet their safety oversight responsibilities, in many regions a number of States have failed to develop the capability for safety oversight. Safety oversight audits and audit follow-ups conducted by ICAO in the last six years indicate that a number of States have not been able to implement an effective safety oversight system over their aviation activities. The main reason identified for this situation is lack of adequate resources, specifically in terms of qualified technical expertise. This has led ICAO to conclude that regional or sub-regional safety oversight organizations may be required to overcome this problem through shared objectives, strategies and activities and, most importantly, that they would enable Member States to pool resources and thus be able to attract, recruit and retain appropriately qualified and experienced personnel. A regional safety oversight system can also provide economies of scale by allowing for the sharing of required resources and thus building the capability for an effective safety oversight system. In addition, working together, Contracting States of a region or sub-region can have a more persuasive voice on the world stage and can help secure a more favorable climate aimed at a safer international air transportation system. Furthermore, the aviation industry will benefit from the incorporation of harmonized regulations and procedures at a regional or sub-regional level.

Effective regional cooperation requires an organizational structure for the establishment and management of a regional safety oversight system. Membership in one of these organizations provides several benefits. At the basic level, technical cooperation would provide an opportunity to share experience and discuss problems in areas of common interest. This would, in turn, allow States to make informed decisions and avert duplication on the part of States with respect to meeting their safety oversight obligations.

In many areas of regional cooperation, States can produce economies of scale leading to increased efficiency due to the possibility of sharing and pooling of human and financial

resources. Regional programmes can be more effective through joint action, where they can address external factors and constraints more effectively. Participant States will also increase their capacity to develop harmonized regulations adapted to their local environment and in compliance with ICAO Standards and Recommended Practices (SARPs).

In the international arena, the existence and effective operation of regional organizations is a demonstration of regional solidarity and increases the involvement of individual States in aviation activities relating to the region or sub-region. A regional strategy should seek to empower Contracting States to determine common priorities and programmes, to solve regional safety-related deficiencies and, eventually, to secure donor support for improving the regional aviation structure and implementing a more efficient allocation of resources.

In order to strengthen safety oversight capabilities within States, ICAO, through its Technical Cooperation Programme, has formulated intra-State (regional) projects, known as the Cooperative Development of Operational Safety and Continuing Airworthiness Projects (COSCAPS). These projects are designed to achieve a level of regional cooperation that will ensure cost-effectiveness and optimization of human resources. The goal is to overcome financial and labor shortages that have adversely affected the effective implementation of State safety oversight obligations in the past and thus achieve regional harmonization of safety regulations, policies and procedures.

### **Safety Management Systems (SMS)**

Performance based approaches to management of safety are best exemplified by Safety Management Systems (SMS) and the maturity achieved by the SMS concept allows for its implementation on global basis.

The efficient and effective management of any aviation organization, regardless of the nature of its functions or its size, requires the management of basic and traditional business processes: financing; budgeting; communicating; allocating resources; and so forth. In recent years, managing safety has been added to the list of basic and traditional business processes. Managing safety should now be as much a part of running an aviation organization as managing any of the traditional business processes. The term safety management conveys the notion that the management of safety is a business process that must be considered at the same level and along the same lines as any other business process.

Certain approaches for the management of safety are set in motion only after some triggering event, such as an accident, incident or reportable event, discloses a safety concern. For this reason, such approaches may be considered outcome-driven and reactive. They need an outcome in order to react and engage the safety management process. In these approaches, responsibility for monitoring outcomes and the remedial action to the safety concerns that are underlying such outcomes may be scattered within the organization, depending on the

sector(s) involved (flight operations, maintenance, ramp, cabin and so forth) in the event leading to the outcome. Furthermore, lines of accountability for safety monitoring and safety responses may not always be clearly articulated and, if they are, safety accountability generally stops at the middle management

SMS, on the other hand, involve the on-going and routine collection and analysis of safety data during the course of the activities that an organization must pursue every day while conducting its core business functions, in addition to reacting to outcome data. For this reason, SMS may be considered process-driven and proactive. They continuously collect and analyze big volumes of data that provides for a principled basis to the definition of activities and the allocation of resources to address safety concerns in a proactive manner. The term system conveys the notion of an integrated set of processes aimed at managing safety that crosses departmental boundaries, thus addressing safety concerns from an integrated, broad perspective.

An SMS is thus a systemic approach to the management of safety, that includes the necessary organizational structure, accountabilities, policies and procedures. In order to reinforce the notion of safety management being a managerial business process, SMS requirements include provisions for an organization to establish lines of safety accountability throughout the organization, as well as at the senior management level.

IATA is an active participant of the ICAO Safety Management Panel and was involved in the drafting of the newest ICAO Annex, namely Annex 19 – Safety Management, which became applicable on 14 November 2013.

A Safety Management System (SMS) is a systematic approach to managing safety, including the necessary organizational structures, accountabilities, policies and procedures. As per ICAO requirements, service providers are responsible for establishing an SMS, which is accepted and overseen by their State.

### **Types of service providers**

- Approved training organizations that are exposed to safety risks during the provision of their services
- Aircraft operators
- Approved maintenance organizations
- Organizations responsible for type design and/or manufacture of aircraft
- Air traffic services providers
- Certified aerodromes

Under the requirements, the service provider must implement an SMS accepted by their State that, as a minimum

- Identifies safety hazards



- Ensures that remedial action necessary to maintain an acceptable level of safety is implemented
- Provides for continuous monitoring and regular assessment of the safety level achieved
- Aims to make continuous improvement to the overall level of safety

Alongside the ICAO requirements, SMS requirements have been incorporated into the IATA Operational Safety Audit (IOSA).

Industry has been implementing the Safety Management System (SMS) framework elements for a number of years. As demonstrated through IOSA audit results, there are varying degrees of implementation to date. Recognizing the need to progress the implementation of SMS by Industry, in April IATA introduced the IOSA SMS Strategy. This Strategy provides a timeline for the progressive elevation of all SMS designated SARPs to Standards by 2016.

### **ICAO Global Aviation Safety Plan**

The worldwide rate for fatal accidents in air transport operations has been stagnant at a low level for a number of years which makes the civil aviation the safest mode of transport in the world. However, the controlled flight into terrain (CFIT) continues to be a very significant cause of accidents in airline operations. Moreover, the public's perception of aviation safety is largely based on the number of aircraft accidents rather than the accident rate. The improvement of the confidence of the public needs a sustained effort from all participants in the aviation industry, including ICAO, States, aircraft manufacturers and operators in order to reduce the accident.

In this regard, the Air Navigation Commission proposed an ICAO Global Aviation Safety Plan. In November 1997 the DGCA Conference in Montreal endorsed the objectives of the GASP and recommended that States be urged to cooperate with ICAO in the development of the ICAO Global Aviation Safety Plan. Since the 31st ICAO Assembly, ICAO has developed a Programme for the prevention of the CFIT accidents consisting of CFIT educational and training aid and the introduction of new Standards and Recommended Practices and Procedures relating to on board equipment and flight crew training and coordination.

The ICAO Assembly in 1998 adopted a Resolution A 32-15 which reiterates the need for full implementation of the ICAO Programme for the prevention of controlled flight into terrain (CFIT). The Assembly Resolution A32-15 (Attachment A) also endorses the establishment of the ICAO Global Aviation Safety Plan and urges all Contracting States to cooperate by providing the needed support and implementing its various elements. ICAO also encourages States to foster regional and sub-regional safety groups and to take measures

to ensure that human resources in civil aviation obtain and maintain an appropriate level of competency.

Recently, the ICAO Assembly adopted the Resolution A33-16, “**ICAO Global Aviation Safety Plan (GASP)**” which reinforces the progress made since the previous resolutions. This Resolution (Attachment B) among other issues:

- *Urges* Contracting States to adopt the GASP objectives to reduce aircraft accidents and to reduce the worldwide accident rate;
- *Urges* Contracting States to apply the political will to take the remedial action identified by USOAP audits, to correct the deficiencies identified in the regional planning process and related activities, and to promulgate the necessary regulations to implement the safety systems developed under the GASP umbrella;
- *Reiterates* the need for implementation of the ICAO prevention of controlled flight into terrain (CFIT) and approach and landing accident reduction (ALAR) programmes;
- *Urges* all Contracting States to provide the needed support for the various elements of the ICAO Global Aviation Safety Plan;
- *Endorses* the concept of concentrating the safety-related activities of ICAO on those safety initiatives, planned or currently under way, that offer the best safety dividend in terms of reducing the accident rate;
- *Instructs* the Council and Secretary General to participate in efforts by States to improve existing safety database systems and the exchange of safety-related information, and to participate in activities aimed at the development of comprehensive data analysis and information dissemination network, taking into account the need to adequately protect privileged information and its sources;
- *Encourages* the free communication of safety-related information amongst users of the aviation system, including the reporting of accident and incident data by States to the ICAO Accident/Incident Data Reporting (ADREP) system;
- *Urges* all Contracting States to examine and, if necessary, adjust their laws, regulations, and policies to achieve the proper balance among the various elements of accident prevention efforts (e.g. regulation, enforcement, training, and incentives to encourage voluntary reporting) and to encourage increased voluntary reporting of events that could affect aviation safety, and *instructs* ICAO to develop appropriate policies and guidance in this respect;
- *Urges* all Contracting States to ensure that their aircraft operators, providers of air navigation services and equipment, and maintenance organizations have the necessary procedures and policies for voluntary reporting of events that could affect aviation safety; and
- *Encourages States* to foster regional safety groups.

The recent development of air transport, liberalization of air transport activities and the establishment of new operators requires the involvement of CAAs in the respective Regions and an effective coordination for a prompt implementation of the ICAO provisions and Resolutions pertaining to the accident prevention and the Global Aviation Safety Plan.

The Global Aviation Safety Plan (GASP) has undergone significant change, driven mainly by its strengthened role as a high level policy, planning and implementation document guiding complementary and sector wide air transport progress in conjunction with the ICAO Global Air Navigation Plan (GANP). The Global Plans define the means and targets by which ICAO, States and aviation stakeholders can anticipate and efficiently manage air traffic growth while proactively maintaining or increasing safety.

The GASP and its amendments are therefore approved by the Council prior to eventual budget related developments and endorsement by the Assembly. The GASP can assist ICAO States and regions in their aviation safety policy, planning and implementation activities in several ways:

- || Firstly, it sets out the global air navigation safety objectives including specific milestones and priorities to be addressed by State and regional aviation safety planners.

- || Secondly, it provides a familiar planning framework to assist States and regions to make improvements in safety through the use of the four Safety Performance Enablers: standardization, collaboration, resources and safety information exchange.

- || Finally, it outlines implementation strategies and best practice guidance material to assist States and regions in their efforts to tailor State and regional solutions to address the global objectives and priorities.

The timetable for the implementation of ICAO's GASP objectives sets out target dates over the next 15 years applicable to the global aviation community as a whole. It is particularly vital that all States put in place over the next decade, effective safety oversight systems (including proper governance arrangements) and fully implement the ICAO State Safety Programme (SSP) framework.

However one of the strengths of the GASP is that while setting global objectives and priorities, it allows States and regions to plan and establish their own specific approaches towards meeting these objectives and priorities according to each Member State's safety oversight capabilities, SSP's and safety processes necessary to support the air navigation systems of the future.

## **Conclusion**

To enhance Global Aviation Safety there is a need for ICAO to take steps

- Identify and monitor existing types of safety risks to civil aviation and develop and implement an effective and relevant global response to emerging risks.
- Without innovative solutions it is highly probable that situation of understanding between different states will deteriorate further which calls for ICAO's intervention. So there should be more involvement and participation of ICAO, as globalization increases the participation of more states, which will make national safety oversight tasks more and more complex. In order to improve the existing situation and to overcome the difficulties of future adoption of a common strategy by all States to strengthen the role of ICAO in aviation safety will help in improving the standard of aviation safety especially in developing countries.
- An independent body like ICAO would have the merit of developing standardized procedures for surveillance of aircraft and its implementation without any influence and political differences among different States;
- The introduction of a uniform system of training of inspectors would offer a positive guarantee in respect of safety standards at both national and international levels;
- It could offer incentives to States which are unable to resolve their discrepancies due to paucity of resources. Recommendations can be given to the ICAO International

Financial Facility For Aviation Safety (IFFAS) for allocation of funds; and Development of an appropriate forum for resolution of disputes will minimize the differences among Contracting States.

- ICAO Standards and Recommended Practices should be the universal benchmark. The States which comply with, and satisfy the various audits and oversight/surveillance programmes conducted by ICAO, should be given due weightage in any disagreements with other regional authorities or agencies. ICAO should play a more active and supportive role.
- ICAO should increase the formation of more regional bodies, so that it can monitor whether the Standard Recommended Practices (SARP's) are followed correctly. The number of safety audits should increase to find any discrepancy.
- It should encourage states in implementing the Safety Management Systems by explaining the benefits.
- It urges it member states to follow Universal Safety Oversight Audit Programme (USOAP).

By following the recommendations enlisted in ICAO Safety Manual and the increased role of ICAO in future enhancements in technology will give rise to safer skies and secured civil aviation.

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ICAO JOURNAL



**MODULE II**

**GLOBAL AIR  
SECURITY  
REGULATIONS: AN  
OVERVIEW**





## **MODULE II**

### **GLOBAL AIR SECURITY REGULATIONS: AN OVERVIEW**

#### **INTRODUCTION**

With the benefit of hindsight, it may seem hard to imagine how the need to address acts of sabotage, unlawful seizure of aircraft and the use of civil aircraft in terrorist attacks (as was the case on 11 September 2001) could have been overlooked by the drafters of the Chicago Convention, ICAO's founding charter and corner piece for international technical legislation in the field of civil aviation. In 1944, however, no one foresaw such security threats and the need for security measures.

When aviation security did arise as a serious issue in the late 1960s, there was a need to adopt an international framework for addressing acts of unlawful interference. ICAO assumed a leadership role in developing aviation security policies and measures at the international level, and today the enhancement of global aviation security is a key objective of the Organization.

Foremost among the chief priorities for aviation administrations and airlines is the security of passengers, general public, ground personnel and property. Indeed, the improvements in 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 security and efficiency in civil aviation. Casualties have remained high due to the total destruction of aircraft in flight.

Aviation security involves the protection of persons and cargo in carriage by air facilities and related auxiliary support activities. Annex 17 of the Chicago Convention defines aviation security as a "combination of measures and human and material resources intended to safeguard civil aviation against acts of unlawful interference". It contains standards and recommended practices (SARPs) for safeguarding international civil aviation operations worldwide.<sup>101</sup> Aviation security requires incessant precautions and effective security controls and procedures to be implemented by governments, airports authorities and airlines.

Stressing the need for effective and more sustainable security, the International Civil Aviation Organization (ICAO) brought together more than 700 officials today for the start of its High-level Conference on Aviation Security. Ministers and senior security officials representing 135 countries and 27 international organizations will be seeking agreement on a number of critical priorities at the three-day ICAO security event, including the

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<sup>101</sup>See Annex 17, Security - Safeguarding International Civil Aviation Against Acts of Unlawful Interference, Fourth Edition, October 1989 (ICAO, Montreal), p. 1.

implementation of new air cargo security measures. These have been developed collaboratively by aviation and cargo sector experts over the past two years, largely in response to a 2010 incident where explosives were discovered in printer cartridges in air cargo shipments.

“Civil aviation remains an attractive target for terrorists,” said Roberto Kobeh González, President of the ICAO Council. “It is an essential mode of transport that contributes significantly to worldwide economic and social development. Clearly, as terrorist threats evolve, we must continually adapt and reinforce our strategies and improve our level of collaboration so that aviation remains a secure means of moving people and goods quickly and affordably.”

The Conference agenda will focus on how to implement tighter security measures but on a more sustainable, long-term basis. The goal in this area is to agree on coordinated, risk-based approaches which will provide solutions that are both more effective and efficient for airports, airlines and passengers.

“The comprehensive sharing of passenger information and other data, in conjunction with advanced risk analyses and the latest screening innovations, point us to a future where aviation can be as secure as it is today but less obtrusive to industry and passengers,” commented Kobeh. “This is an important goal from a security sustainability standpoint and this high-level conference will be very helpful in beginning to determine the practical, globally-agreed means of achieving it.” Among other topics on their agenda, conference delegates will consider the threat posed by insiders such as airport and airline staff, the evolution of ICAO’s aviation security audit process, means of augmenting assistance to States experiencing security deficiencies and enhancing the security of passports.

The conference is the first high-level ICAO meeting on aviation security since early 2002, when Member States adopted a new and highly successful global security strategy following the 9/11 attacks. It also supports the implementation of the Declaration on Aviation Security adopted at ICAO’s 37th Assembly in 2010, and follows a series of regional consensus-building security events organized by ICAO during 2011 and 2012.

Fourteen Asia/Pacific States\* meeting in Kuala Lumpur yesterday and today adopted a comprehensive strategy to systematically improve passenger and cargo security throughout the region, part of a global initiative aimed at countering new and emerging threats to air transport worldwide.

Y.B. Dato’ Seri Kong Cho Ha, Minister of Transport of Malaysia, said the Conference represented “a commitment to strengthening aviation security and protecting civil aviation in the Asia/Pacific region”. He identified greater openness of security audit results, sharing of data, increased collaboration among States, and effective partnering of regulators and industry, as critical elements to achieve more effective aviation security.

International Civil Aviation Organization Secretary General, Raymond Benjamin, praised State representatives “for agreeing on specific actions that reflect the particular security needs of the region while further contributing to a worldwide solution to the problem of terrorism aimed at international aviation”.

To further improve national, regional and global aviation security, participants agreed on collective action to address threats to the air transport system. This includes: assistance to States in capacity building and strengthening of national security systems; closer cooperation with Customs, border control authorities and other bodies to strengthen the global supply chain system for air cargo; and implementation of sustainable security measures to ensure the highest degree of passenger and cargo facilitation.

The Kuala Lumpur Security Conference was the fourth in a series of events aimed at promoting the implementation of an ICAO Declaration on Aviation Security. The first took place in New Delhi (India), followed by Dakar (Senegal) and Moscow (Russia), in advance of a global high-level security conference at ICAO Headquarters in Montréal, from 12 to 14 September. Two other regional conferences are planned for Venezuela in February and the Middle East in April.

\*Australia, Bangladesh, Cambodia, China, Indonesia, Japan, the Lao People's Democratic Republic, Malaysia, Nepal, Pakistan, the Republic of Korea, Singapore, Sri Lanka and Thailand. Officials from the United Kingdom and the United States also provided advice and discussed partnership opportunities that could benefit aviation security. Other participants included the Association of Asia Pacific Airlines (AAPA), the Airports Council International (ACI) and the International Air Transport Association (IATA).

### **Problems Relating to Aviation Security**

Civil aviation has been greatly affected by social unrest for the past four decades in various forms: hijacking, shooting down, sabotage - like explosions in aircraft, missile attacks against aircraft, armed attacks on airports, passengers and aviation property and bombings. The motives range from political ideology to extortion and murders. The targets, besides aircraft themselves, include "aviation facilities" - air terminals, cargo buildings, maintenance hangars, passenger buses, airline offices and travel agencies. These acts are committed by individuals, organizations, groups, or members of a community.<sup>102</sup>

The President of the ICAO Council, Assad Kotaite, cautioned the world against this danger in 1985: "...the last two decades witnessed the emergency (sic) of an alarming wide scale of a new type of danger to international civil aviation. This new type of danger is man-made and is manifested in violent human acts against the safety of civil aviation, use of threat or force, unlawful seizure of aircraft and other forms of unlawful interference with civil aviation. These violent acts that constitute a worldwide problem are not limited by (sic)

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<sup>102</sup>Ian Awford, "Civil Liability Concerning Unlawful Interference with Civil Aviation", *Air Law*, vol. 12, no. 3, 1987, pp. 120-142, at p. 120

geographic or political boundaries and no nation or no airline of the world is immune to such acts."<sup>103</sup>

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.<sup>104</sup>

Protection of international civil aviation against acts of unlawful interference has been a grave concern to the United Nations and its specialized agencies, the ICAO and the IATA, for the past three decades. The year 1968 is widely recognized to have begun the modern era of international terrorism. The new terrorist era started by a wave of aerial hijackings, bombings, kidnappings, assassinations and murders shocked the world nations. Hijacking became one of the most serious threats to global aviation safety and security.<sup>105</sup> From 1968 through 1970 some 200 aircraft hijackings occurred. That the perpetrators were mostly criminals, political militants or mentally unstable persons made the problem more alarming.<sup>106</sup>

Earlier in the past, commercial air travel was generally safe, certainly not vulnerable to hijackings and sabotage. But with the occurrence of unlawful aircraft seizures and criminal acts against civil aviation, the world began to experience the evolution of a new civil aviation security regime. This regime, now enforced by all countries of the world where air travel is a mode of transport, encompasses a series of measures and procedures designed to prevent unlawful interference and protect airport ground facilities and air navigational aids.<sup>107</sup>

The increasing use of sophisticated weapons, explosive devices and other equipment by terrorists, criminals and anti-social elements has thrown up fresh challenges to law-enforcing agencies and underscores the need to understand aviation terrorism in different perspectives. Three types of attacks-hijacking, bombing and missile attacks - have, of late, dominated the crime against civil aviation. Aircraft have been destroyed, both in the air and on the ground, with an enormous loss of life.<sup>108</sup> In certain countries, the continuing deaths

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<sup>103</sup>See Assad Kotaite, "ICAO Policy and Programmes in the Field of Aviation Security", Address on the occasion of the Fourth International Civil Aviation Conference, Philadelphia, USA, 15-17 April 1985, published in **Annals of Air and Space Law** (AASL), vol. 10, 1985, p. 83. Also see Assad Kotaite, "Security of International Civil Aviation - The Role of ICAO", **Annals of Air and Space Law**, vol. 7, 1980, pp. 95-101.

<sup>104</sup>R.G. Sutherland, "Well-Trained Staff are Key to Effective Security Programme", **ICAO Journal**, April 1992, pp. 6 and 7, at p. 6.

<sup>105</sup>Shirlyce Manning, "The United States' Response to International Air Safety", in **Journal of Air Law and Commerce** (JALC), vol. 61, 1995-96, pp. 505-37, at p. 508.

<sup>106</sup>Duane Freer, "ICAO at 50 Years : Riding the Flywheel of Technology", in **ICAO Journal**, September 1994, pp. 19-32, at p. 31.

<sup>107</sup>M. A. Aleman, "Aviation Security" (AVSEC), **ICAO Bulletin**, June 1989, pp.23-26 at p.23

<sup>108</sup>Gray n. Horlick, "The Developing Law of Air Hijacking", **Harvard International Law Journal**, vol.12, 1971, p.33.

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and injuries to passengers and crew caused by the indiscriminate use of surface-to-air missiles or ground-to-air missiles or ground-to-air fire are of grave concern. Information provided by governments highlight that weapons, ammunition and explosives have recently been stolen from military armories in countries undergoing political instability.<sup>109</sup>

Hijacking or aerial piracy was first recorded in Peru way back in 1930, when an aircraft was seized and used to drop political leaflets. People, more often than not, identify hijacking with piracy. It is imperative, however, to distinguish hijacking from piracy. Hijacking connotes commandeering or seizure of an aircraft, but piracy implies robbery, pillage, or degradation for personal ends. The penalties for pirates have long been established and effectively enforced; the pirate commits a crime against all states indiscriminately. So, of course, does a hijacker, but, unfortunately, some states have offered and are still offering the hijacker refuge.<sup>110</sup>

Seventeen years later, in 1947, one of the flight crew was killed when a Rumanian aircraft was hijacked to Turkey while on an internal flight. In 1948, a pilot and two of the flight crew were themselves members of a 17-member strong hijacking team, which forced a Czechoslovakian airliner to the then US zone of Germany. Apart from a four-year break, between 1954 and 1957, there have been acts of hijacking every year, reaching their peak in the late 1970s. In spite of stringent clamp down at airports, terrorists have continued to find loopholes in the security system and subvert the airport vigil. There is no single remedy to curb hijacking. While those charged with maintaining airport security has achieved much technical success, a great deal of work in devising effective countermeasures remains unfinished.<sup>111</sup>

Air travel today encounters a more serious and faceless threat - hitch bomb, no bigger than a paper book, Hijackers do invariably have demands: freeing comrades from prison, political concession, or simply ransom. But bombers make no demands, nor seek negotiations nor claim responsibility. Terrorism necessarily involves the use of violence to evoke fear, with a view to promoting a particular political and ideological aim. Terrorism, whatever the motivation, involves certain common techniques to execute. The observation that "terrorism is a threat" to gain mass publicity holds very true in bombings and sabotage. The destruction of four aircraft following the Leilakhalad hijack attempt in 1970, the Pan Am 747 mid-air explosion, while on its approach to Honolulu, in 1982, the recovery of a bomb from a Pan Am 747 in Rio, the same year, and the 1984 explosion of an Air France 747 after it left for Karachi, all testify to this technique.<sup>112</sup>

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**Security**, September 1994, pp.14-17, at p.14.

<sup>109</sup> Brian Wall, "Industry Sectors must Work Together to Promote Security", **ICAO Journal**, April 1992, p.11.

<sup>110</sup> Andreas Avgoustis, "Hijacking and the Controller", **Air Law**, vol.3, no.2, 1978, pp.91-95, at p.91. See also, Alona E. Evans, "Aircraft Hijacking, its Cause and Cure", **AJIL**, vol.63, 1969, p.695

<sup>111</sup> See Edward McWhinney, **Aerial Piracy and International Terrorism: the Illegal Diversion of Aircraft and International Law** (Dordrecht, 1987), p.165. See also Inderjit Singh, 31, p.15.

<sup>112</sup> **Skyways** (Bombai), June 1990, p.10.

The most devastating of terrorist acts, in recent times, are: the Air India Boeing 747 explosion en route to Delhi from Montreal, in 1985; the bomb explosion on board TWA Boeing 727 en route from Rome to Athens; the Airlink Tristar blowing up at Colombo airport prior to departure, in 1986; the crash of Korean Airlines Boeing 707 into the sea, in 1987; Pan Am Boeing 747 explosion over Lockerbie on London-New York flight, in 1986; the France's UTA DC-10 jetliner, in 1989, over Niger's Enere Desert; and the Colombian Avianca Airline Boeing 727 detonation minutes after take-off at Botota, with bomb planted near the fuel tanks, in 1989. In the last decade nearly 1,800 people have been killed in airliner bombings, while 800 were killed in hijacking over the past 50 years.<sup>113</sup>

More recently attacks at Heathrow, Britain's busiest airport, thrice within a short span of five days, demonstrates the killer instinct, determination and capacity of intruders to act by meticulous planning: survey of the existing security system, an in-depth knowledge of surroundings, the selection of appropriate locations to conceal mortars and the sensing of timing with built-in intervals to strike. Airport security programmes are sadly lacking at most busy air traffic centers across the world.<sup>114</sup>

These 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. The legislative machinery of many states and international organizations has, over the past few years, been busy establishing effective means to combat hijackings. More and more agreements are showing deeper interest in internationally agreed regulations to be implemented by airport and airline managements. New and improved hi-tech equipment is being continually tested and marketed.<sup>115</sup>

### **The ICAO and Aviation Security**

Aviation safety is at the core of ICAO's fundamental Objectives. The organization is constantly striving, in close collaboration with the entire air transport community, to further improve aviation's successful safety performance while maintaining a high level of capacity and efficiency. This is achieved through:

The development of global strategies contained in the Global Aviation Safety Plan and the Global Air Navigation Plan;

The development and maintenance of Standards, Recommended Practices and Procedures applicable to international civil aviation activities which are contained in 16 Annexes and 4 PANS (Procedures for Air Navigation Services). These standards are complemented by more than 50 Manuals and Circulars which are providing guidance on their implementation.

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<sup>113</sup>Singh, n. 31, p. 14.

<sup>114</sup>R.I.R. Abeyratne, "Legal Aspects of Unlawful Interference with International Civil Aviation", **Air and Space Law**, vol. 18, no. 6, 1993, pp. 262-74, at p. 273.

<sup>115</sup>See Singh, n. 31, p. 15.

The monitoring of safety trends and indicators. ICAO audits the implementation of its Standard, Recommended Practices and Procedures through its Universal Safety Oversight Audit Programme. It has also developed sophisticated tools to collect and analyse a vast array of safety data which allows identifying existing and emerging risks.

The implementation of targeted safety programmes to address safety and infrastructure deficiencies; and An effective response to disruption of the aviation system created by natural disasters, conflicts or other causes.

In all of its highly coordinated safety activities, ICAO strives to implement practical and achievable measures to improve safety and efficiency in all sectors of the air transportation system. This approach ensures that aviation's complimentary achievements of a remarkably safe and efficient air transport network continue to serve a fundamental role in supporting global social and economic priorities.

The emergence of aeroplane as a major means of transport has brought in its wake international problems: the co-ordination of techniques and laws and the dissemination of technical and economic information were far beyond the ability of individual governments. Safety and security regulations in air transport involve the creation of aerodromes, navigational aids, effective communication networks and weather reporting systems.<sup>116</sup> The standardization of operational practices for international services is of fundamental importance, enabling elimination of error caused by misunderstanding or inexperience. The establishment of standards for air traffic control, personnel licensing, aerodrome design and infrastructure development, etc., all require more than a national action.<sup>117</sup>

Doubtless, it is the responsibility of each individual sovereign state to provide an effective system of aviation security for flights leaving its territory, but aviation security is essentially an international issue affecting each state which operates international flights. An international forum is, thus, deemed crucial to develop and implement effective measures, standards and recommended practices.<sup>118</sup>

The basic aim of the ICAO, as stated above, is to ensure a safe and orderly growth of international civil aviation throughout the world and promote flight safety. The ICAO has formulated aviation security policies and implemented relevant programmes with the full support of its contracting states. Its aviation security programme was developed by its Assembly as well as by the Council, its standing committee on unlawful interference created in 1969, the Air Navigation Commission, the Air Transport Committee, the ICAO legal

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<sup>116</sup>See K. Hammar skjold, "Introductory Lecture on the Law and Growth of International Air Transport", in *Recueil Des Cours*, vol. 135, no. 1, 1972, pp. 413-30.

<sup>117</sup>See Krishnan, n. 8, p. 10

<sup>118</sup>Alan Pangborn, "How far has Europe Come since Pan Am 103?" **INTERSEC** (Surrey, UK), vol. 6, Issue 5, May 1996, p. 195.

committee and its sub-committees, and ICAO diplomatic conference convened by the ICAO Council.<sup>119</sup>

The tragic incident of the shooting down of a Korean Airlines flight by the then Soviet Union noted above, sparked a worldwide outcry and raised serious questions about the rules of international law governing airspace. The UN Security Council could not take action on the KAL incident, as the Soviet Union had vetoed a resolution condemning the use of armed force against civil aviation as "incompatible with the norms governing international behavior and elementary considerations of humanity".<sup>120</sup> This impelled the ICAO to take action.

The ICAO Council met on 15 and 16 September 1983 in an extraordinary session and adopted two resolutions.<sup>121</sup> The first resolution strongly deplored the destruction of the KAL aircraft, which resulted in the loss of 269 innocent lives. "Such use of armed force against international civil aviation is incompatible with the norms governing international behavior and elementary considerations of humanity and with the rules, standards and recommended practices enshrined in the Chicago Convention and its Annexes and invoke generally recognized legal consequences." The resolution further reaffirmed the principle that states, when intercepting civil aircraft, should not use weapons against them.<sup>122</sup>

The resolution directed the ICAO Secretary-General to institute an investigation into the facts and technical aspects of the flight and its destruction. It urged all parties to fully co-operate with the investigation. It directed the Secretary-General to report urgently to the Council on the adherence to and implementation of the Chicago Convention and its Annexes, as they bore upon the incident; and it asked the ICAO Air Navigation Commission to review the provisions of the Chicago Convention, its Annexes and related documents to consider possible amendments to prevent a reoccurrence of such tragic incidents. The Commission was told to examine the ways to improve the co-ordination of communication systems between military and civil aircraft and air traffic control services and to approve procedures in cases involving the interception of civil aircraft.<sup>123</sup>

In the second resolution, the Council instructed the Air Navigation Commission to undertake without delay technical tasks aimed at bringing about improvement in existing international rules and ensuring the safety of civil aircraft.<sup>124</sup> The ICAO Assembly endorsed the Council resolutions at its 24th session.<sup>125</sup>

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<sup>119</sup>Groenewege, n. 1, p. 250.

<sup>120</sup>See ILM, vol. 22, 1983, p. 1148.

<sup>121</sup>Ibid., pp. 1449-52.

<sup>122</sup>Ibid., p. 1150.

<sup>123</sup>Ibid., p. 1157.

<sup>124</sup>Ibid., p. 1152.

<sup>125</sup>See ICAO Assembly Resolution A24-25, Doc. 9414 A24-Res p. 22.



The ICAO Secretary-General addressed a letter<sup>126</sup> to all the contracting states in January 1991, informing them that the ICAO Council had identified major challenges facing international civil aviation. The threat of unlawful interference was identified by the ICAO's 27th Assembly session as the overriding priority in its work programme. The Secretary-General requested that all contracting states provide their views on priorities and action to be taken to meet the challenges.<sup>127</sup> The response of the states was consensual in those measures as the implementation of the ICAO policy on unlawful interference, the worldwide enhancing of security measures and aviation security assistance programmes were unanimously accepted as most desirable to combat the threats. A significant decision taken by ICAO Council was to proceed with the development of a comprehensive and detailed ICAO aviation security training programme.<sup>128</sup>

The main objective of the ICAO's technical aviation security programme is to ensure the safety of passengers, crew, ground personnel, and members of the general public by denying offenders access to their primary target - the aircraft. The inspection and screening of passengers and their baggage is, thus, most important. Human error or lack of vigilance in the process of inspection and screening is the key lapse, which made it difficult to detect and prevent recent acts of unlawful interference.<sup>129</sup>

The programme also proposes contingency measures to crack down on acts of unlawful interference. Several amendments were made to Annex 17, in September 1992, including the comprehensive security screening of checked baggage and security control over cargo. The ICAO is currently studying measures to recast the design and construction of aircraft for enhanced ability to withstand onboard explosives and help guard against acts of unlawful interference.<sup>130</sup>

It is essential to continue developing and modernizing aviation security programmes together with the effective implementation of existing programmes. The ICAO provides advice and guidance to the member states on the implementation of aviation security standards and procedures, as decreed in Annex 17 of the Chicago Convention. Many contracting states have benefited from the aid provided by donor states through a voluntary bilateral assistance programme for aviation security, set up in 1968. The ICAO has fielded aviation security experts in several states; over 360 aviation security training fellowships have been awarded as part of its technical co-operation activity by 1993 end.<sup>131</sup>

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<sup>126</sup>See ICAO state letter EC 2/65-91/6, dated 16 January 1991.

<sup>127</sup>The other challenges to civil aviation as identified in the state letter were: human factors in flight safety; environment; regulatory developments; commercial developments; airport and airspace congestion; legal issues; financial resources and human resources development.

<sup>128</sup>Annual Report of the ICAO Council, 1990, ICAO Doc. 9568, p. 96.

<sup>129</sup>Groenewege, n. 1, p. 251.

<sup>130</sup>Ibid.

<sup>131</sup>Ibid.

In the implementation of the ICAO planning mechanism, care has been taken to ensure co-ordination with other assistance initiatives: bilateral or multilateral assistance programmes from individual donor states and the United Nations Development Programme [UNDP]. A mechanism was launched in January 1990 for financial and technical assistance to the states on aviation security. The mechanism provides:

- (a) Advice to states, on request, on aviation security organization and techniques;
- (b) International security surveys and assessments on a confidential basis, also on request;
- (c) The co-ordination of an aviation security programme; and
- (d) Regional and sub-regional seminars and workshops.<sup>132</sup>

The ICAO Aviation Security branch has created a separate section to deal with requests by states seeking assistance as part of this mechanism. Initial technical evaluation surveys have been conducted in many of these states and confidential reports were provided to the respective governments recommending action for security enhancement.

On airport security, the ICAO provides optimal security in developed and developing countries. It has provided the developing countries with technical, financial and material assistance. It launched training programmes and helped develop expertise in the maintenance of aviation security equipment and security exercises. A. Kotaite is confident that the organization's efforts will "go a long way towards eliminating the threat to civil aviation proposed by acts of unlawful interference".<sup>133</sup>

#### **(a) Annex 17 - Security - Safeguarding International**

With the benefit of hindsight, it may seem hard to imagine how the need to address acts of sabotage, unlawful seizure of aircraft and the use of civil aircraft in terrorist attacks (as was the case on 11 September 2001) could have been overlooked by the drafters of the Chicago Convention, ICAO's founding charter and corner piece for international technical legislation in the field of civil aviation. In 1944, however, no one foresaw such security threats and the need for security measures.

When aviation security did arise as a serious issue in the late 1960s, there was a need to adopt an international framework for addressing acts of unlawful interference. ICAO assumed a leadership role in developing aviation security policies and measures at the international level, and today the enhancement of global aviation security is a key objective of the Organization.

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<sup>132</sup>M.A. Aleman, "Strengthened Aviation Security Branch Oversees Newly-Developed Assistance Programme", *ICAO Journal*, June 1990, pp. 9-11, at p. 9.

<sup>133</sup>F.A. Campbell, "Security Screening", in *Blacklock*, n. 57, pp. 292-5, at p. 295.

Provisions for international aviation security were first disseminated as Annex 17 to the Chicago Convention in 1974, and since then have been improved and updated 14 times. The 14th amendment to the Annex became applicable on 14 November 2014.

With the advent of Annex 17, ICAO began providing States with guidance material to assist with the implementation of international security measures, the primary document being the Security Manual for Safeguarding Civil Aviation Against Acts of Unlawful Interference (Doc 8973 – Restricted)

Initially, ICAO's security-related work focused on developing Standards and Recommended Practices (SARPs) for inclusion in Annex 17. Over the years, its work in the field of aviation security broadened and today is essentially carried out in three inter-related areas: policy initiatives, audits focused on the capability of Member States to oversee their aviation security activities, and assistance to States that are unable to address serious security deficiencies highlighted by ICAO audits. Security audits are performed under the Universal Security Audit Programme, which is managed by the Aviation Security Audit (ASA) Section. Short-term or urgent security-related assistance to States is facilitated by the Implementation Support and Development (ISD) Programme, which is managed by the ISD-Security Section, and longer term project assistance is available from the ICAO Technical Co-operation Bureau.

Policy work is focused primarily on maintaining the currency of Annex 17 and related guidance material such as Doc 8973, a significant challenge considering the evolving nature of the threat. Security policy is the responsibility of the Aviation Security Policy (ASP) Section, which promotes the implementation of Annex 17 through seminars and workshops attended by experts from airports, airlines and law enforcement agencies, as well as through the dissemination of guidance material.

In addressing the evolving threat to civil aviation, ICAO relies on the advice of experts who sit on the Aviation Security (AVSEC) Panel. Established in the late 1980s, the Panel is currently comprised of 27 members nominated by States, as well as five observers from industry. Together with the ICAO Secretariat, the Panel actively develops ICAO security policy and responses to emerging threats as well as strategies aimed at preventing future acts of unlawful interference. The Panel has met 25 times since its formation, most recently in March 2014. Its Twenty-sixth Meeting will be held in Montréal from 13 to 17 April 2015.

Aside from the AVSEC Panel, the International Explosives Technical Commission (IETC) focuses on keeping up to date the Technical Annex to the Convention on the Marking of Plastic Explosives for the Purpose of Detection, which entered into force in 1998. Each State party to the Convention is required to prohibit and prevent the manufacture in its territory of unmarked plastic explosives.

ICAO's other activities in the field of aviation security include efforts to enhance the security of travel documents and improve the training of security personnel. In addition, ICAO provides support for regional security initiatives with the aim of strengthening aviation security globally.

Travel document security is addressed by the Machine Readable Travel Document (MRTD) Programme. Under this initiative, ICAO developed the worldwide standard for machine readable passports (MRPs). Over 180 States had issued MRPs that comply with the ICAO standard by 1 April 2010, the deadline for achieving compliance. ICAO is also concerned with the facilitation of international air transport, which involves the efficient clearance of passengers, crews, baggage, cargo and mail across international boundaries without unnecessary delays. Closely aligned with security processes, facilitation matters are addressed by the Facilitation (FAL) Programme, which is managed by the Facilitation Section.

With respect to security training, ICAO develops course material on a range of topics for use by civil aviation administrations and a network of regional aviation security training centres. This material covers such subjects as airline and cargo security and, of course, crisis management. Training workshops and seminars are conducted on a regular basis.

All of ICAO's initiatives in the field of aviation security rely, both globally and regionally, on cooperation amongst States and all other stakeholders. The overarching goal is to enhance global security by implementing uniform security measures around the world, a goal that cannot be achieved without an unswerving commitment by all concerned.

A dramatic increase in crime and violence, adversely affecting the safety of civil aviation in the late 1960s, led to an extraordinary ICAO Assembly session in 1970. The Assembly, in a resolution, called for specifications in either new or existing Annexes to tackle the unlawful seizure of aircraft. Annex 17 [Security - Safeguarding international civil aviation against acts of unlawful interference] was, as a result, adopted by the ICAO Council on 22 March 1974 under Article 37 of the Chicago Convention. This Annex is primarily concerned with administrative and technical measures for the security of international civil air transport.<sup>134</sup>

Annexe 17 is divided into five chapters. Chapter one defines terms like air side, security, security control and security programme. The aims and objectives of Annex 17 are stated in chapter two: to safeguard international civil aviation against acts of unlawful interference; safety of passengers, crew and ground personnel, and development plans and their implementation procedures for the operation of international flights.<sup>135</sup>

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<sup>134</sup>Ibid.

<sup>135</sup>Security - Safeguarding International Civil Aviation Against Acts of Unlawful Interference, Annex 17 to the Convention on International Civil Aviation, Fourth edition, October 1989, pp. 1 and 2.

Chapter three of Annex 17 embodies detailed provisions for the organization of security. Each contracting state has a right to establish its own civil aviation security programme to ensure the safety, regularity and efficiency of international civil aviation against acts of unlawful interference. It emphasizes the designation of an appropriate authority responsible for the development, implementation, maintenance and constant review of national aviation security programmes. The co-ordination and implementation of activities between various national agencies, establishment of airport security programmes, airport security committees, staff training, supporting facilities and resources are other important matters relating to the organization of security. International co-operation in aviation security proposed under the security clauses of bilateral agreements and exchange of information on training programmes between countries are also covered in this chapter.<sup>136</sup>

Chapter four mentions various preventive security measures for the contracting states: the prevention of weapons, explosives or dangerous devices, which may be used to commit acts of unlawful interference against civil aviation; special authorization from states concerned for the carriage of weapons; the carriage of weapons by authorized and duly qualified persons; pre-flight checks; established procedures for concealed weapons, explosives or other dangerous devices; arrangements for surveys; and inspection of security measures. The measures relating to passengers include the adequate control, transfer and transit of passengers and their cabin baggage to prevent unauthorized articles being taken on-board aircraft; and the security inspection/screening of checked baggage, crew and other goods.<sup>137</sup>

Chapter five describes the management of response to acts of unlawful interference. The contracting states shall take adequate measures for the safety of passengers and aircraft crew, provide air traffic services to aircraft, and ensure assistance to an aircraft under unlawful seizure, exchange information with other states when an aircraft is in distress and also notify to the state of aircraft registry and help free hostages.<sup>138</sup>

On airport design, Annex 17 requires airport operators to follow security measures when designing new or expanding facilities. The process could gather momentum, however, as the present facilities have to be modified to comply with new security measures.<sup>139</sup>

The Attachment to Annex 17 provides the officials of states, responsible for implementing national programmes, with all relevant specifications appearing in other annexes as well as related procedures appearing in and the PANS documents. The material provides the officials with a summary of all security-related standards and recommended practices and procedures in a single document.

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<sup>136</sup>Ibid., p. 3.

<sup>137</sup>Ibid., pp. 4 & 5.

<sup>138</sup>Ibid. p. 6.

<sup>139</sup>See Oris W. Dunham Jr., "ACI - the Voice of the World's Airports", in Blacklock, n. 57, pp. 303-309 at p. 307.

New problems and perspectives have resulted in the enactment of nine amendments to Annex 17. The amendment, adopted in September 1992, proposes the comprehensive security screening of checked in baggage, security control over cargo, courier and express parcels and mail, pre-flight checks of international aircraft and the incorporation of security considerations into airport design.<sup>140</sup> Amendment 9 to Annex 17, adopted by the ICAO Council on 12 November 1996, and effective on 31 March 1997 and applicable on 1 August 1997, envisages the introduction of new provisions in relation to: pre-employment checks and capabilities of persons engaged in implementing security controls; baggage accountability and authorization; measures to be applied to catering supplies; tests for programme effectiveness; and the notification to the state of known or presumed destination of an aircraft under seizure.<sup>141</sup>

Following the decision of the 17th (extraordinary) session of the ICAO assembly in 1970, the ICAO Council developed a security manual for the prevention of unlawful acts against civil aviation. The manual provides guidance and procedures on all aspects of aviation security and was designed to assist the states in the implementation of their own national aviation programmes. The manual was first published in 1971 and subsequently amended in 1974 and 1977; it underwent its first major revision in 1982.<sup>142</sup>

The increased severity and frequency of acts of unlawful interference in mid-1985 forced the ICAO Council to appoint an ad hoc group of experts to assist the committee on unlawful interference with a review of the ICAO security Programme. The president of the council appointed 18 aviation security experts from various states and international organizations. The ad hoc group's meetings were held at the ICAO headquarters, in Montreal, that year and again in July 1986, planning numerous new and tightened standards, recommended practices and procedures. There was, it became apparent, sufficient justification for the creation of a panel to carry out the work of the experts. So, the aviation security panel came into being in late 1986. The panel revised the security provisions in 1987 and further amended them in 1989.<sup>143</sup>

Following the publication of the fourth edition of Annex 17 in October 1989 and in the light of changes in the methods and level of sophistication and technologies used by terrorists, it was considered timely for a comprehensive revision of the manual. The Aviation Security Branch began revising the security manual in close co-operation with security experts from around the globe, following a recommendation by the committee on unlawful interference.<sup>144</sup>

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<sup>140</sup>Ibid.

<sup>141</sup>See Annual Report of the ICAO Council, 1996, ICAO Doc. 9685, p. 52.

<sup>142</sup>A. Kotaite, "Security of International Civil Aviation - Role of ICAO", *AASL*, vol. 7, 1982, pp. 95-100 at p.98.

<sup>143</sup>ICAO Journal, April 1992, p.5

<sup>144</sup>Ibid.

#### **IV. Conventions Relating to Aviation Security**

Criminal acts endangering air safety and security have, over the past four decades, gained prominence as the highest priority area for regulatory process of civil aviation. The UN and its specialized agencies, such as the ICAO, have worked to eradicate terrorist threat to international civil aviation. Conventions and protocols have been adopted to check aircraft hijacking and curb terrorist attacks on international airports. The efforts of the international community helped to focus attention on the problem. Nevertheless, there has been no consensus, or effective concerted action to crack down on terrorist attacks.

This part of the chapter examines the legal rules developed by the aviation community, especially through the ICAO, to prevent acts of unlawful interference against civil aviation. International customary law proved inadequate in persuading the states to co-operate and co-ordinate actions targeting terrorist acts against civil aviation. This has resulted in specific undertakings by the states under various international conventions, bilateral agreements and national legislation. The most important conventions are the Tokyo Convention, 1963, the Hague Convention, 1970, the Montreal Convention, 1971, the Montreal Protocol (Supplementary to the Montreal Convention 1971) 1988, and the Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991.

##### **(A) Convention on Offences and Certain Other Acts Committed on Board Aircraft Signed at Tokyo on 14 December 1963**

The earliest multilateral action ever initiated to target hijacking was the Tokyo Convention, 1963, drawn up under the auspices of the ICAO, with four principal objectives. First, as the Convention makes clear, the state of aircraft registration has the authority to apply its laws to events occurring on board its aircraft while in flight. Second, the Convention provides the aircraft commander with the necessary authority to tackle persons who have committed, or are about to commit a crime, or an act jeopardizing safety on board the aircraft by the use of reasonable force when required, and without fear of subsequent retaliation through civil suit, or otherwise. Third, the Convention delineates the duties and responsibilities of the contracting state in which an aircraft lands after the commission of a crime on board, including its authority over and responsibilities to any offenders, who may be either disembarked within the territory of that state, or delivered to its authorities. The fourth major subject stated by the Convention is the crime of hijacking.<sup>145</sup>

The Tokyo Convention applies to criminal offences and acts committed to jeopardize the safety of an aircraft, the life and property of persons on board while the aircraft is in flight,<sup>146</sup> that is, from the movement power is applied for take-off until the

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<sup>145</sup>See Robert P. Boyle and Roy Pulsifer, "The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft", *JALC*, vol. 30, no. 4, 1964, pp. 305-354 at p. 329.

<sup>146</sup>See Article 1(2) of the Convention on Offences and Certain Other Acts Committed on Board Aircraft signed at Tokyo on 14 September 1963 (for short Tokyo Convention), see ICAO Doc. 8364.

movement when the landing run ends.<sup>147</sup> It means that the Convention recognizes the jurisdiction of the state of aircraft registration over offences and acts committed on board the jet.<sup>148</sup> Under Article 4, the Convention recognizes the criminal jurisdiction of the aircraft in respect of offences committed on board the aircraft which have effect on the territory of that state, or offences committed by or against a national or permanent resident of that state, or an offence made against the security of that state.

Articles 5 to 10 of the Convention give the aircraft commander substantial powers of control, including restraint, where he has reasonable grounds to believe that a person has committed or is about to commit a crime on board the aircraft<sup>149</sup> - the offences or acts specified in the opening clause of the Convention, namely "acts which, whether or not they are offences, may or do jeopardize the safety of aircraft or of persons or property therein or which jeopardize good order and discipline on board".<sup>150</sup>

The provisions of the Tokyo Convention deliberately and specifically oriented to the problem of aerial hijacking are contained in Article 11 (unlawful seizure of aircraft).

Article 11(1) states that when a person on board an aircraft has unlawfully committed by force of threat thereof, an act of interference, seizure or other wrongful exercise of control of an aircraft in flight, or when such an act is about to be committed, the contracting states shall take all appropriate measures to restore control of the aircraft to its lawful commander, or to preserve his control of the aircraft.

In the cases contemplated in the preceding paragraph, the contracting state in which the aircraft lands shall permit its passengers and crew to continue their journey as soon as practicable and shall return the aircraft and its cargo to the person lawfully entitled to possession.<sup>151</sup>

The powers and duties of the states are covered under Articles 12-15 of the Convention. The contracting state is obliged to allow the aircraft commander to disembark passengers for safety reasons,<sup>152</sup> and upon the delivery of an offender, to institute an inquiry into the offence immediately,<sup>153</sup> paying due regard to the general interests of air navigation so as to avoid the unnecessary delay to the aircraft, passengers, crew, or cargo.<sup>154</sup> Although the contracting state is bound to take hijackers into custody, which is to continue until any prosecution or extradition proceedings take place,<sup>155</sup> the Convention contains no obligation actually to prosecute, or extradite.

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<sup>147</sup>Ibid., Article 1(3).

<sup>148</sup>Ibid., Article 3.

<sup>149</sup>Ibid., Article 6.

<sup>150</sup>Ibid., Article 1.

<sup>151</sup>Ibid., Article 11(2).

<sup>152</sup>Ibid., Article 12.

<sup>153</sup>Ibid., Article 13(4).

<sup>154</sup>Ibid., Article 17.

<sup>155</sup>Ibid., Article 13(2).



Although the Tokyo Convention attempts to deal with hijackings, it has, nevertheless, been criticized. The main criticism is: (1) the Convention fails to list any offences which the state is required to suppress and to impose any obligations involving the prosecution of extradition of offenders; (2) the convention lacks in any attempt to develop a system of priorities governing the order in which several possible criminal jurisdictions, including the one given to the state of aircraft registry, can be exercised; (3) the text adopted in Tokyo contains no provision dealing with double jeopardy, or *ne bis in idem*; and (4) the convention is silent on the question of aircraft under bare hull character to a national of a state other than the state of registry.<sup>156</sup>

### **(B) The Convention for the Suppression of Unlawful Seizure of Aircraft Signed at the Hague on 16 December 1970**

The Hague Convention of 1970 arose for two essential reasons; first, the menacing dimensions of aerial hijacking throughout the 1960s; and second, the demonstrated inadequacy of anti-hijacking provisions enacted in the Tokyo Convention, 1963. The formal preparation of the Hague Convention began in 1968, with a request by the ICAO Assembly that the ICAO Council study the threat of aerial hijacking as soon as possible, in view of the fact that Article 11 of the Tokyo Convention did not clearly provide a complete remedy. The ICAO Council subsequently referred the matter to its legal committee, which produced a draft treaty that was ultimately adopted at a diplomatic conference of the ICAO on 16 December 1970.<sup>157</sup>

The Hague Convention opens by a definition of the offence of "unlawful seizure of aircraft". According to Article 1, any person who - on board an aircraft in flight -

- (a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of that aircraft, or attempts to perform any such act, or
- (b) is an accomplice of a person, who performs or attempts to perform any such act, commits an offence.

Under Article 2 of the Convention, each contracting state is to make the offence "punishable by severe penalties". An offence under this convention is deemed to have been committed from the time the doors of the aircraft are shut until they are opened again for disembarkation.<sup>158</sup> Each contracting state is also obligated, under Article 4, to take steps to establish its legal jurisdiction over the unlawful seizure of aircraft and any other act of violence against passengers or crew committed in connection with hijacking - particularly when the offence is committed on board an aircraft registered in that state, or when the

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<sup>156</sup>See comment on Air Safety, *JALC*. vol. 61, 1995-96, p. 512. Also see Boyle and Pulsifer, n. 142, p. 330.

<sup>157</sup>The Convention for the Suppression of Unlawful Seizure of Aircraft was signed at the Hague on 16 December 1970, see ICAO Doc. 8920.

<sup>158</sup>*Ibid.*, Article 3(1) of the Hague Convention.

hijacked aircraft lands in that state with the hijacker still on board. This is a step forward in establishing the universality of jurisdiction.

Under Article 6 of the Convention, each contracting state is required to take the hijacker into custody for the purpose of criminal or extradition proceedings and to notify interested states to that effect. Under Article 7, the state in whose territory the hijacker is found, if it does not extradite him, is obliged "without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offences of a serious nature under the law of that state." Article 7 seeks to render into treaty the obligation *aut dedere, aut punire* in the case of a hijacker.

Article 8 of the Convention attempts to deal with the difficult issue of extradition, raised by the establishment of the alternative obligation to extradite, if the state in which the hijacker is found should decide not to refer the hijacker to its criminal authorities for prosecution within that state. It declares that hijacking is "deemed to be included as an extraditable offence" in any extradition treaty existing between the contracting states, and that it is to be expressly included as an extraditable offence in any new extradition treaty between the contracting states.<sup>159</sup> Where no extradition treaty is in force between two contracting states, then - under Article 8(2) - any one of the contracting states may, at its option, consider the Hague Convention as the legal basis for extradition in response to a request from the other state.

Article 9 of the Hague Convention restates with some minor changes the basic international legal obligation to an aircraft, and its passengers and crew in distress - which has been restated from the existing customary international law and which, under Article 11 of the Tokyo Convention 1963, is reaffirmed once more as an obligation of all the contracting states under the convention in the case of aircraft hijacking. The new Article 9(2) of the Hague Convention requires the contracting states to facilitate the continuation of the journey of the passengers and crew as soon as practicable.

The other important provisions of the Convention include: assistance between the contracting states in connection with criminal proceedings; information to the ICAO by the contracting states in tracking the circumstances of the offence, measures taken in relation to the offender, etc; provisions for negotiations and, then failing that, arbitration in the event of a dispute between two or more contracting states; and the instrument of ratification and provisions relating to the denunciation.<sup>160</sup>

### **(C) Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation Signed at Montreal on 23 September 1971**

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<sup>159</sup>Ibid., Article 8(1).

<sup>160</sup>Ibid., Article 10-14.

The Tokyo Convention does not define specific offences, but the Hague Convention, concerned only with the specific offence of unlawful seizure of aircraft, has defined them. The Montreal Convention, dealing with various acts against the safety of civil aviation, adopts the enumerative approach in the definition of the offence. The Montreal Convention follows the general plan of the Hague Convention, creating a wider jurisdiction over offences specified in the convention and imposing the requirement of either extradition or prosecution of criminal offenders on the part of the contracting states.<sup>161</sup>

The offence of unlawful acts against civil aviation is defined in the opening provision of the Montreal Convention. Under Article 1.1 of the Convention, any person is deemed to have committed an offence if he unlawfully and intentionally:

- (a) perform an act of violence against a person on board an aircraft in flight and if the act is likely to endanger the safety of that aircraft;
- (b) destroys an aircraft in service or causes damage to such aircraft, which renders it incapable of flight, or such aircraft, which renders it incapable of flight, or which is likely to endanger its safety in flight;
- (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or cause damage to it which renders it incapable of flight, or cause damage to it which is likely to endanger its safety in flight; or
- (d) destroys or damages air navigation facilities, or interferes with their operation, and if any such act is likely to endanger the safety of aircraft in flight; and
- (e) Communicates information which he knows to be false, thereby endangers the safety of an aircraft in flight.

Article 1(2) of the Convention goes on to penalize the attempt to commit any of these offences and also punishes accomplices of persons committing or attempting to commit the offences. Under Article 3 of the Convention, each contracting state is to make the offence punishable by severe penalties.

Article 5(1) of the Convention ordains every contracting state to establish its jurisdiction - when the offence is committed in its territory against or on board an aircraft registered in that state; and when the aircraft, on board which the offence is committed, lands in its territory with the alleged offender still on board. Each contracting state is required beyond this to establish its jurisdiction in cases defined in Article 1, wherein the offender is present in its territory and it does not extradite him pursuant to the Convention (Article 5(2)).

Under Article 7, a contracting state in which the offender is found, if it does not extradite him, is obliged - "without exception whatsoever and whether or not the offence was

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<sup>161</sup> G. F. Fitzgerald, "Unlawful Interference with Civil Aviation", in Arnould Kean, ed., **Essays in Airlaw** (The Hague, 1982), pp.59-76, at p.62.

committed in its territory, to submit the case to its competent authorities for the purpose or prosecution". Article B of the Montreal Convention has the same basic provisions as included in the Hague Convention of 1970, to treat offences under the Convention as extraditable offences.

Under Article 10, the contracting states shall, in accordance with international and national laws, endeavor to take all practicable measures for the purpose of preventing the offences mentioned in Article I. The contracting states shall one another the greatest measure of assistance in connection with criminal proceedings brought over the offences. The law of the state, if required, shall apply in all cases. (Article 11 (71)).

Under Article 13 of the Convention, each contracting state shall, in accordance with its national law, report to the ICAO Council relevant information as stated in the Hague Convention. Article 14 of the Montreal Convention follows again the Hague Convention, regarding dispute settlement, arbitration, ratification, etc.

#### **(D) A Critical Review of the Tokyo-Hague and Montreal Conventions**

If the Tokyo Convention of 1963 can fairly be described as purely historical in its practical significance, the latter conventions of the Hague and Montreal do attempt to impose sanctions on the individual hijacker or aircraft, saboteur, by requiring the contracting states either to extradite the offender when they find him within their territory, or themselves to move the punish the offender. But, there are several important gaps in the coverage of these conventions. First, the host state, which receives the hijacker or saboteur but does not extradite him, is bound under the Hague and Montreal conventions only to submit his case to its competent authorities for prosecution. But there is no guarantee that prosecution will in fact follow; and also no provision exists for any follow-up under the two conventions with any degree of diligence or good faith exercised by the host state in actually ensuring that there will be prosecution and subsequent punishment of the offender. Second, there is no provision under the Hague and Montreal Conventions for possible sanctions against a contracting state, which wilfully or negligently fails to honor its obligation under the conventions to either extradite or prosecute.

It is only an accident of history that the two conventions have been drafted on subjects so closely related that they should instead have been handled in one single instrument. The two conventions also have very similar provisions on the jurisdiction, custody, prosecution and extradition of alleged offenders, submission of relevant information to the ICAO, settlement of disputes and arbitration, ratification, and denunciation of the conventions. But, it was due to a sense of urgency and strong political will on the part of the states to find an early solution that the unlawful seizure of aircraft and the sabotage of aircraft or air navigation facilities were separated.<sup>162</sup>

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<sup>162</sup>M. Milde, "Law and Aviation Security", in T.M. Zwaan and M.M.J. Mendes, eds, **Air and Space Law : De Lege Ferenda** (Dordrecht, 1992), pp. 93-98, at p. 95.

According to V.S. Mani, the major points of distinction between the Tokyo, the Hague and Montreal Conventions are:

- (a) The Tokyo Convention targets offences committed on board an aircraft in flight under national laws, whereas the latter conventions focus on acts against the safety of civil aviation;
- (b) The Tokyo Convention is still haunted by the ghost of traditional extradition law, i.e. the political offences exception, which most certainly renders its practical utility almost marginal.
- (c) The Hague-Montreal regime attempts for the first time in the history of international law to create an obligation on the part of a state to prosecute or extradite an offender or a person accused of an offence. There is a clear obligation for the state to take effective steps to prosecute him if it decides not to extradite him. There is no such provision in the Tokyo Convention.
- (d) The ICAO Council under the Hague-Montreal regime is given a supervisory role, perhaps in view of its overall responsibilities in civil aviation, pursuant to Article 44 of the Chicago Convention. The Tokyo Convention lacks such explicit organizational link.<sup>163</sup>

**E) The Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, (Supplementary to the Montreal Convention 1971) signed at Montreal on 24 February, 1988**

This Protocol was adopted by a diplomatic conference in Montreal on 24 February 1988. It extended the definition of the term "offence" given in the 1971 Montreal Convention to include certain specified acts of violence at airports serving international civil aviation, if such acts endanger or are likely to endanger the safety of such airports. The contracting states have undertaken to make these offences punishable by severe penalties. The Protocol also contains provisions on jurisdiction.<sup>164</sup>

The main criticism against the Protocol is that the unlawful acts of violence committed at international airports are clearly located in the territory of a particular state, and that there is no vacuum in the substantive criminal law, or the rules of jurisdiction, which could not be solved otherwise by an international instrument. Thus, the real purpose of the protocol would be limited to rare, marginal cases, when a perpetrator of violence at an international airport escapes and is eventually apprehended in another state, and that state

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<sup>163</sup>V.S. Mani, "Aviation Security, International Terrorism and the Indian Response", in S. Bhatt, V.S. Mani, and V.B. Reddy, eds, **Air Law and Policy in India** (New Delhi, 1994), pp. 365-84 at p. 370.

<sup>164</sup>The Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation signed at Montreal on 24 February 1988. For text see ICAO Doc. 9518.

would be obliged under the protocol to prosecute or extradite such offender.<sup>165</sup> On the other hand, a case such as the bomb blast that took place at Madras Airport in 1984 was clearly the handiwork of a foreign terrorist organization aimed at causing unlawful interference with civil aviation by violence at the airport.

**(F) Convention on the Marking of Plastic Explosives for the Purpose of Detection Signed at Montreal on 1 March 1991**

The latest effort to unify and develop international air law against crime is the convention on the marking of plastic explosives for the purpose of detection. Plastic explosives present a greater danger, partly because of their vast destructive power even in minute quantities and partly because they are difficult to detect. This was proved when Pan Am Flight 103 exploded over Lockerbie on 21 December 1988. Immediately after this incident, the ICAO and its various committees - including the Committee on Unlawful Interference (CUI), the ad hoc group of specialists on the detection of explosives established by the ICAO Council, and the ICAO legal committee - and ICAO Resolution A 27-8 adopted the convention on the Marking of Plastic Explosives for the purpose of detection on 1st March 1991.<sup>166</sup>

The Explosives Convention consists of two parts: the body of convention proper, which contains the main objectives of state parties, and a technical annex, described as an integral part of the convention with technical elements. The main obligations of the parties to the Convention are set out in Articles II to IV and contain mainly two sets of obligations concerning unmarked plastic explosives. One obligation prohibits the manufacture of unmarked explosives and requires the states to control their possession and transfer. The second obligation is related to eventual phasing out/destruction of such explosives to be replaced by explosives mixed with specified detection agents.<sup>167</sup>

Under Article II, each state shall take necessary and effective measures to prohibit and prevent the manufacture, in its territory, of unmarked explosives. This will encompass legislative action as well as practical measures going beyond the mere enactment of legislation to prevent such manufacture. Likewise, Article III obligates each state to take necessary and effective measures to prohibit and prevent the movement, into or out of its territory, of unmarked explosives. However, there is an exemption in respect of movement for purposes not inconsistent with the objectives of the Convention by authorities of a state performing military or police functions [Article 11(2)]. The obligation of the state over the existing stocks is "to exercise strict and effective control over the possession and transfer of

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<sup>165</sup>See Milde, n. 159, p. 96.

<sup>166</sup>See ICAO Doc 9571; also see R.D. Van Dam, "A New Convention on the Marking of Plastic Explosives for the Purpose of Detection", *Air Law*, vol. 16, 1991, p. 167.

<sup>167</sup>164. See J.V. Augustin, "The Role of ICAO in Relation to the Convention on the Marking of Plastic Explosives for the Purpose of Detection", *AASL*, vol. 17-2, 1992, pp. 33-62.

possession of unmarked explosives which have been manufactured in or brought into its territory prior to the entry into the force of this convention in respect of that state, so as to prevent their diversion or use for purposes inconsistent with the objectives of this convention".<sup>168</sup>

The Convention then draws a distinction between existing stocks held by the authorities of a state performing military or police functions, and those not held by such authorities. Of the latter, Article IV(2) obliges the state to take the necessary measures to ensure that they are destroyed or consumed for purposes not inconsistent with the objectives of this Convention, or marked or rendered permanently ineffective within three years after the enforcement of the Convention in that state. For the existing stocks held by authorities performing military or police functions, however, the time limit is 15 years. Article IV (3), and IV(4) seek the destruction of all unmarked explosives, which are not referred to in this article. The possession and transfer of explosives referred to in Para II of Part I of the technical annexe must be strictly and effectively controlled. [IV (5)]

Article V of the Convention creates an International Explosives Technical Commission as a new subsidiary organ of the ICAO Council. The functions of the Commission include: to evaluate technical developments in the manufacture, marking and detection of explosives; report its findings to the states and international organizations; and supervise the implementation of the convention, with authority to recommend to the Council amendments to the technical annexes of the convention (Article VI).

There is a need to have an annex, which would be subject to a simpler and more flexible amendment procedure than the convention itself, in order to facilitate a quick response in matters such as the development of new additives and new methods of making explosives. A general formulation of the explosives so covered, as stated in Article I(1) of the Convention, is "explosive products commonly known as plastic explosives, including explosives in flexible or elastic sheet form as described in the technical annex". Annex in Part I...1 provides a detailed description of these explosives. Part I.11 lists explosives which, although meeting the definition in Para 1, are not generally to be considered as explosives for the purpose of the Convention. The excluded explosives include inter alia those means for research, training in explosives detection, and forensic science purposes. Part II lists detection agents, of which there are four, intended to enhance detectability by means of vapors analysis of the explosives covered.

### **Aviation Security FAQ by ICAO**

#### **Why do security controls vary from airport to airport?**

ICAO sets minimum standards to be met by Member States in all fields of international civil aviation, including aviation security. States must comply with these baseline standards, but

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<sup>168</sup>Ibid., p. 60.

they may also add measures according to national requirements based on risk assessments. As a result, national and regional variations in the type of security controls can emerge.

**Why do I have to remove my footwear at the security checkpoint?**

Depending on the location, authorities may require that passengers remove their shoes because prohibited items can be embedded inside. Some prohibited items may not be revealed by a walk-through metal detector.

**Why are children not excluded from a hand search (pat down)?**

All passengers are subject to security controls as well as enhanced or secondary controls in certain circumstances. No category of passenger can be excluded from screening because this potentially could leave them open to exploitation by terrorists. Where children are concerned, parents are normally allowed to remain present during a hand search.

**Does the baggage I check in at the airport undergo a security check?**

Everything that is loaded on an aircraft for an international flight, including hold baggage, is inspected according to national requirements that must meet the baseline standards set by ICAO.

**I had a bad experience going through security. What can I do about it?**

You can inform the relevant national authority about your unpleasant experience, preferably in writing, with a request for a reply. Generally authorities responsible for aviation security want to be aware of passenger concerns.

**Is airline food inspected prior to boarding?**

All items to be loaded on an aircraft engaged in commercial passenger transport have to be inspected beforehand. With regard to items supplied by caterers, carts and their contents are examined for restricted items or signs of tampering before they are dispatched to the aircraft. Carts and containers are secured in some cases with tamper-evident seals following inspection.

**Are pilots and flight attendants checked at security?**

Flight crew members must be subjected to security measures. This process is usually not apparent to passengers, however, because flight crew typically use a separate checkpoint.

**Why does airport security sometimes open hold baggage?**

All baggage must undergo a security check. Whenever detection equipment raises an alarm, the bag is given special attention. If the alarm cannot be resolved by a simple examination, it may be necessary for authorized personnel to open the bag and physically inspect its contents.

**My friend was told by a flight attendant to “tone it down”. Did he have to comply?**

Cabin crew have the authority to intervene whenever a passenger’s behaviour is judged to be unruly, causing discomfort to others. This authority is given to crew members under the Tokyo Convention of 1963.



**MODULE III**

**ANTI-HIJACKING,  
AVIATION  
TERRORISM AND  
GLOBAL  
REGULATIONS: AN  
OVERVIEW**



## **MODULE III**

### **ANTI-HIJACKING, AVIATION TERRORISM AND GLOBAL REGULATIONS: AN OVERVIEW**

#### **INTRODUCTION**

Hijacking means illegally seize (an aircraft, ship, or vehicle) while in transit and force it to go to a different destination or use it for one's own purposes. The terrorist attacks of 11 September 2001 marked the start of a new period in modern history. This period is one characterized by instability, unpredictability, and the re-shaping of complex systems, including both traditional and new types of challenges and threats. Of particular significance in the last and most dangerous category is beyond any doubt, the emergence of terrorism as a truly global threat. It has to be kept in mind that terrorism, as an independent and self-reproducing socio-political phenomenon of violence, can be seen throughout the history of human civilization. However, in the twenty-first century, terrorism has evolved into a major geopolitical factor, capable of causing a systemic crisis at the global level.

The history of criminal acts against civil aviation has long coincided with the history of civil aviation. The first recorded hijacking was in 1931 when Peruvian Revolutionaries commandeered a Ford Tri-motor. In 1937, terrorists planted a bomb on the Hindenburg Zeppelin, exploding it at Lakehurst, New Jersey.<sup>169</sup> The first hijacking of a commercial aircraft was in 1948, resulting in the crash of a Cathay Pacific aircraft in the Ocean near Macau. As the rising number of incidents and the inability to obtain jurisdiction over a substantial number of criminals who jeopardized the safety of international civil aviation and often exacerbated international relations, the international community began to establish international solutions. Taking into account the fact that the safety of civil aviation has been endangered not only by terrorism, but also by many other unlawful acts with different motivations (e.g. pure criminal acts aimed at private gain, refugees, insane or mentally deranged persons), the solutions have been consisted of security programmes in the legal and technical fields.<sup>170</sup> These are essential and necessary to combat and prevent acts of unlawful interference against civil aviation.

The concept of 'terrorism' is of utmost significance, due to its contemporary nature. It is now taken a novel dimension, and has intensified in degree, outreach as well as frequency. It becomes particularly important in light of the fact that new issues arise on a daily basis, which needs constant deliberation like this form and pondering for solutions through counter-terrorism measures. Terrorism is one of the major problems facing the world at the end of the 20th century. The problem has been raised vigorously at various national and international fora. Terrorism, of course, is not a recent phenomenon. It has been present throughout

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<sup>169</sup> Paul Dempsey & Laurence Gesell, *Air Transportation: Foundations for the 21<sup>ST</sup> Century* 25-29(1997).

<sup>170</sup> Gero, D. (1997). *Flights of terror*. Somerset, UK: Haynes Publishing.p 54.

history. It originated in the conspiracies within the royal courts for capturing power. But developments in the modern age have changed the entire concept. Systematic terrorism in its modern form received great impetus in the late 18th and 19th centuries with the propagation of secular ideologies and nationalism in the wake of French revolution.

Most of the terrorist groups today are transnational terrorist organizations, structured and trained to cause mass destruction either motivated by religious, political or idealistic conflicts. The associated issue which arises is the proliferation of weapons of mass destruction and nuclear warfare and the illegal methods of raising finances.<sup>171</sup> Since 2007, Iraq has faced the relation of harboring extremists and has faced multiple bombings reducing the country to a barren land. Most of the attacks in Iraq and Afghanistan have used unconventional modes of warfare including chemical weapons, acid attacks, anthrax laced letters, sarin nerve gas attack and explosion of chlorine tanks.<sup>172</sup> Thus the forms and modes of terrorist attacks have undergone a sea change in the past decade.

### **Causes of Terrorism**

Understanding the root causes of terrorism is of utmost importance because only upon such understanding, will we be able to carve out methods to address the issue. Not knowing the cause will not lead to any solution to the problem. While there is no straight jacket formula to determine the exact causes of terrorist activities, the paper has identified the following as the major causes of violent and terrorist activities:

Supportive Infrastructure, State Sponsored, Majority-minority clash, Unrest in neighboring countries, Revenge and Miscellaneous causes including poverty, lack of education, etc.<sup>173</sup> That is the primary reason why the South Asian nations also focus on economic integration, and prioritize this over anti-terrorism integration.

### **Categories of Terrorist activities**

The terrorists orchestrate and indulge into different kinds of violence, depending upon the motive and the object of such activities. Categories of terrorism may be varied, depending up the scope and extent; type of violence; parties to it, etc. The paper chose to discuss the following types of terrorism activities: Nationalist terrorism, Religious terrorism, State sponsored, Left-Wing Extremism, and Right Wing Extremism

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<sup>171</sup> Raphael F. Perl, "International Terrorism: Threat, Policy, and Response", January 3, 2007, CRS Report for Congress, p. 5.

<sup>172</sup> Wm. Robert Johnston, "Chemical weapon terrorism in Iraq and Afghanistan", 3 September 2012, Accessed from <http://www.johnstonsarchive.net/terrorism/wmdterrorism-1.html>

<sup>173</sup> James A Piazza, 'Poverty, Minority Economic Discrimination, and Domestic Terrorism', Journal of Peace Research-ch, 2011; also available here: <http://www.personal.psu.edu/jap45/Piazza%20Poverty%20Minority%20Economic%20Discrimination%20and%20Domestic%20Terrorism%20JPR.pdf>.

## **Impact of Terrorism**

Terrorism has repercussions on various aspects of life of an individual as well as the State. The most crucial consequences have been detailed as follows: Political Structures, Economic Development & Growth, Human Rights, Instrument for other crimes, Miscellaneous effects include, obstacles for cooperation between countries specifically during external or cross border terrorism, general harm to peace in a State, destabilizes democracy, threatens 'social development' of a country, etc.

"Terrorism destabilizes Governments, undermines civil society, jeopardizes peace and security, and threatens economic and social development," Ms. Pillay said.

She noted that an effective response required Member States to adopt a holistic and integrated approach that protected human rights and respected the rule of law. In her view, strategies that were not anchored by those fundamental principles could prove counterproductive. The Office of the UN High Commissioner for Human Rights (OHCHR) had received allegations of human rights violations in the counter-terrorism context, such as extrajudicial killings, enforced disappearances and torture. "Such practices can give rise to a sense of injustice and persecution that is dangerously corrosive of the values that bind a nation together," Ms. Pillay said. Ms. Pillay also spoke of specific areas of concern for her Office. She said that authorities in some jurisdictions were using broad and abusive counter-terrorism laws to curb otherwise legitimate activity, at times intended to "stifle the voices of human rights defenders, journalists, minorities and indigenous peoples."

Authorities might also resort to administrative detention, control orders, terrorist listings, and the use of immigration and deportation laws to bypass the criminal justice system. Such practices presented challenges to due process, including the right to a fair trial.

Respecting the rights to freedom of expression and opinion, of assembly and association had also proven challenging in countering incitement to commit terrorist acts. When it came to preventing terrorism, it was important to understand and tackle conditions that might lead to violent extremism and radicalization.

Reasons for involvement in acts of terrorism varied between men and women. However, both were part of the solution. Member States should therefore integrate more women into law enforcement and security and take their views into account when developing counter-terrorism strategies. Another area of concern related to States' use of security surveillance measures without adequate safeguards to protect the right to privacy. Governments could gather and protect information, Ms. Pillay said, but they must comply with international human rights law in doing so.

## International Legal Regime for Aircraft Hijacking

The constant increase in the incidents of hijacking and acts against the safety of civil aircraft presented a very serious problem before the members of the international community and in particular the members of the International Civil Aviation Organizations (ICAO). In order to solve this problem and ensure punishment to the hijackers, the Tokyo Convention was adopted in 1963, which came into force in 1969.<sup>174</sup> However the Tokyo Convention has failed to solve the problem and the number of incidents of hijacking continued to increase.<sup>175</sup>

The legal instruments are based on several multilateral Conventions drafted under the auspices of ICAO and several air security Agreements or Resolutions adopted out the ICAO auspices, including the "European Convention" and "Bonn Declaration". The legal instruments have mainly focused on how to get rid of the safe havens for unlawful actors, secure the safety of passengers, crew, and facilitate the resumption of affected aircraft. In particular, considering the fact that the Tokyo, Hague and Montreal Conventions, the Montreal Protocol, and the Montreal Convention of 1991 continue to rank among the most widely accepted international Conventions and the fact that this trend demonstrates that each State recognizes the importance of aviation security, these legal instruments seem to have established a new international aviation security culture which could force each State to show good will as a sound member of the international community in the fight against aviation terrorism and this could lead to air transport isolation against a State that failed to do so, without a uniform and universal enforcement system for the Conventions.<sup>176</sup>

One of the major shortcomings of the Tokyo Convention was that it failed to declare the act of hijacking to be a crime under International Law. This was because of the agreement during drafting of the convention that no attempt should be made to define penal offences.<sup>177</sup> Clearly this has political undertones at play.

In December 1970, The Hague Convention was signed wherein State Parties would get jurisdiction over the hijacker and it would thus become difficult for the hijacker to escape the process of law. However despite of this convention, there was no decrease in the number of hijacking incidents. In order to counter this terrorist threat, there was a need to evolve a more effective means to suppress the crime of hijacking. The Montreal Convention for the Suppression of Unlawful Acts, Against the Safety of Civil Aviation, 1971<sup>178</sup> was signed

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<sup>174</sup> *Convention on Offences and Certain Other Acts Committed on Board Aircraft* signed in Tokyo in 1963, International Civil Aviation Organization Doc. 8364

<sup>175</sup> Edward McWhinney, *Aerial Piracy and International Terrorism, The illegal Diversion of Aircraft and International Law*, 2nd ed. (Dordrecht, the Netherlands ; Boston: Martinus Nijhoff, 1987) at p 128.

<sup>176</sup> See Narinder Aggarwala, "Political Aspects of Hijacking" in *Air hijacking: An International Perspective* (New York: Carnegie Endowment for International Peace, November 1971, No.585) p 8.

<sup>177</sup> Dawson, H. (1987). Civil aviation, hijacking and international terrorism: An historical and legal review. *International Business Lawyer*, 15, 57-72.

<sup>178</sup> *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation* signed in

wherein parties were now not only responsible for terrorist acts aboard aircrafts but were also required to provide for deterrent punishment for the crime of hijacking. A protocol supplementary to the Montreal Convention stipulated that severe penalties for unlawful international acts of violence against persons at an airport serving international civil aviation which causes or is likely to cause serious death or injury or death or destruction or serious damage to the facilities or disruption of the service at such airports.<sup>179</sup>

### **Hijacking for Retention**

Passengers on board of an airplane are the primary objects of this category of actions. The aim is to achieve political, propaganda, and psycho-logical effect (show of force and presence; pressuring state structures and public opinion; attraction of maximum attention; compliance with conditions and demands). A classical act of terror in the form of the forcible seizure of hostages on board of an air-craft and a demonstrative threat to their lives poses a practically unsolvable political and moral-psychological dilemma for the state, which is faced with the necessities of suppressing terrorism and saving the lives of hostages as diametrically opposite tasks. As effective means of pressure, this form of terror provides terrorists with an ample “window of opportunity,” following which they are in a position to attain their goals.

There are tens of episodes where the hijacking of passenger airliners has been committed for the above-mentioned considerations. One example took place in November 1991, when a group headed by Shamil Basayev seized an Aeroflot Tupolev-154 air-liner at the Mineralniye Vody airport and hijacked it to Turkey, establishing as a precondition for the release of the hostages the cancellation of the state of emergency that had been imposed by the Russian government in the Chechen-Ingush Autonomous Re-public.

### **Hijacking for Movement**

The airplane as a means of transportation is the primary target of this category of actions, with passengers acting as an additional factor enhancing safety guarantees for terrorists. The aim is to ensure the movement of terrorists from a territory that they are restricted or prohibited from exiting for some reason to another geographical point. In this category, seven acts of seizure of passenger airliners were committed in the USSR in 1990 alone in an effort to leave the country on the grounds of personal, political, or economic motivation. In some countries, this category of terror acts remains a marginal method of the migration of individuals, taken separately, or of small groups of persons with identical ideas. In particular, thirteen cases of hijacking of passenger airliners to Taiwan were registered in China from 1993–98.

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Montréal in 1971, International Civil Aviation Organization Doc. 8966 hereinafter known as the ‘Montreal Convention’.

<sup>179</sup> Supra n.2 p 4.

In March–April 2003, two Antonov-24 passenger planes were hijacked from Cuba to Florida. In some cases, acts of terror of this sort end with grave consequences that were unexpected by the organizers. In particular, the seizure and hijacking of an Ethiopian Airlines Boeing 767 in November 1996 by a group of separatists, owing to the inadequate training of the terrorists, ended with a crash-landing into the Indian Ocean off of the Comoros Islands, and the subsequent death of 125 passengers and crew members.

### **Hijacking for Annihilation/Destruction**

Using an aircraft itself as a weapon for hitting a previously selected target is a primary object of this category of actions; passengers act as a factor, ensuring that an additional level of overall damage will ultimately result from the attack. The aim is to incur direct material damage to an adversary, in combination with collateral political and psychological damage. This category of actions is directly attributable to the parameters of asymmetrical warfare. The first operational precedent occurred in December 1994, when gunmen from the Algerian terrorist organization Armed Islamic Group (GIA) captured an Air France Airbus A-300 with 240 people on board in an attempt to explode it over Paris. It was a rescue operation at the intermediate landing point in Marcel mounted by a SWAT team that helped avoid potentially grave consequences.

In October 2002, terrorists attempted to hijack a Saudi Airlines Airbus A-320 with the purpose of crashing it into a U.S. air base at Al-Udeid in Qatar. The culminating mega-terrorist attack within this category was the capture of four passenger airliners on 11 September 2001 and their subsequent use as cruise missiles against targets in Washington, D.C. and New York City. It should be noted that, despite heightened safety measures at airports and the introduction of appropriate technologies, the threat of this absolute use of aviation terrorism does not decrease, but rather increases. An eloquent testimony to this fact is the information that has been gathered about Al Qaeda operatives' testing of innovative techniques of seizing and hijacking airplanes, aiming to realize in practice a form of kamikaze (airplane as a delivery vehicle, suicide pilot as guidance unit). That is why it is not surprising today to see SAM firing units and radar arrays in capitals around the world, from Washington to Colombo, to thus protect key government facilities against "uninvited guests."

### **Principle of Universal Jurisdiction**

Soon after the aircraft was invented, the question of problems over crimes committed in aircraft and which law should apply had to be considered. One of the early pioneers of air law, French Jurist P Fauchille, discussed the question of which state had the competence to exercise jurisdiction over offences and other acts occurring on board aircraft in flight. As



mentioned earlier, various international meetings were conducted during the many stages of the development of civil aviation.<sup>180</sup>

Currently the principle of Universal Jurisdiction has already been recognized in respect of the crime of piracy and war crimes. Since hijacking is generally described as aerial piracy, the logical extension should be that the principle of Universal Jurisdiction should also apply in respect of the crime of hijacking. The abovementioned Hague and Montreal Conventions have given a long way to confer Universal Jurisdiction, to a great extent, on all states.

If an offender or an alleged offender is within the territory of a state, both Conventions contain provisions for him to be taken into custody and if he is not extradited, for his case to be placed before the prosecution authorities. Although neither the Convention creates a duty to extradite nor an inescapable duty to prosecute, authorities are nevertheless under a duty to take their decision in the same manner as in the case of an ordinary offence of a serious nature under the law of the state. <sup>181</sup> The handling of hijackings has the preventive and crisis management aspects of all terrorism-related offences, plane hijacking is the easiest to prevent through thorough physical security at the airport. The prevention drill involves evaluation of the psychological profile of the passenger at the time of his checking-in through carefully-framed questions; x-ray of the checked- in baggage and, if necessary, their identification by the passenger before they are loaded; X-Ray of hand baggage; door-frame metal detector tests of passengers; their personal search; and ladder point checking by the airline staff to neutralize dangers due to negligence of the airport security staff or their complicity with the hijackers.<sup>182</sup>

### **Efforts of the United Nations**

The United Nations has consistently addressed the problem of terrorism, taking both legal and political steps. In the legal sphere, the U.N. and its specialized agencies have developed a network of international agreements that constitute the basic legal instruments against terrorism. In the political sphere, the General Assembly adopted in 1994 the Declaration on Measures to Eliminate International Terrorism, which condemned “all acts and practices of terrorism as criminal and unjustifiable, wherever and by whomever they were committed.” The Assembly urged states to take measures at the national and international level to eliminate international terrorism. The General Assembly of the United Nations set up a ad hoc committee on International Terrorism in 1972. In 1979 the Assembly adopted a Convention against the Taking of Hostages.

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<sup>180</sup> Sir Richard Wilberforce, ‘*Crime in Aircraft*’, 67, Journal of the Royal Aeronautical Society, March (1963), P 75.

<sup>181</sup> Supra n.2, p 14.

<sup>182</sup> Dugan, L., LaFree, G., & Piquero, A. R. (2005). TESTING A RATIONAL CHOICE MODEL OF AIRLINE HIJACKINGS. CRIMINOLOGY, 43, 1031-1065.

## **Legal Basis for Action against International Terrorism**

The legal basis for action against international terrorism is provided by some of the fundamental principles of international law, namely, sovereign equality, prohibition of force, non-intervention, and respect for human rights. Every state has an “obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states”. The Friendly Relations Declaration adopted by the UN General Assembly in 1970 specifically applies this rule in the contexts of the principles of prohibition of force and non-intervention, and proclaims the duty of every state to refrain from organizing, assisting, instigating, financing or participating in terrorist acts in another state.

### **Duty of the State:**

It is time that terrorism is Recognized as an offence of *Sui Generis* and it is not always international in nature and motivated by the political aims of the perpetrators In international law the duty of a state (a) to prevent perpetration of a terrorist act against another state, and (b) consequently, also to cooperate with other states in prevention of terrorism and punishment of terrorists. It is this aspect of the principle of international cooperation that has moved the international community to evolving legal instruments for the purpose of combating and punishment of the offences of terrorism in the interests of protection of territorial integrity of states and respect for human rights. In addition to a state's obligation in the matter of subversive activities against other states, a state also has a duty to do all it can to prevent and suppress attempts to commit common crimes against life or property, where such crimes are directed against other states, a state must not itself engage in or support international terrorist acts.

The undertakings or encouragement by the authorities of a state of terrorist activities in another state, or the toleration by the authorities of a state of organized activities calculated to carry out terrorist acts in another state was included by the International Law Commission in its draft Code of Offences against the Peace and Security of Mankind. In the Declaration on the Strengthening of International Security and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among states the General Assembly reaffirmed the duty of states to refrain from organizing, assisting, instigating or participating in terrorist acts in another state. Progress towards general and more binding international an anti-terrorist measure has however been hindered by difficulties over, particular, the definition of “terrorism”.

## **Legal regimes for International Terrorism**

Combating the financing of terrorism is a key tool in the 'war against terror'. After the attack of 9/11 United State has declared the War against terrorism under which it attacked upon Afghanistan – Taliban and Iraq and it is threatening the Iran. Although if we lift the veil and real motive of the America behind these attack it was different from the combating of the

terrorist activities which were running in the Afghanistan under the flag of Taliban by Al-Qaida the head of which the most wanted terrorism of the world is Osama Bin Laden. So when we talk about the combating of terrorism we should study the International Conventions which are into existence for the suppression of the International terrorism. Although there is no as such uniform definition of the terrorism or the terrorist activities by which we can enforce a single law universally for all the terrorists' activities universally or at international level. This is the first major concern of terrorism itself.

The legal basis for action against international terrorism is provided by some of the fundamental principles of international law namely, sovereign equality, prohibition of force, nonintervention and respect of human rights. In international law the duty of a state is to prevent within its borders terrorist activities directed against foreign states.<sup>183</sup> Such a duty was expressed in the Draft Declaration on the Rights and Duties of States 1949<sup>184</sup> and in Friendly Relations Declaration of 1970.<sup>185</sup>

We can divide the laws relating to International Terrorism in the following categories:

1. National Laws
2. Bilateral Treaties
3. Regional Conventions
4. Global or multilateral conventions

### **International Conventions and Treaties**

Prior to the adoption of resolution 1373 (2001) and the establishment of the Counter Terrorism Committee, the international community had already promulgated 12 of the current 16 international counter terrorism legal instruments. However the rate of adherence to these conventions and protocols by United Nations Member States was low.<sup>186</sup>

As attempts to arrive at a comprehensive terrorism convention floundered at various stages, the search for a generic definition was replaced by the elaborated of a framework of conventions that identify specific forms of terrorism. There are 16 such conventions. These conventions do not attempt to define the terrorism, but address specific conduct that may fall within the purview of what is commonly referred to as terrorist activity and set forth a framework of obligations on the states parties, including measures to prevent such crimes and to cooperate in prosecution thereof. Unlike certain other international treaties, they do not themselves purport to criminalize conduct but to impose obligations on states to do so in domestic law.<sup>187</sup> The following list identifies the major terrorism conventions open to ratification by all states. A brief summary is provided in each case of the principal provisions

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<sup>183</sup> Ranbir Singh and Ghansyam Singh, "Human Rights Education, Law and Society", 1st ed., 2004, pp. 230-231.

<sup>184</sup> Article 4 of the Draft Declaration on the Rights and Duties of States 1949.

<sup>185</sup> The Declaration specifically applies this rule in the context of the principles of prohibition of force and nonintervention and proclaims the duty of every state to refrain from organizing, assisting, instigation, financing or participating to terrorist acts in another state.

<sup>186</sup> Security Counter Terrorism Committee, <http://www.un.org/sc/ctc/page5.html>, accessed on 28/09/08.

<sup>187</sup> For example, Convention of Torture, Convention on Genocide or the Geneva Conventions and Protocols.

in each instrument. In addition to the provisions summarized below, most of these conventions provide that parties must establish criminal jurisdiction over offenders (e.g., the state(s) where the offense takes place, or in some cases the state of nationality of the perpetrator or victim):<sup>188</sup>

**1. Convention on Offences and Certain Other Acts Committed On Board Aircraft (Aircraft Convention)<sup>189</sup>**

- Applies to acts affecting in-flight safety;
- Authorizes the aircraft commander to impose reasonable measures, including restraint, on any person he or she has reason to believe has committed or is about to commit such an act, where necessary to protect the safety of the aircraft; and
- Requires contracting States to take custody of offenders and to return control of the aircraft to the lawful commander.

**2. Convention for the Suppression of Unlawful Seizure of Aircraft (Unlawful Seizure Convention)<sup>190</sup>**

- Makes it an offence for any person on board an aircraft in flight to "unlawfully, by force or threat thereof, or any other form of intimidation, [to] seize or exercise control of that aircraft" or to attempt to do so;
- Requires parties to the convention to make hijackings punishable by "severe penalties"
- Requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution; and
- Requires parties to assist each other in connection with criminal proceedings brought under the Convention.

**3. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Civil Aviation Convention)<sup>191</sup>**

- Makes it an offence for any person unlawfully and intentionally to perform an act of violence against a person on board an aircraft in flight, if that act is likely to endanger the safety of the aircraft; to place an explosive device on an aircraft; to attempt such acts; or to be an accomplice of a person who performs or attempts to perform such acts;
- Requires parties to the Convention to make offences punishable by "severe penalties"; and
- Requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution.

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<sup>188</sup> Supra note 61.

<sup>189</sup> Tokyo, 14/09/1963, entered into force on 04/12/1969.

<sup>190</sup> The Hague, 16/12/1970, entered into force on 14/10/1971.

<sup>191</sup> Montreal, 23/09/1971, entered into force on 26/01/1973.

**4. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including diplomatic Agents (Diplomatic agents Convention)<sup>192</sup>**

- Defines an "internationally protected person" as a Head of State, Minister for Foreign Affairs, representative or official of a State or international organization who is entitled to special protection in a foreign State, and his/her family; and
- Requires parties to criminalize and make punishable "by appropriate penalties which take into account their grave nature" the intentional murder, kidnapping or other attack upon the person or liberty of an internationally protected person, a violent attack upon the official premises, the private accommodations, or the means of transport of such person; a threat or attempt to commit such an attack; and an act "constituting participation as an accomplice".

**5. International Convention against the Taking of Hostages (Hostages Convention)<sup>193</sup>**

- Provides that "any person who seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostage within the meaning of this Convention".

**6. Convention on the Physical Protection of Nuclear Material (Nuclear Materials Convention)<sup>194</sup>**

- Criminalizes the unlawful possession, use, transfer or theft of nuclear material and threats to use nuclear material to cause death, serious injury or substantial property damage.

**7. Amendments to the Convention on the Physical Protection of Nuclear Material<sup>195</sup>**

- Make it legally binding for States Parties to protect nuclear facilities and material in peaceful domestic use, storage as well as transport; and
- Provide for expanded cooperation between and among States regarding rapid measures to locate and recover stolen or smuggled nuclear material, mitigate any radiological consequences or sabotage, and prevent and combat related offences.

**8. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Extends and supplements the Montreal Convention on Air Safety) (Airport Protocol)<sup>196</sup>**

- Extends the provisions of the Montreal Convention to encompass terrorist acts at airports serving international civil aviation.

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<sup>192</sup> New York, 14/12/1973, entered into force on 20/02/1977.

<sup>193</sup> New York, 17/12/1979, entered into force on 03/06/1983.

<sup>194</sup> Vienna, 26/10/1979, entered into force on 08/02/1987.

<sup>195</sup> Vienna, 8/07/2005, subject to ratification.

<sup>196</sup> Montreal, 24/02/1988, entered into force on 6/08/1989.

**9. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Maritime Convention)<sup>197</sup>**

- Establishes a legal regime applicable to acts against international maritime navigation that is similar to the regimes established for international aviation; and
- Makes it an offence for a person unlawfully and intentionally to seize or exercise control over a ship by force, threat, or intimidation; to perform an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship; to place a destructive device or substance aboard a ship; and other acts against the safety of ships.

**10. Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation<sup>198</sup>**

- Criminalizes the use of a ship as a device to further an act of terrorism;
- Criminalizes the transport on board a ship various materials knowing that they are intended to be used to cause, or in a threat to cause, death or serious injury or damage to further an act of terrorism;
- Criminalizes the transporting on board a ship of persons who have committed an act of terrorism; and
- Introduces procedures for governing the boarding of a ship believed to have committed an offence under the Convention.

**11. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (Fixed Platform Protocol)<sup>199</sup>**

- Establishes a legal regime applicable to acts against fixed platforms on the continental shelf that is similar to the regimes established against international aviation.

**12. Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf<sup>200</sup>**

- Adapts the changes to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation to the context of fixed platforms located on the continental shelf.

**13. Convention on the Marking of Plastic Explosives for the Purpose of Detection (Plastic Explosives Convention)<sup>201</sup>**

- Designed to control and limit the use of unmarked and undetectable plastic explosives (negotiated in the aftermath of the 1988 Pan Am flight 103 bombing);
- Parties are obligated in their respective territories to ensure effective control over "unmarked"

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<sup>197</sup> Rome, 10/03/1988, entered into force on 01/03/1992.

<sup>198</sup> London, 14/10/2005.

<sup>199</sup> Rome, 10/03/1988, entered into force on 01/03/1992.

<sup>200</sup> London, 14/10/2005.

<sup>201</sup> Montreal, 01/03/1991, entered into force on 21/06/1998.

- Generally speaking, each party must, inter alia, take necessary and effective measures to prohibit and prevent the manufacture of unmarked plastic explosives; prevent the movement of unmarked plastic explosives into or out of its territory; exercise strict and effective control over possession and transfer of unmarked explosives made or imported prior to the entry into force of the Convention; ensure that all stocks of unmarked explosives not held by the military or police are destroyed, consumed, marked, or rendered permanently ineffective within three years; take necessary measures to ensure that unmarked plastic explosives held by the military or police are destroyed, consumed, marked or rendered permanently ineffective within fifteen years; and, ensure the destruction, as soon as possible, of any unmarked explosives manufactured after the date of entry into force of the Convention for that State.

**14. International Convention for the Suppression of Terrorist Bombings (Terrorist Bombing Convention)<sup>202</sup>**

- Creates a regime of universal jurisdiction over the unlawful and intentional use of explosives and other lethal devices in, into, or against various defined public places with intent to kill or cause serious bodily injury, or with intent to cause extensive destruction of the public place.

**15. International Convention for the Suppression of the Financing of Terrorism (Terrorist Financing Convention)<sup>203</sup>**

- Requires parties to take steps to prevent and counteract the financing of terrorists, whether direct or indirect, through groups claiming to have charitable, social or cultural goals or which also engage in illicit activities such as drug trafficking or gun running;
- Commits States to hold those who finance terrorism criminally, civilly or administratively liable for such acts; and
- Provides for the identification, freezing and seizure of funds allocated for terrorist activities, as well as for the sharing of the forfeited funds with other States on a case-by-case basis. Bank secrecy is no longer adequate justification for refusing to cooperate.

**16. 2005 International Convention for the Suppression of Acts of Nuclear Terrorism (Nuclear Terrorism Convention)<sup>204</sup>**

- Covers a broad range of acts and possible targets, including nuclear power plants and nuclear reactors;
- Covers threats and attempts to commit such crimes or to participate in them, as an accomplice;

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<sup>202</sup> New York, 15/12/1997, entered into force on 23/03/2001.

<sup>203</sup> New York, 09/12/1999, entered into force on 10/04/2002.

<sup>204</sup> New York, 13/04/2005, entered into force on 07/07/2007.

- Stipulates that offenders shall be either extradited or prosecuted;
- Encourages States to cooperate in preventing terrorist attacks by sharing information and assisting each other in connection with criminal investigations and extradition proceedings; and
- Deals with both crisis situations (assisting States to solve the situation) and post-crisis situations (rendering nuclear material safe through the International Atomic Energy Agency (IAEA)).

### 4.3 UN Resolutions

"The passing of the resolution on the United Nations Global Counter-Terrorism Strategy with its annexed Plan of Action by 192 Member States represents a common testament that we, the United Nations, will face terrorism head on and that terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, must be condemned and shall not be tolerated."<sup>205</sup>

The event of 11 September 2001 have been ubiquitously characterised and internationally condemned as acts of 'international terrorism'. A proliferation of legal measures ensued, with broad reaching political and legal effect, including Security Council resolution that imposed a wide range of obligations on states to prevent and suppress terrorism. These include ensuring that 'terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.'

In the wake of the 11 September 2001 terrorist attacks in the United States, the United Nations Security Council unanimously adopted resolutions 1368 (2001) and 1373 (2001);<sup>206</sup> the General Assembly adopted resolution 56/1 by consensus, and convened a special session. The Counter Terrorism Committee (CTC) was established by Security Council resolution 1373, which, among its provisions, obliges all States to criminalize assistance for terrorist activities, deny financial support and safe haven to terrorists and share information about groups planning terrorist attacks. The 15-member Counter-Terrorism Committee (CTC) was established at the same time to monitor implementation of the resolution. While the ultimate aim of the Committee is to increase the ability of States to fight terrorism, it is not a sanctions body nor does it maintain a list of terrorist organizations or individuals.

Seeking to revitalize the Committee's work, in 2004 the Security Council adopted resolution 1535, creating the Counter-Terrorism Committee Executive Directorate (CTED) to provide the CTC with expert advice on all areas covered by resolution 1373. CTED was established also with the aim of facilitating technical assistance to countries, as well as promoting closer cooperation and coordination both within the UN system of organizations and among regional and intergovernmental bodies.

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<sup>205</sup> *Sheikha Haya Rashed Al Khalifa, President of the 61st session of the General Assembly Launching the UN Global Counter-Terrorism Strategy on 19 September 2006.*

<sup>206</sup> SC Res. 1373 (2001), 28 September 2001, UN Doc. S/RES/1373 (2001); this resolution also established a Counter – Terrorism Committee to monitor the implementation of the resolution.



During the September 2005 World Summit at the United Nations, the Security Council meeting at the level of Heads of States or Government for just the third time in its history adopted resolution 1624 concerning incitement to commit acts of terrorism. The resolution also stressed the obligations of countries to comply with international human rights laws.

In 2003, The Security Council adopted four resolutions directly related to terrorism. Resolution 1456, drafted by the Foreign Ministers of the Security Council in January, reinforced the Council's commitment to combating terrorism and Resolution 1455 strengthened the mandate of the 1267 Sanctions Committee. Resolutions 1465 and 1516 condemned specific acts of terrorism in Bogotá, Colombia, and in Istanbul, Turkey.

All these resolutions and declarations *inter alia* call upon Member States to take necessary steps to 'prevent and suppress terrorist acts' and also to 'prevent and suppress the financing of terrorist acts'.

#### **4.4 United Nations Declarations<sup>207</sup>**

1. Declaration on the issue of combating terrorism<sup>208</sup>
2. Declaration on the global effort to combat terrorism<sup>209</sup>
3. Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism<sup>210</sup>
4. Declaration on Measures to Eliminate International Terrorism<sup>211</sup> A/RES/49/60

#### **4.5 Counter Terrorism and Related Bodies<sup>212</sup>**

1. 1267 Committee<sup>213</sup>: - its main task was the monitoring the sanctions against the Taliban and subsequently Al-Qaida as of 2000.
2. Counter – Terrorism Committee (CTC): - In 2001, following the September 11 terrorist attacks against the US , the Security Council established a Counter Terrorism Committee also comprising all members of the Security Council by resolution 1373. This obliges Member States to take a number of measures to prevent terrorist activities and to criminalize various forms of terrorist actions, as well as to take measures that assist and promote cooperation among countries including adherence to international counter-terrorism instruments. Member States are required to report regularly to the Counter Terrorism Committee on the measures they have taken to implement resolution 1373.
3. 1540 Committee<sup>214</sup>: - it says that all states should refrain from supporting by any means non-state actors from developing, acquiring, manufacturing,

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<sup>207</sup> <http://www.un.org/terrorism/declarations.shtml>, accessed on 29/09/2008.

<sup>208</sup> S/RES/1456 (2003).

<sup>209</sup> S/RES/1377 (2001).

<sup>210</sup> Supra note 37.

<sup>211</sup> Supra note 41.

<sup>212</sup> Refer to [http://www.un.org/terrorism/sc\\_bodies.shtml](http://www.un.org/terrorism/sc_bodies.shtml), accessed on 29/09/2008.

<sup>213</sup> Established in 1999 by resolution 1267, also known as "Taliban and Al-Qaida Sanctions Committee".

<sup>214</sup> Resolution 1540 (2004) adopted on 28 April, 2004 at SC 4956<sup>th</sup> meeting.

possessing, transporting, transferring or using nuclear, chemical or biological weapons and their delivery systems.

4. 1566 Working Group<sup>215</sup>: - by the establishment of this Working group Security Council called on Member States to take action against groups and organizations engaged in terrorist activities that were not subject to the 1267 Committee's review. The Working Group made up of all Council members to recommend practical measures against such individuals and groups as well as to explore the possibility to setting up a compensation fund for victims of terrorism.

## **CASE STUDIES ON AIRCRAFT HIJACKING**

### **LOCKERBIE INCIDENT**

Even though the Montreal Convention has been discussed in Part II of this paper, one case that illustrates the practical deficiencies of the aforementioned Convention is the case of Libya v United States, more famously known as the Lockerbie case. The facts involved the attempt of the United States to bring to justice 2 Libyan nationals who had allegedly put a bomb aboard Pan Am flight 103 that exploded over Lockerbie, Scotland. The Montreal Convention required Libya either to prosecute or extradite those committing an offence that destroys civil aircraft (*Aut dedere aut judicare*).<sup>216</sup> Libya contended that it was prosecuting the alleged perpetrators under its domestic law. It relied on Article 14 of the Convention which provided that any dispute over the interpretation and application of the Convention that cannot be settled by negotiation should be submitted to arbitration. The United States and the United Kingdom were insisting that Libya promptly surrender the suspects for trial to British authorities, disclose all it knew about the crime and pay appropriate compensation.<sup>217</sup> Libya approached the International Court of Justice<sup>218</sup> petitioning before it to promptly take provisional measures to preserve the rights of Libya and to order the United States to cease and desist in its violations of the Montreal Convention and in its threats of the use of force against Libya.<sup>219</sup>

It appeared that Libya had complied with the Convention and the United States had not. However, the Americans were convinced that the Libyan Government was involved in the criminal act, and would not accept its willingness to prosecute the suspects. The United States was able to persuade the UN Security Council to intervene, and the Security Council

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<sup>215</sup> S/RES/1566 (2004).

<sup>216</sup> M. Chertif Bastouni and Edward Wise, *Aut Dedere Aut Judicare : The duty to Extradite or Prosecute in International Law*, Maastricht Journal of European and Comparative Law, (1996)- 3-20.

<sup>217</sup> *Libya v United States*, 31 *IdL.M.* 662(1992).

<sup>218</sup> Hereinafter referred to as "ICJ".

<sup>219</sup> *Supra* n.31, 662.

issued a couple of resolutions which concerned with the persistence of acts of international terrorism and second requesting Libya to cooperate during the process.

The ICJ examined American behaviour in light of these two resolutions and found that under Article 25 of the UN Charter, both Libya and the United States were obligated to carry out the decisions of the Security Council. The Court found that these obligations “prevail over their obligations under any other international agreement, including the Montreal Convention, thus the relief requested by Libya was denied.”<sup>220</sup>

### **IC 814 INCIDENT**

The Indian Airlines flight, IC-814, carrying 178 passengers was hijacked on 24th December 1999 after it took off from Kathmandu. The aircraft landed at three different places (Amritsar, Lahore and Dubai) before it flew to Kandahar. No counter-hijacking action was taken while the aircraft was still in Indian airspace. In fact the pilot of the craft deliberately delayed the departure of IC-814 from the Amritsar airport and waited for more than half hour to give the Indian agencies a chance to mount a takeover. His wait was in vain. Later, the then national security adviser, Brajesh Mishra stated that while the plane was still in Amritsar he had given instructions to the security agencies to shoot at the tyres of the craft so as to make it immovable. He also very candidly admitted that his instructions were not heeded to; why? Even he doesn't know. Brajesh Mishra at that time was no ordinary man or a bureaucrat. He was the national security adviser and the closest confidante of the Prime minister, even LK Advani who at that time was the Home Minister couldn't boast of sharing the same intimacy with Vajpayee when it came to Mishra. If he says that his instructions went ignored then we can well imagine the whole anti-terrorism machinery the country had at that time. It can be termed as nothing but a diplomatic failure that the Vajpayee-led government was not able to take either Pakistan's or Saudi Arabia's assent for a commando-led operation to take control of the craft when it was still in their respective airspace. Surely a commando operation was more feasible in Pakistan or Dubai rather than Afghanistan as it was subsequently discovered.<sup>221</sup>

The subsequent chain of incidents is well-known as the Indian government had to resort to a face-saving exercise and release 3 dreaded terrorists in return for the safe release of the passengers aboard the ill-fated aircraft. The then foreign minister personally took the terrorist to Kandahar. The three were Maulana Masood Azhar, Mushtaq Ahmed Zargar and Ahmed Omar Saeed Sheikh. After his release Maulana Azhar set up Jaish-e-Mohammad in early 2000 which is accused of the deadly attacks on Indian targets, including one on the parliament in Delhi in December 2001. Mushtaq Ahmed Zargar after his release renewed the activity of Al-Umar Mujahideen in Muzaffarabad, close to the LOC, in recruiting and training of young Muslims to the independence war in Indian occupied Kashmir. Zargar while

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<sup>220</sup> Joyner and Rothbaum, “*Libya and the Aerial Incident at Lockerbie : What lessons for International Extradition Law?*”, 14 Michigan Journal of International Law (1993) 222 at 256.

<sup>221</sup> Giriraj Shah, *HIJACKING AND TERROR IN THE SKY*, Anmol Publishers, New Delhi, 2002, p 49.

in custody revealed his enormous hatred for Non-Muslims especially Jews, Hindus and Christians and once famously said "If you want to end these terror strikes in the world then either accept Islam or wipe out Islam".<sup>222</sup> The last of the freed terrorist who was once a LSE attendee, Sheikh Omar Saeed was later arrested by Pakistani police on February 12, 2002, in Lahore for his involvement in the Pearl kidnapping and sentenced to death.

The whole IC 814 incident and the way in which it was handled is a terrible blotch on the BJP and India as a whole and is often used as an example of "how not to deal with hijack situations".

As recently as August 2012, a top militant who was behind the IC 814 hijacking scenario was caught and is said to be charged under the 1982 Act.<sup>223</sup>

## INDIAN ANTI-HIJACKING REGIME

Signed in 1970, the 'Convention for the Suppression of Unlawful Seizure of Aircraft' [was neither the first nor the last international treaty reflecting the concern of the States against the acts of aircraft hijacking and its relation to terrorism. But then reference to it is relevant as far as Indian Anti-Hijacking legislation is concerned. The first international convention in this line was the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft' which was signed in 1963 but came into force only in 1969. This Tokyo Convention obliged all the signatories to take all appropriate measures required in order to restore control of an hijacked aircraft to the Captain of the ship or the person in-charge and various other measures in relation to the safety of the crew and the passengers. The 1970 Convention, signed in Hague and hence 'the Hague Convention', was a measure to strengthen up this 1963 Convention in the sense that it defined what constituted an "unlawful seizure of aircraft" and obliged the signatories to engraft this offence in their domestic laws as one punishable with various penalties.<sup>224</sup> This Hague Convention was further built upon by the Montreal 'Convention for the Suppression of Unlawful Acts against Safety of Civil Aviation (Sabotage)', signed in 1971 and provided for situations such as attack against a person on-board a civilian aircraft in flight or an attack which would endanger the aircraft.

As for India, the 1970 Hague Convention is relevant for it formed the backdrop for the passing of the Anti-Hijacking Act enacted in 1982. Nonetheless, India being a dualist State, only the provisions of the Anti-Hijacking Act are applicable in India and the Convention per se is not of relevance except as it may be referred by courts for interpretation of Act if required. This Act of 1982 came under intense criticism when IC-814, an Indian Airlines

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<sup>222</sup> Giriraj Shah, *Hijacking and Terror in the Sky*, Anmol Publishers, New Delhi, 2002, p 49.

<sup>223</sup> "Kandahar IC 814 Flight Hijack Suspect Arrested", Indian Express, <http://www.indianexpress.com/news/kandahar-ic-814-flight-hijack-suspect-mehrajuddin-wani-arrested/1001985> (Last visited on 1st November, 2012).

<sup>224</sup> Wallis, *How Safe Are Our Skies?: Assessing the Airlines' Response to Terrorism* (Westport: Praeger, 2003) p. 70.

plane, was kidnapped and taken to Kandhar and it was only upon the release of a few terrorists, as demanded by the kidnappers, that the hostages could be released. Nonetheless a newlywed Rupin Katyal was killed on-board for refusing to co-operate with the kidnappers.<sup>225</sup>

India's most significant international achievements in the area of counter-terrorism has been its association with all the 13 major UN instruments in specific areas of terrorism as well as its successful discharge of all legal obligations under relevant UN Security Council Resolutions.<sup>226</sup> Another forward step was the adoption of the 2006 "*UN Global Counter Terrorism Strategy*" wherein India became a signatory to the resolution reinforcing its stand against terrorism and inter alia undertook to make a united effort to combat terrorism through practical measures and capacity building<sup>227</sup>. Besides, India also chairs the "*UNSC Counter Terrorism Committee*" with a mandate of "zero tolerance towards terrorism"<sup>228</sup>. In November 2012, while heading the committee, India called for concerted global efforts to dismantle safe havens and isolate extremist groups like Haqqani network in Pakistan in the interest of security and safe peacekeeping in the South Asian region.<sup>229</sup>

At the domestic level, various legislative and administrative reforms were brought in to curb the menace of increasing terrorist attacks including regulation on foreign exchange management, drugs and psychotropic substances, money laundering etc. The Unlawful Activities (Prevention) Act, 1967 was enacted to prevent secessionist tendencies and any unlawful activity prejudicial to the sovereignty or territorial integrity of India. It was amended time and again with the latest amendment in 2012 post the Mumbai 26/11 attacks, with greater collaboration amongst the security agencies at the state and the central level including the deputation of the National Security Guards at four major hubs in India.

Another forward legislation in line with the SAARC mandate was the "SAARC Convention (Suppression of Terrorism) Act, 1993" which mirrored the provisions of the convention as a part of national legal regime.

India has already entered into treaties for mutual assistance in legal and criminal matters with as many as 26 countries with more negotiations in the pipeline<sup>230</sup>. Its commitment to the cause against international crime is evident from the various "Joint Working Groups on

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<sup>225</sup> Hoffman, B. (2003). *Inside terrorism*. New York: Columbia University Press.

<sup>226</sup> Resolutions 1267, 1373 and 1540 of the UN Security Council.

<sup>227</sup> "United Nations Action to Counter Terrorism", October 2009, Peace and Security Section of the Department of Public Information, United Nations, p. 15.

<sup>228</sup> "India to head UNSC panel on combating terror", Jan 7, 2011, The Times of India. Accessed from [http://articles.timesofindia.indiatimes.com/2011-01-07/india/28356411\\_1\\_counter-terrorism-committee-counter-terrorism-unsc](http://articles.timesofindia.indiatimes.com/2011-01-07/india/28356411_1_counter-terrorism-committee-counter-terrorism-unsc)

<sup>229</sup> "India calls for concerted efforts to combat terrorism", Zee News, October 20 2013, Accessed from [http://zeenews.india.com/news/nation/india-calls-for-concerted-efforts-to-combat-terrorism\\_811131.html](http://zeenews.india.com/news/nation/india-calls-for-concerted-efforts-to-combat-terrorism_811131.html)

<sup>230</sup> Avtar Singh Bhasin, "India's Foreign Relations-2011 Documents", Public Diplomacy Division Ministry Of External Affairs, p.45.

Counter Terrorism” with regional organizations like the European Union and the BIMSTEC. The Financial Intelligence Unit of India is an observer at the EGMONT Group and is working towards joining it as a member.<sup>231</sup>

Very recently, in May 2013, India was one of the very active participants of the “*INTERPOL Capacity Building Programme on Counter-Terrorism*” in Asia held in Mumbai which stressed on the vitality of “community based policing approach” as a cornerstone of regional cooperation to counteract terrorism.<sup>232</sup> India is on the verge of having its own centralized intelligence in the form of National Counter Terrorism Centre with separate planning and execution wings independent of the Intelligence Bureau specifically to focus on the anti-terror agenda.<sup>233</sup>

## New Policy

In August 2005, India revealed its new anti-hijacking policy. The policy came into force after the cabinet committee on security (CCS) approved it. The main points of the policy are as follows<sup>234</sup>: Any attempt to hijack will be considered an act of aggression against the country and will prompt a response fit for an aggressor.

- Hijackers, if captured, will be sentenced to death.
- Hijackers will be engaged in negotiations only to bring the incident to an end, to comfort passengers and to prevent loss of lives.
- The plane will be shot down if it is deemed to become a missile heading for strategic targets.
- The plane will be escorted by armed fighter aircraft(s) and will be forced to land.
- A grounded plane will not be allowed to take off under any circumstance.

The list of strategic targets is prepared by the Bureau of Civil Aviation in India. The decision to shoot down a plane is taken by CCS. However, due to the shortage of time, whoever – the prime minister, the Defence Minister or the home minister can be reached first will take the call. In situations in which an aircraft becomes a threat while taking off – which gives very little reaction time – a decision on shooting it down may be taken by an Indian Air Force officer not below the rank of Assistant Chief of Air Staff (Operations).

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<sup>231</sup> Amal Jayawardane, “Building Stronger Partnership to Prevent Terrorism,” 8th October 2009, Conference Organized by the Center on Global Counterterrorism Cooperation, Washington, DC, p.4.

<sup>232</sup> “Mumbai hosts INTERPOL training course to boost counter-terrorism capacity across Asia”, 16th May 2013, Accessed from <http://www.interpol.int/News-and-media/News-media-releases/2013/N20130516>.

<sup>233</sup> V. Mahalingam, “Countering Terrorism: The Way Forward”, March 3, 2013, Institute For Defence Studies & Analyses, New Delhi, p. 6.

<sup>234</sup> “Indian Tightens its Anti Hijacking laws”, Economic Times, <http://economictimes.indiatimes.com/articleshow/11218459.cms> (Last visited on 23<sup>rd</sup> October, 2012).

This policy, which lays down basic principles to deal with such situations, was made more stringent last year when the cabinet approved amendments of section 4 of the 1982 Act. The act provides for life imprisonment and a fine for hijacking, to also include the death penalty. The new policy permits the shooting down of a "hostile plane if there is conclusive evidence that it is likely to be used as a missile to blow up strategic establishments". To avoid humiliating situations like the release of militants, the new policy categorically rules out negotiations with hijackers except for the purpose of bringing an end to the crisis, to ensure comfort of the hostages and to prevent the loss of lives. The Bureau of Civil Aviation Security has also put in place an aviation security manual that lists out a three-stage classification process for shooting down a hijacked aircraft. While the tougher anti-hijacking policy has been seen as a positive development, many strategic analysts and former diplomats feel that India still remains vulnerable to such attacks.

The Indian Government decided in 2011 to amend the anti-hijacking law to award death punishment to hijackers, and also to arm itself with powers to shoot down a passenger plane if its hijackers intended to use it as a missile, as was done by the 9/11 hijackers in the US in 2001. Home Minister P Chidambaram, respected for his professionalism in whichever ministry he has handled in the past, asked the government to ensure deterrent punishment to criminals, and the Union Cabinet accepted his plea today. He headed the Group of Ministers (GoM) constituted to study the recommendations of the Civil Aviation Ministry in this regard, and expressed endorsement. It was also decided that there would be a complete no-negotiations policy with hijackers.

The new provision constitutes a competent authority to authorize the Indian Air Force (IAF) to intercept to force to land and/ or shoot down any hijacked or hostile aircraft, particularly if it is believed that the aircraft would be used as a missile to hit a vital installation.

It may be recalled that in 1999, terrorists had hijacked an Indian Airlines aircraft to Kandahar in Afghanistan, and the government had to release three terrorists already jailed in India to seek the release of hostage passengers, some of whom were killed.

The amendment also calls for immobilising a hijacked aircraft on Indian soil if it has not taken off already. This apart a new clause will also be inserted for punishment to those who launch a conspiracy to hijack an aircraft.<sup>235</sup>

Notably, Indian courts have also been getting tough in awarding the death punishment, and only this month, a man servant was given the capital punishment for killing five members of a family he worked for. In another case, another person was given the same

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<sup>235</sup> India Strategic, March 2010, <http://www.indiastrategic.in/topstories547.htm> (Last accessed on November 1<sup>st</sup> 2012).

sentence for raping and killing a small girl. In the 1970s, India's apex Supreme Court had said that death punishment should be given only in rare of the rarest cases, but as many criminals manage to escape the noose of the law, there is a general demand in the public now for deterrent laws and tougher punishment.<sup>236</sup>

In 2012, during the writing of this paper, Five alleged Sikh militants accused of hijacking an Air India plane to Pakistan in 1981 and were deported back to India after serving life term faced the prospect of being declared proclaimed offenders by a Delhi court if they fail to appear before it on December 3, 2012. The Court ordered initiation of proceedings under section 82 of the Code of Criminal Proceedings (CrPC) to declare the five accused-- Tajender Pal Singh, Satnam Singh, Gajender Singh, Karan Singh Kini and Jasbir Singh Jima--absconding. Under section 82 of the CrPC if the court has a reason to believe that the accused is absconding or concealing himself, it orders the prosecution to publish notice about the accused or publicly announce or affix information about them near their house or public places for making them appear in court. The judge said since the NBWs issued against them could not be executed at the addresses recorded in the police file, he was satisfied that a case has been made out under section 82 to initiate the process of declaring them absconding.<sup>237</sup>

This segment will now examine some specific laws developed by India in its quest to increase security in its airports and aircraft.

### **Aircraft Act (1934)**

The Aircraft Act (1934) is regarded as the basic constitutional law of aviation in India.<sup>238</sup> While it appears that this status was acquired due to it being the first statute to regulate civil aviation in India, this statute, on closer scrutiny, fails to address certain key issues of importance to civil aviation today. One might excuse these omissions in light of the fact that they were not matters of importance in 1934. However, this statute covers most other aspects of civil aviation by vesting/granting power in/to authorities/bodies to make laws governing civil aviation in India. The purpose of the Airport Act (1934) is to make better provision for the control of the manufacturing, possession, use, operation, sale, import and export of aircraft. The concept of aviation security, let alone airport security, is not once mentioned. However, it is noteworthy that for the security of India and to secure the safety of aircraft operations.

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<sup>236</sup> *Ibid.*

<sup>237</sup> 1981 Plane Hijack: All 5 Accused Absconding, Says Court, Outlook India, <http://news.outlookindia.com/items.aspx?artid=778391> (Last visited on November 2<sup>nd</sup> 2012).

<sup>238</sup> Bhatt, "A Survey of Current Air Law in India" in S.Bhatt, V.S. Mani, V.Balakista Reddy, eds., *Air Law and Policy in India* (New Delhi: Lancer Books, 1994) 53 p. 54



### **Aircraft Rules (1937)**

The Aircraft Rules (1937) contain rules that apply to the operation and use of aircraft as well as rules of the air relating to the public order of air space.<sup>76</sup> Part XI (Rules 78 through 92) deals with airports (management aspects), but here again airport security does not seem to feature into the drafters' agenda.

International Airports Authority Act (1971); National Airports Authority Act (1985); and Airports Authority of India Act (1994)

These laws share commonalities in that all are concerned with the administration and management of airports in India. However, like the other Indian laws discussed above, none of these has any bearing on airport security. Nevertheless, they do grant authorities, established under them, with the power to make rules and regulations to deal with, inter alia, "securing the safety of aircraft, vehicles and persons using the airport or civil enclave and preventing danger to the public arising from the use and operation of aircraft in the airport or civil enclave.

### **Anti-Hijacking Act (1982)**

This law was enacted on the lines of the Tokyo Convention Act (1975). It gives effect to the Hague Convention (1970) in India. Chapter II ( Sections 3 through 6C) of the Anti-Hijacking Act contains substantive provisions and details the offences that are to be considered. Since the Hague Convention (1970) has already been discussed, it shall not be further addressed here.<sup>239</sup>

This Anti-Hijacking Act defines the act of hijacking is based upon a single line definition of hijacking, which has been defined as seizing or exercising control of an aircraft, unlawfully, by force or threat of force or by any other way of intimidation on board an aircraft in flight. The term aircraft in flight has also been defined as starting from the moment external doors of the aircraft are closed following by embarkation till the moment they are opened again for disembarkation. Here it to be noted that the Act covers any aircraft which is not a military aircraft or one used by customs or police and the nation in which the aircraft is registered is not relevant.

The punishment for hijacking is "imprisonment for life" along with a fine and there is no power with the judge to reduce the sentence below that and this raises question of constitutionality of this provision for Section 301 of the Indian Penal Code, which did not leave any power with the judge as to the quantum of punishment was declared as unconstitutional by the Supreme Court on grounds that it interfered with judicial review, a

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<sup>239</sup> *Ibid.*

facet of basic structure doctrine. As regards the commission of violence in connection with hijacking, the perpetrator shall be liable to the same punishment which is imposable for a similar offence if committed in India.<sup>240</sup> Then the Act also prescribes that hijacking of aircrafts shall be considered as a part and parcel of the various grounds under the extradition treaties signed by the Government of India with other countries. It also makes way to provide for extensive cooperation with and in relation to the Contracting Parties (to the Hague Convention).

But the reality does not stop at that for this law is substantiated by the external and defense policy of India, as revamped by the former National Security Advisor, J.N. Dixit. Nonetheless, nothing has been done on the legal front as the 1982 Act continues whereas there have been a number of changes all across the world, brought in the legal systems to deal with the menace of terrorism, of which aircraft hijacking is a distinct part. In retrospect, however, it looks that the system does work with this older law for the IC-814 hijackers have been finally brought to book and punished under this 1982 Act itself.<sup>241</sup> But as there is always a room for improvement, so does the argument of reforming this outdated law find strength in the wake of the recent advances with the terrorist activities have made.

### **Suppression of Unlawful Acts against Safety of Civil Aviation Act (1982)**

Similar to the previous two Indian laws under discussion, this law was given weight by the Indian law makers so as to give effect to the Montréal Convention, 1971, in India. Chapter II (Sections 3 through 5D) of this legislation contains the substantive provisions and details the offences that are to be considered. Since the Montréal Convention (1971) has already been discussed, it shall not be addressed further.

### **Statutory Notifications Affecting Aviation in India**

The Aircraft Manual of India contains important notifications issued by the Government of India under the Aircraft Act (1934) affecting civil aviation in India. A notification of 1966 authorizes certain officers of the Directorate General of Civil Aviation to exercise powers under the Aircraft Act (1934), and the Aircraft Rules (1937).<sup>242</sup> A 1981 notification confers power on an officer, under rule 8A of the Aircraft Rules (1937) for security check of persons boarding aircraft.

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<sup>240</sup> Zia, A. (2000.). Hijackers drop two key demands. Chicago Sun Times, p. 1.

<sup>241</sup> Kandahar hijack suspect held in J&K, The Hindu, [HTTP://WWW.THEHINDU.COM/NEWS/NATIONAL/ARTICLE3891775.ECE](http://www.thehindu.com/news/national/article3891775.ece), SEPTEMBER 13<sup>TH</sup> 2007, (Last Accessed On 20<sup>th</sup> October 2012).

<sup>242</sup> Supra n.25 p 53.

## Conclusion

As discussed throughout this study, there is no shortage of laws aimed at handling situations after an attack on an aircraft or airport has occurred. States, together with international organizations, must realize that laws made reactively are of little consolation to those who have already suffered grief and loss. There is little solace in securing the metaphorical 'stable door' after a horse has bolted. What states and international organisations must focus on is the formulation of stringent laws, procedures and requirements applicable at an early stage, mitigating dangers before they come to fruition. For the civil aviation industry, the early stage is the airport. If airport security laws, procedures and requirements were tightened and rigorously monitored for consistency, then much time, effort and money could be saved – resources currently being expended on enacting, implementing, enforcing and interpreting new aviation security laws. It is hoped that ideas of a similar nature to those contained in the model proposed above will perhaps inspire others to carry on researching the most efficient methods for increasing aviation security in the air and on the ground. But research is not enough. It is further hoped that those responsible for providing secure air travel take heed of the warnings and follow through with programmes to ensure that human lives are saved in a preventive manner – by adequately securing vulnerable public spaces of which the airport ranks high.

The international community has undertaken a variety of security measures in an attempt to prevent and combat criminal acts against civil aviation. The most notable success in preventing unlawful interference against civil aviation has been the creation of international consensus that: aviation security issues are matters of international concern, as aviation transport itself; security deficiencies in any part of the world directly constitute a threat to the entire global aviation security system; and unlawful acts against civil aviation and the support for the acts clearly constitute criminal conduct under customary international law and aviation security Conventions. As a result, regardless of enforcement system deficiencies in the aviation security Conventions, no country in the world dares to provide a safe haven for the perpetrators under current international political circumstance and most States seem to strictly restrict the political offences exception to extradition for criminals. Also, according to the international security States have adopted their own domestic aviation security regulations and all over the world, security measures in airports and aircraft have been tightened to prevent any security deficiencies from being manipulated by potential criminals. Furthermore, ICAO is carrying out security audits to improve the level of security performance in all contracting States.

However, there are still several parts to be improved and newly emerging parts to be solved under the international aviation security system. To begin with, although all States have the will to identify security deficiencies and to correct them, many lack the necessary technical or financial resources to take action. Considering the facts that international legal

instruments and technical measures will not effectively prevent aerial unlawful acts without global cooperation, and that the weakest security link in the world will determine the overall strength of the aviation security system, the international community needs to develop a more active international cooperation system for the training of security personnel and for the procurement of security equipment for the needed States with the same passion which was shown during the period when the international community endeavored to adopt the aviation security conventions. Second, it is every government's basic responsibility to secure the safety of its air transportation system. But until today, in practice, airlines are being penalized by liability for damage which is caused by unlawful interference with civil aviation, but which is not directly associated with the performance of air transport. Even though the claimants may sue the government or airport authority for negligence or for breach of a duty of care, the claimants will face many obstacles to prove the negligence or the breach of them. This is because in the absence of international law, the applicable law will be the domestic tort law of the concerned State. Taking into account the facts that Governments are taking over or actually have control over aviation security operations, and that the ICAO and security audit may play a significant role in the determination of the duty of care, the liability for damage caused by unlawful interference with civil aviation deserves a profound review to allocate risk in a just and equitable manner.

**MODULE IV**

**AVIATION LIABILITY:  
AN OVERVIEW**



## **MODULE IV**

### **AVIATION LIABILITY: AN OVERVIEW**

#### **INTRODUCTION**

In legal terms, the word liability refers to fault. The person who is at fault is liable to another because of his or her actions or failure to act. One example is in the case of a crime. The liability of the offending party may include providing restitution for damage to property or paying medical bills in the case of physical injury. An obligation that legally binds an individual or company to settle a debt. When one is liable for a debt, they are responsible for paying the debt or settling a wrongful act they may have committed. When an aircraft crashes and causes personal injury or death, it is often difficult to determine the exact cause of the accident. Was it pilot error? Did the aircraft malfunction? Was there negligence on the owner's part? How well was the pilot trained? Was the aircraft being flown in a way it wasn't intended to fly? Were the crew and passengers aware of how to act in an emergency? In virtually any instance where a plane crashes, someone is liable. Whether it is the operator's error, the owner's poor judgment or a defective part on the aircraft, there are almost always steps which could have been taken to prevent the accident. Determining which individual is liable, or if it is a combination of issues must be determined before restitution can be awarded.

If one looks at the history of aviation, in the beginning of the aviation, there was no issue related to any compensation to the passengers, cargo etc carried on an aircraft, in the event of an injury or damage during any phase of aviation. With the blossoming of commercial aviation in the 1920s, governments and the aviation industry began to think into the ramifications of an aviation accident. The purpose of this was to unify rules related to international transport of persons and property by air and fix damages for losses or injuries to/death of passenger, or damage to or loss of property. This led to the question of Aviation liability. The First International Conference of Private Air Law was held in Paris in 1925. It established the Comité International Technique d'Experts juridiques Aériens (CITEJA), whose purpose was to study whether a uniform private international air law should be established, and if so, to identify its components and draft Conventions addressing the subject which then might be considered by interested governments.

Four years later, delegates from thirty-three nations met in Warsaw, Poland to consider the CITEJA proposal. They adopted the Convention for the Unification of Certain Rules Relating to International Transportation by Air, more affectionately known as the Warsaw Convention. It entered into force on February 13, 1933. The Warsaw Convention differs from most treaties in that it established a private law regime that affects persons rather than nations. Although the United States did not participate in the work of CITEJA and sent only an observer to Warsaw in 1929, it ratified the Warsaw Convention on June 15, 1934,

filing notice to the CITEJA on July 31, 1934. The Convention took effect on October 29th of that year. Once the treaty was ratified, it became controlling law in all international aviation cases in the United States, superseding domestic federal and state law. Twenty-three mostly European nations signed the Warsaw Convention in 1929. Since then, 127 additional nations have ratified the original convention, making it the most widely adopted private law treaty in history.

The Warsaw system a group of air law documents, governs air carrier liability with regard to passengers and consignees. It became law during the infancy of inter-continental aviation and soon proved itself incapable of adequately regulating liability issues in the burgeoning jet age. The inadequacy of the 1929 Warsaw Convention, which governed air carriers' liability for death and injury and of its subsequent revisions, led to the need to modernise and unify the rules on liability. Various conventions and Air law such as Hague Protocol (1955); the Guadalajara Convention (1961); the Guatemala City Protocol (1971); the 1975 Additional (Montreal ) Protocol 1-3 and Montreal Protocol 4 updated the rules related to international transport of persons and property by air and fix damages for losses or injuries to/death of passenger, or damage to or loss of property.

In May 1999, the Contracting States of the ICAO (International Civil Aviation Organisation) negotiated an agreement to modernise the Warsaw Convention rules, recasting them into a single legal instrument offering an appropriate level of compensation in the event of damage caused to passengers during international air transport. The new Montreal Convention of 1999 introduced a uniform legal framework to govern air carrier liability in the event of damage caused to passengers, baggage or goods during international journeys. . The Montreal Convention has already been ratified by 86 countries, out of which 25 have direct air links with India, including routes having high traffic density such as UK, USA, UAE, Qatar, Kuwait, Bahrain, Saudi Arabia, Japan, Austria, France, Germany, Netherlands and Italy. In brief, the Convention seeks to increase the compensation levels for international passengers in the event of death or body injury and damage and delay to the passenger baggage and cargo. While the compensation for death or bodily injury is proposed to be increased 7 times from the existing levels of 20000 USD approximately to 140000 USD approximately, the compensation for damage to the checked baggage is to increase from 20 USD per kg approximately to 1400 USD per passenger. The compensation for damage to cargo is proposed to be increased from 20 USD per kg approximately 24 USD per kg. The Warsaw System allows at present four choices of jurisdiction for filing of a claim by the passenger namely, place of issue of ticket, principle place of business of the carrier, the place of destination of the passenger and the place of domicile of the carrier. Through the Montreal Convention a fifth jurisdiction is added which is the place of domicile of the passenger, provided the airline has a presence there. Therefore an Indian would be able to file claim in India even if the journey was undertaken outside India. By amending certain provisions of the Carriage by Air Act, 1972 and to include the text of the Montreal Convention to the said



Act as the Third Schedule, this would have the force of law in India in relation to any carriage by air to which those rules apply irrespective of the nationality of the aircraft performing the carriage. The Government of India has acceded to the Montreal Convention, 1999 and deposited the Instruments of Accession with ICAO.

### **1. The Warsaw Convention of 1929**

With the blossoming of commercial air transport in the 1920s, governments and transport industry alike began to inquire into the ramifications of an aviation accident. The French government, in response to this concern, convened the first international conference on private air law, in 1925, primarily to consider the creation of a uniform system of aviation law. The second international conference on private air law was held in Warsaw from October 4 to 12, 1929. Its main purpose was to unify the rules on the international transport of persons and property by air, fix the damages for loss or injuries sustained and create a presumption of liability against the carrier on the happening of an injury to or death of a passenger, or damage to or loss of property.

The Warsaw Convention of 1929, formally known as the Convention for the "unification of certain rules relating to international carriage by air", was signed in Warsaw on 12 October 1929 and came into force on 13 February 1933. This convention established the international liability of air carriers and the monetary limits of damage, delay or loss. The legal regime governing the liability of air carriers in the carriage of passengers, baggage and cargo comprised a number of international instruments, collectively known as the Warsaw system. The Warsaw system consists of the original Warsaw Convention of 1929, a series of protocols amending the Warsaw Convention provisions, as well as one supplementary convention to the Warsaw Convention, commonly known as the Guadalajara supplementary convention of 1961. In its practical application, the Warsaw Convention has been amended de facto by a private agreement of air carriers operating to, from or via the territory of the US. Some components of the Warsaw system are in force for a considerable number of countries; the other instruments have not yet been enforced, although they were adopted by a diplomatic conference many years ago.

The Warsaw Convention was adopted with a sole purpose of laying down Uniform Rules relating to the liability of the international carrier where damage/injury is sustained to passengers, baggage or cargo during the carriage, which might be on board, embarkment or disembarkment.

The basic idea behind this Convention is to establish and limit liability of carrier by taking out insurance cover.

### **Objectives**

The main objectives of the Warsaw Convention may be mentioned as follows:

- Uniform Documentation of the Rules with regard to the liability of International Air Carrier
- Liability of the International Air Carrier without any proof of Negligence
- Limits on Compensation to be claimed by the affected parties (But breakable if wilful misconduct is proved) Specified jurisdictions at the choice of the Claimant

There are 41 articles in Warsaw Convention which are listed below:

- A) Scope & definitions covers article 1 & 2
- B) Document of carriage – passenger ticket covers article 3
- C) Luggage ticket covers article 4
- D) Air consignment note covers article 5 to 16
- E) Liability of the carrier covers article 17 to 30
- F) Provisions relating to combines carriage covers article 31
- G) General and final provisions covers article 32 to 41.

## **General Provisions**

Considering the importance of the Warsaw Convention, it is quite common for the Convention to consist of quite a few Articles. There are some Articles that deal with general topics while there are some which specifically deal with the liability of the international air carrier and the compensation, which is perhaps more important in this context. There are also some Articles that deal with the defences that are available to the international air carrier in case of any damage/injury to passengers, baggage or cargo.

*Article 1(1)* – This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

*Article 1(2)* – For the purposes of this Convention, the expression *international carriage* means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two High Contracting Parties or within the territories of two High Contracting Parties or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another State, even if that State is not a High Contracting Party. Carriage between two points within the territory of a single High Contracting Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.

## **Liability of the Carrier**

*Article 17* – The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident

which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

*Article 18(1)* – The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, any registered baggage, if the occurrence which caused the damage so sustained took place during the carriage by air.

*Article 18(2)* – The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the occurrence which caused the damage so sustained took place during the carriage by air.

*Article 19* – The carriage is liable for damage occasioned by delay in the transportation by air of passengers, baggage, or cargo.

### **Compensation**

*Article 22 (1)* – In the carriage of persons, the liability of the carrier for each passenger is limited to the sum of 1,25,000 francs (which has been increased to 2,50,000 francs by the Montreal Protocol, 1975). Where, in accordance with the law of the Court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed two hundred and fifty thousand francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

*Article 22(2)* – (a) In the carriage of registered baggage, the liability of the carrier is limited to a sum of 250 francs per kilogram, unless the passenger or consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that the sum is greater than the passenger's or consignor's actual interest in delivery at destination.

(b) In the carriage of cargo, the liability of the carrier is limited to a sum of 250 francs per kilogram, unless the passenger or consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that the sum is greater than the passenger's or consignor's actual interest in delivery at destination.

(c) In the case of loss, damage or delay of part of registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of a part of the

registered baggage or cargo, or of an object contained therein, affects the value of other packages covered by the same baggage check or the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

*Article 3* – As regards objects of which the passenger takes charge himself the liability of the carrier is limited to 5, 000 francs per passenger.

### **Defenses Available to the Carrier**

*Article 16(1)* – The consignor must furnish such information and such documents as are necessary to meet the formalities of customs, octroi or police before the cargo can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier, his servants or agents.

*Article 16(2)* – The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

*Article 18(3)* – The carrier is not liable if he proves that the destruction, loss of, or damage to, the cargo resulted solely from one or more of the following:

- (a) Inherent defect, quality or vice of that cargo
- (b) Defective packing of that cargo performed by a person other than the carrier or his servants or agents
- (c) An act of war or an armed conflict
- (d) An act of the public authority carried out in connection with the entry, exit or transit of the cargo.

*Article 20* – In the carriage of passengers and baggage, and in the case of damage occasioned by delay in the carriage of cargo, the carrier shall not be liable if he proves that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures.

*Article 21(1)* – In the carriage of passengers and baggage, if the carrier proves that the damage was caused by or contributed to by the negligence of the person suffering the damage the Court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

*Article 21(2)* – In the carriage of cargo, if the carrier proves that the damage was caused by or contributed to by the negligence or other wrongful act or omission of the person claiming compensation or the person from whom he derives his rights, the carrier shall be wholly or partly exonerated from his liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage.

*Article 25* – In the carriage of passengers and baggage, the limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.

### **Jurisdiction**

*Article 24(1)* – In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention, without any prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.

*Article 24(2)* – In the carriage of cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability.

### **Period of Limitation**

*Article 29(1)* – The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to arrive, or from the date on which the carriage stopped.

*Article 29(2)* – The method of calculating the period of limitation shall be determined by the law of the court seised of the case.

### **Draw backs of Warsaw Convention**

(a) **Limits to Liability:** - Severely limits the ability of a passenger or the surviving descendants to recover damages fully resulting from injury or death on board an international flight.

(b) **Domestic versus international air disasters in USA** Huge disparity between damages awarded in international and national crashes in USA as there is no liability capping of damages under US law for domestic air crash. Conversely, international disaster implicating US carriers are subject to the limited liability provisions of the Warsaw Convention.

(c) **Jurisdiction.** The Warsaw Convention not only curtails the amount and type of damages recoverable but also the forum for filling the claims against the air carriers.

The jurisdiction under which an action for damages must be brought by the claimant is:-

- (i) Where the carriers has its principal place of business, or
  - (ii) Where it has an establishment, or
  - (iii) Where the contact of air carriages was made, or
  - (iv) Before the court having jurisdiction at the place of destination.
- (d) **Difficulty of amendment.** The convention is a treaty and can only be amended by its signatures in accordance with the procedure provided by the convention itself. Even the airlines cannot amend it.
- (e) **Difficulty in drafting and interpolation.** Ambiguity in requirements for drafting of air travel document. Huge diversity in interpolation.
- (f) **Willful misconduct.** Varying interpolation of the term willful misconducts as it applies to air carrier's liability under Article 25 of the Warsaw Convention.
- (g) **Delay.** Under the provision of Articles 19 of the Warsaw Convention, the carriers is liable of passengers and baggage. The liability of true carriers is the same for delay as it is for death and injury.

11. Advances in aviation technology, safety and insurance have made many of these arguments void in the 21<sup>st</sup> century and whilst subsequent bilateral agreements and protocols have serve to attempt to bring the convention up to date, particularly in terms of liability capping, a complete replacement for the Warsaw Convention to define a new regime of Private International Air Law seemed like the best solution. The demand for a total overhaul of the system has been huge from passengers, government and even the carriers themselves. The attempts made in the past have resulted in chaotic amalgam and superimposition of international treaties and trilateral agreements that have all served to undermine and jeopardize the viability, certainty and uniformity of the global legal framework initially sought to be satisfied by the Warsaw Convention at its inception in 1929.

### **Modifications of Warsaw Convention**

The Warsaw convention was seen to be too Airline Friendly and a need was felt to change from a treaty for the benefit of airlines to one that is for the benefit of consumers/passengers, and the goal was to consolidate and modernize. Efforts to modify the Warsaw Convention have focused on the singular divisive and controversial issue of the Convention's limitations on liability, which have been eroded over time by inflation. In the cargo arena, updates focused on evolving commercial realities. In the ensuing discussion, we shall explore the following intergovernmental and inter-carrier agreements designed to update and modernize the Warsaw Convention:

## **2. The Hague Protocol, 1955**

The Hague Protocol, 1955, has changed those provisions of the Warsaw Convention which were found incompatible with the changed situation of international air transport, or were unclear or subject to different interpretations. It doubles the original Warsaw limits of liability by amending Article 22, to increase the gold franc limit from 1,25,000 to 2,50,000 (approximately \$ 16,000 in 1955). This was accompanied by a revision of Article 25. Under the original text, a claimant could recover unlimited damages if he established that the accident was the result of "wilful misconduct". [Dol in the original French text is an admittedly loose term, which has been subject to widely differing interpretations]. The Hague Protocol changed this to a more precise standard, permitting unlimited recovery if the plaintiff could establish that "the damage resulted from an act or omission of the carrier, his servants or agents done with intents to cause damage or recklessly and with knowledge that damage would probably result". It also simplified documentation, provided for more adequate "notice" to passengers and permitted the attorney's fees and other costs of litigation to be awarded separately from the limit if permitted by the law of the forum.

## **3. The so called Montreal Agreement of 1966**

The so called Montreal Agreement of 1966, which is not an intergovernmental agreement but only an arrangement on liability among air carriers operating passenger transport, to, from or with an agreed stopping place in the United States, was adopted on 13 May 1966. This was necessitated by the withdrawal of the denunciation of the Warsaw Convention by the US which was to take effect on 16 May 1966. By this agreement, the parties have de facto amended the application of the Warsaw Convention as changed by the Hague Protocol, 1955, by providing for a limit of liability for each passenger in the case of death, or bodily injury, of US\$ 75,000, inclusive of legal fees and costs and \$ 58,000 exclusive of legal fees and costs.

## **4. The Guatemala City Protocol in 1971**

The rapidly changing nature of international air transport necessitated the Guatemala City Protocol in 1971, which effected a far reaching revision of the Warsaw Convention, 1929, as amended by the Hague Protocol, 1955, particularly the provisions on the concept of liability and the limitation of the air carrier's liability.

The Guatemala City protocol mainly provides for a regime of absolute liability of the air carrier; an unbreakable limit of the carrier's liability at the maximum amount of 1,50,000 francs (US \$ 100,000) per person; a domestic system to supplement, subject to specified conditions, the compensation payable to claimants under the convention in respect of the death or personal injury of passengers; a settlement inducement clause, conferences for the purpose of reviewing the passenger limit; and an additional jurisdiction for suits pertaining to passengers and baggage.

## **5. The Montreal Protocols of 1975**

The 1975 'diplomatic conference on air law' drafted and adopted four protocols to the Warsaw Convention. The protocols did not raise the limit of liability, but changed the expression from Poincaré francs to special drawing rights (SDRs) as defined by the International Monetary Fund (IMF). Additional Protocol No. 1 establishes the liability limit at 8,300 SDR, or 1,25,000 monetary units (MU) per passenger. Additional protocol No. 2 limits the liability at 16,600 SDR, or 2,50,000 MU, per passenger. Additional Protocol No. 3 establishes 100,000 SDR, or 1,50,000 MU, per passenger in the case of injury or death. Additional Protocol No. 4 revises various provisions relating to air cargo regulations.

To protect third parties on the ground, the Rome Convention of 1933 and the additional Insurance Protocol of Brussels, 1938, were drafted to establish the absolute but limited liability of an aircraft operator with respect to damage caused to third parties on the surface of the earth. These agreements did not receive sufficient adherence. Today they have been replaced by the Rome Convention of 1952, amended by the Montreal Protocol of 1978. The difference between the Warsaw system and the Rome Convention is that while the Warsaw Convention relates to the liability of the carrier with a contractual relationship to the passenger, the Rome Convention sets the liability of carrier to persons with whom they have no contractual relationship. The operator of an aircraft is liable to damage claims, on the proof by the injured person that the damage has resulted and is attributable to the aircraft. These are in force, but with a rather limited adherence.

### **The IATA and ATA Inter-Carrier Agreement, 1997**

In the face of the failure of governmental efforts to modernize the liability regime for passengers, the Department of Transportation facilitated communications among U.S. and foreign carriers, under the auspices of the IATA and the Air Transport Association (ATA) to develop private voluntary agreements under which carriers would waive the passenger liability limits of the Warsaw Convention and its related instruments (the "Warsaw liability limits"). In February 1997, the Department of Transportation approved a set of two IATA and one ATA inter-carrier agreements, all of which, at a minimum, waived the Warsaw liability limits in their entirety. Because these agreements waived the Warsaw liability limits for participating carriers, they effectively superseded the 1966 Montreal Inter-carrier Agreement, by which carriers had merely waived the limits on liability up to US\$75,000 per passenger.

As of June 1, 2000, 122 international carriers, representing more than 90% of the world's air transport industry, have signed the IATA Inter-carrier Agreement on Passenger Liability (IIA), which waives the Warsaw liability limits. Most of the carriers signing the IIA also signed the second IATA agreement, which requires carriers to pay up to 100,000 SDR (approximately US\$135,000) to accident victims, regardless of carrier negligence.



Consequently, any accident victim having a claim against a carrier that was party to this second IATA agreement would have an absolute right to recover up to 100,000 SDR of proven damages. The ATA agreement, signed by a number of U.S. carriers, describes the manner in which carriers agree to implement the two IATA agreements. In addition to waiving the Warsaw liability limit for passenger injuries and accepting 100,000 SDR of strict liability, airlines signatory to the ATA agreement also agree, subject to application law, that compensation for passenger injuries may be determined by reference to the law of the domicile or permanent residence of the passenger. Meanwhile, at governmental levels, a number of States adopted domestic laws or regulations to address their growing dissatisfaction with the Warsaw liability limits.

#### **Montreal Protocol No. 4 and Cargo Operations**

Until 1988, nothing had been done in the United States to modernize the rules relating to the air cargo industry. Accordingly, following Senate advice and consent to ratification, given on September 28, 1998, the United States accomplished its objective of modernizing rules for the international air-cargo industry by ratifying Montreal Protocol No. 4, which entered into force for the United States on March 4, 1999. Among other things, this Protocol eliminated requirements for paper-based transactions, including the requirement to completed detailed air waybills. In accordance with the provisions of Montreal Protocol No. 4, the United States also became bound by the provisions of The Hague Protocol when it ratified Montreal Protocol No. 4. The passenger liability limitations contained in The Hague Protocol, although objectionable to the United States decades earlier, no longer were an obstacle, because they were effectively superseded by the IATA and ATA Inter-carrier Agreements, by which most major international scheduled carriers had waived those limits.

#### **The Rome Convention on damage caused by foreign aircraft to third party on the surface, 1952:**

This Convention was signed at Rome, on 7<sup>th</sup> October, 1952 with the main purpose of ensuring adequate compensation for persons who suffer damage caused on the surface by foreign aircraft, while limiting in a reasonable manner the extent of the liabilities incurred for such damage in order not to hinder the development of international civil air transport and also to unify to the greatest extent possible, through an international convention, the rules applying in the various countries of the world to the liabilities incurred for such damage.

#### **THE MONTREAL CONVENTION (1999)**

The Montreal Convention, formally the Convention for the Unification of Certain Rules for International Carriage, is a treaty adopted by a Diplomatic meeting of ICAO member states in 1999. The Montreal Convention 1999 was designed to replace the Warsaw Convention of its entire related instrument as well as to eliminate the requirement for this patchwork of regulation of private voluntary agreements. It amended important

provisions of the Warsaw Convention's regime concerning compensation for the victims of air disasters. The Convention re-establishes urgently needed uniformity and predictability of rules relating to the international carriage of passengers, baggage and cargo. Whilst maintaining the core provisions which have successfully served the international air transport community for several decades (i.e. the Warsaw regime), the new convention achieves the required modernization in a number of key areas. It protects passengers by introducing a two-tier liability system and by facilitating the swift recovery of proven damages without the need for lengthy litigation.

Under the Montreal Convention, all arbitrary limits in the receipt of compensation for death or injury caused by passengers were removed, air carriers are strictly liable for proven damages up to 100,000 Special Drawing Rights (SDR), a mix of currency values established by the International Monetary Fund (IMF), approximately US \$138,000 per passenger at the time of its ratification by the United States in 2003 (as of June 2009, around \$154,800). Where damages of more than 100,000 SDR are sought, the airline may avoid liability by proving that the accident which caused the injury or death was not due to their negligence or was attributable to the negligence of a third party. This defense is not available where damages of less than 100,000 SDR are sought. The Convention also amended the jurisdictional provisions of Warsaw and now allows the victim or their families to sue foreign carriers where they maintain their principal residence, and requires all air carriers to carry liability insurance.

The Montreal Convention changes and generally increases the maximum liability of airlines for lost baggage to a fixed amount 1000 SDR (the amount in the Warsaw Convention is based on weight of the baggage). The amount has now been increased to 1131SDR. Montreal Convention was brought about mainly to amend liabilities to be paid to families for death or injury whilst on board an aircraft. It's an expansion of the basis for jurisdiction for claims relating to passenger death or injury to permit states in the passenger's place of domicile or permanent residence subject to certain condition. It presumes all key benefits achieved for the air cargo industry by the Montreal protocol .No.4 enforceable on 14 Jun 1998. It provided an in-built scheme and mechanism of review of liability limits as well as calculates the conversion of monetary units. The conventions applicable to commercial international air carriage between two states of which at least one should be contracting state. The Montreal convention represents therefore a vast improvement on the liability regime established under Warsaw and its related instruments. It clarifies the duties and obligations of carriers including those engage in code sharing agreements with respect to cargo passengers and baggage documentation whilst it has been seen to be a great improvement and modernization of the out dated Warsaw system. Many commentators have claimed that it still fails to redress many key issue of international air Law liability that have been witnessed throughout the history of international air carrier liability litigation.

The Montreal Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on May 28, 1999, (Montreal Convention of 1999) entered into force on November 4, 2003, 60 days following ratification by the United States and Cameroon, the 30<sup>th</sup> and 31<sup>st</sup> countries to ratify (30 ratifications were needed for it to enter into force). Currently 91 countries have already ratified the Convention. Moreover, the 25 countries of the European Union have mandated its application for all EU carriers, and as a practical matter for any non-EU carrier operating to the European Union.

The Montreal Convention is now well on its way to supplanting the Warsaw and Hague Conventions. In addition, some 123 carriers have subscribed to the IATA Agreements which preceded the 1999 Convention, and like the 1999 Montreal Convention. The 1999 Convention applies to all-round trip journeys by international passengers from any of the countries that have ratified the Convention. It also applies to any one-way journey between the countries that have ratified. Thus, for a very large percentage of international passengers, the applicable rules are those of the 1999 Montreal Convention. Let us now see the major differences in the two treaties before we dwell on them at length. The major differences are

- Treaty structure, text and terminology
- Elimination of liability limits for passenger death or injury
- Addition of a fifth jurisdiction
- Added in Guadalajara convention

• **Liability for passenger injury or death (Articles 17, 20 and 21):**

Under the Montreal Convention, the carrier is liable for passenger injury or death up to 100,000 SDR, subject only to the defense of contributory/comparative liability. For claims in excess of 100,000 SDR, the carrier is not liable if the carrier proves that the damage "was not due to the negligence or other wrongful act or omission of the carrier" or was "solely due to the negligence or other wrongful acts or omission of a third party."

The basis for air carrier liability. (i.e., "accident" on board the aircraft or during embarking/disembarking causing "death" or "bodily injury"), however, remains unchanged. While these provisions represent a desirable departure from the confusing, and much litigated, "all necessary measures" standard, they impose an arduous burden on the air carrier to avoid liability by requiring the air carrier to prove that it or its agents/representatives were not negligent in any degree or that the damages resulted solely from the negligence of a third party. Moreover, absent contributory/comparative liability, air carriers appear to be strictly liable up to 100,000 SDR.

- **Liability Limit/or Delay, Baggage and Cargo (Article 22):**

The liability limit in case of passenger delay is 4,150 SDR. In the carriage of checked or unchecked baggage, the liability limit for loss or delay is 1000 SDR per passenger. For the destruction, loss, damage or delay to cargo, the air carrier's liability is limited to 17 SDR/per kilogram

- **Documentation (Articles 3-16):**

The Montreal Convention streamlines documentation requirements for the carriage of passengers, checked baggage and cargo, embracing electronic ticketing and: air waybills. Moreover, there are no sanctions for non-compliance with the new documentation requirements.

- **Jurisdiction (Article 33):**

In addition to the four jurisdictions presently specified where an action for damages must be brought in Article 28 of the Warsaw Convention, a "fifth jurisdiction" is added which is defined to include the principal and permanent residence of the passenger and to or from which the carrier operates and in which that carrier conducts business.

In providing for the "fifth jurisdiction" it appears the drafters intended to permit a passenger or his heirs to obtain jurisdiction in the place of his permanent residence over both carriers who are a party to a code-share agreement, but where only one of the carriers operates flights into the jurisdiction.

- **Types of Damages (Articles 17 and 29):**

There is no limitation on the types of recoverable compensatory damages. However, the Montreal Convention still does not allow the recovery of damages for pure mental injury and contains an express prohibition on the recovery of "punitive, exemplary or any non-compensatory damages". . :

- **Advance Payments (Article 28):**

While not required by the Montreal Convention, provision is made that a carrier is obligated to make advance payments with respect to passenger injury or death if required by the national law of the air carrier.

- **Recourse against Third-Parties (Article 37):**

It is expressly stated that nothing in the Convention shall prejudice an air carrier's rights of recourse against any other party. While this may be meaningful after a trial and imposition of liability, its actual usefulness when a case is settled is limited,

• **Insurance (Article 50):**

The Convention imposes a duty upon the contracting states to require their air carriers to maintain "adequate insurance" covering their liability under the Convention. The determination of what constitutes "adequate insurance" appears to be left to each contracting state.

**Differences between Warsaw and Montreal Convention**

The difference in the treaty structure are that the Montreal treaty is in many languages unlike Warsaw which was only in French, the new languages are English, Arabic, French, Chinese, Russian, and Spanish and all are equally authentic. Some terminology changes have been done and UK version of English adopted over US.

(a) **End of the arbitrary liability limit:** First and foremost it eliminates in its entirety the arbitrary liability limit for death or injury to passengers under the Warsaw and Hague Conventions. Prior to the 1999 Montreal Convention, the passenger liability limit under Warsaw was only \$10,000, and the limit under Hague \$20,000. The very low limits applicable under the Warsaw and Hague Conventions became unenforceable. Since an exception to the limit arose if "willful misconduct" was proved, international air accidents were subjected to incessant litigation in an effort to prove this escape provision. As a consequence, the standard of "willful misconduct" was being expanded by courts trying to balance the equities between passengers and carriers. In addition, the original objective of the Warsaw Convention, to establish a uniform standard of recoveries in international accidents, was being undermined. Not only did the national laws of many countries override the unconscionable limits, but also application of the limit was becoming more the exception rather than the rule. With the Montreal Convention, we again have uniform rules, which are likely to be applied, by the courts.

(b) **Strict liability:** The Montreal Convention applies a "strict" liability regime up to 100,000 SDRs (approximately \$150,000). By strict liability it means that the carrier may not use the defense under Article 21(2) of proof that such damage was not due to the negligence or other wrongful act of the carrier, or was solely due to the negligence or other wrongful act of a third party. Up to 100,000 SDRs, only the Article 20 defense of comparative contributory negligence would apply. It is important to note, however, that this contributory negligence defense will reduce the recovery only "to the extent" that the person claiming compensation contributed to the damage. If the carrier contributed to the damage, even where the person claiming compensation was partially at fault, the carrier will be liable to that extent. There is no limit for recoveries above 100,000 SDRs. However, above that amount the carrier can avoid recovery if it proves that it was not at fault, or that the damage was caused solely by a third party. The carrier remains liable if the third party was only partially at fault.

(c) **The fifth jurisdiction:** Under Warsaw and Hague, the ability of a claimant to bring suit was limited to one of four jurisdictions: (1) the domicile of the carrier (where it is incorporated); (2) the principal place of business of the carrier; (3) a place of business of the carrier where the contract was made; or (4) the place of destination. Article 33(2) of the Montreal Convention adds a new additional jurisdiction for the death or injury of a passenger based on the “principal and permanent residence” of the passenger. This fifth jurisdiction is not wide open. It requires that the carrier operate to that jurisdiction (not necessarily on the flight where the accident occurred). Moreover, the operation to that jurisdiction may be by contract with another carrier under a commercial agreement, most typically a code-share. The same is true for the additional requirement that the carrier conduct its business from premises in that jurisdiction.

This additional jurisdiction will permit actions, at the option of the claimant, in the passenger’s homeland, provided the carrier has a genuine presence there. No longer will claimants be required to go to foreign jurisdictions if the particulars of the Warsaw jurisdiction are not met. An action in the homeland is particularly pertinent under the new Convention, where the primary factor of litigation would be the measure of damages.

(d) **Code-sharing liability:** Another significant feature of the 1999 Montreal Convention is its application to code-sharing and other forms of “indirect carriage”. Article 40 of the 1999 Montreal Convention makes clear that both the actual or operating carrier, and the contracting carrier whose code is used on the operating carrier, are jointly liable for passenger deaths and injuries, as well as for loss or damage to baggage and cargo. The contracting carrier is liable for the full scope of its contract. The operating carrier is liable only for that segment in which it performs the carriage. This provision is to be distinguished from successive carriage under Article 36, the normal interlining service, under which a carrier writing an interline ticket on another carrier does so only as agent, and the carriers are normally liable only for that portion of the journey performed by them. Of course, under Article 36(3), the passenger with respect to baggage, and the shipper or consignee with respect to cargo, have a right of action against the first and last carrier.

(e) **Liability with respect to baggage:** The former liability limit was based on the weight of the baggage (\$9.07 per pound; \$20 per kilogram). With the advent of large aircraft, where weight was not critical, the piece limit free baggage allowance was adopted, and bags frequently were not weighed at check-in. Under the Warsaw rules, courts have held that the limit could not be claimed where the weight of the baggage did not appear on the ticket or baggage check. Under Montreal ’99, a wholly new liability limit has been adopted for checked and unchecked baggage. Under the 1999 Montreal Convention the carrier’s liability is limited to 1,000 SDRs per passenger (approximately \$1,500). In addition, a new standard of proof is applied for unchecked baggage. Under Article 22(2) the carrier is liable for checked baggage (subject to inherent defects) whenever it is shown that the baggage was in the charge of the carrier. But for unchecked baggage (i.e., carry-on baggage) which is

normally in the charge of the passenger, the carrier is liable only “if the damage resulted from its fault or that of its servants or agents.” In other words, the burden of proof of negligence by the carrier is on the passenger.

**Liability for delay:** Under Warsaw and Hague, the carrier was liable up to the full \$10,000 or \$20,000, respectively, for passenger delay. Article 22(1) of Montreal 1999 applies a new liability limit of 4,500 SDRs (approximately \$6,750) per passenger applicable to delay of passengers. (The limit does not apply to delay of baggage, which has its own limit of 1,000 SDRs per passenger, nor to cargo which retains the 17 SDRs (approximately \$26) per kilogram liability limit.) The carrier is exonerated for liability for delay if it proves “that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.” This is a slightly different standard than that applicable to exoneration for passenger death or injury damages above 100,000 SDRs under Article 21(2) where the carrier must prove that “such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents.”

(f) **Electronic Ticketing:** The 1975 Montreal Protocol No. 4, which was ratified by the United States in 1999, specifically permitted the utilization of “any other means which preserves a record of the carriage to be performed.” This was very important for cargo, since the particulars on an air waybill as required by archaic Warsaw, and especially the requirement that the air waybill accompany the goods, created a severe impediment to the facilitation of the shipment of air cargo. The 1999 Montreal Convention adopts this electronic “any other means” provision for passengers and baggage, thus making feasible the now common, if not predominant, form of electronic ticketing. The carrier must offer a written statement of the information preserved, and a baggage identification tag for each piece of checked baggage. But electronic ticketing is not only feasible, but has now become the rule.

(g) **No deviation from Montreal Protocol No. 4:** As noted, Montreal Protocol No. 4 made a huge impact on the facilitation of cargo shipments. The 1999 Montreal Convention does not disturb this major benefit. The new Convention tracks the Protocol No. 4 provisions for cargo, even to the point of not applying the willful misconduct exception to the liability limits for cargo. Under Article 22(5), the willful misconduct exception continues to apply with respect to liability limits for baggage and delay.

(h) **Periodic increase in limits:** The 1999 Montreal Convention includes a semi-automatic increase in the limits on a periodic basis. Of course there is no limit for passenger deaths or injuries, but the 100,000 SDR strict liability level is subject to the periodic increase. Also the baggage liability limit (1,000 SDRs per passenger), the limit for delay of passengers (4,500 SDRs) and the 17 SDR per kilogram limit for cargo are subject to the periodic

increase. Article 24 provides that the depository (ICAO) shall review the limits at five-year intervals. The first review will be November 5, 2008. ICAO will look at inflation based on a weighted average of Consumer Price Indices of States that comprise the SDR. If an increase of more than 10% has occurred, ICAO will notify State Parties of the revised limits per the Price Indices increase. The notified increase will automatically enter into force six months from the notification unless a majority of the States Parties to the Convention registers their disapproval within three months. In the event of such disapproval, the matter will be referred to a meeting of the States Parties. If an increase of more than 30% occurs within a five-year period, and one-third of the States Parties request a review, the increase will not take effect and the issue is referred to a meeting of the States Parties.

(i) **Following the Warsaw/Hague precedents:** The negotiators were careful to retain the Warsaw/Hague language in most cases, and the “legislative history” of the Convention is replete with the intention that, absent an intended revision, the precedents created under the Warsaw/Hague Convention would remain applicable. Thus the extensive judicial precedent applicable under Warsaw/Hague should, in large measure, continue to apply under the 1999 Montreal Convention.

(j) **Other significant provisions:** Article 25 of the 1999 Montreal Convention, assures that a carrier “may stipulate that the contract of carriage shall be subject to higher limits of liability than those provided for in this Convention or to no limits of liability whatsoever.” This replaces Warsaw Article 22(1) that provided for special contracts to waive the passenger liability limit. That is not directly applicable in Montreal ’99 since the passenger liability limit has been eliminated. Thus, Article 25 preserves the ability of the carrier to waive upward the 100,000 SDR level of strict liability, as well as the liability limits applicable to passenger baggage, passenger delay, and cargo.

So it would seem that despite over three quarters of a century of debate and attempted amendments the long awaited, total revision of the Warsaw convention has not been completely successful in addressing all the issues of air carrier’s liability thrown up by real life cases. The new Montreal Convention of 1999 introduced a uniform legal framework to govern air carrier liability in the event of damage caused to passengers, baggage or goods during international journeys.

### **Bird eye view differences between Warsaw and Montreal Convention**

| <b>SL NO</b> | <b>WARSAW CONVENTION</b>                                     | <b>MONTREAL CONVENTION</b>                                                                                                                                                                                                           |
|--------------|--------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1            | Warsaw Convention originally determined carriers' liability. | Sets out a framework for determining the liability of air carriers for injury or death of a passenger, loss or damage to luggage or cargo and damage caused by a delay in the transport of passengers, luggage or cargo which occurs |



|   |                                                                                                                                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
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|   |                                                                                                                                                                                                                                                                                                                                              | during the course of international carriage. In respect of passengers, it applies to accidents which take place on board an aircraft or in the course of embarking or disembarking.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| 2 | <b>Liability with respect to baggage:</b> Warsaw Convention is based on weight of the baggage (\$9.07 per pound; \$20 per kilogram).                                                                                                                                                                                                         | The Montreal Convention changes and generally increases the maximum liability of airlines for lost baggage to a fixed amount 1000 SDR.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| 3 | Creates a limitation period of Two years within which a claim must be brought (Article 29)                                                                                                                                                                                                                                                   | Under Article 22(2) the carrier is liable for checked baggage (subject to inherent defects) whenever it is shown that the baggage was in the charge of the carrier. But for unchecked baggage ( <i>i.e.</i> , carry-on baggage) which is normally in the charge of the passenger, the carrier is liable only “ <b>if the damage resulted from its fault or that of its servants or agents.</b> ” In other words, the burden of proof of negligence by the carrier is on the passenger.                                                                                                                                                                                                                                                                                                     |
| 4 | <p>Passenger liability limit under Warsaw was only \$10,000. Limits a carrier's liability to at most:</p> <p>(a) 250,000 Francs or 16,600 <b>Special Drawing Rights</b> (SDR) for personal injury;</p> <p>(b) 17 SDR per kilogram for checked luggage and cargo,</p> <p>(c) 5,000 Francs or 332 SDR for the hand luggage of a traveller.</p> | <p>(a) Under the Montreal Convention, air carriers are strictly liable for proven damages up to 100,000 <b>Special Drawing Rights</b> (SDR) (approximately AUD \$230,000). Where damages of more than 100,000 SDR are sought, the airline may avoid liability by proving that the accident which caused the injury or death was not due to their negligence or was attributable to the negligence of a third party.</p> <p>(b) Liability for destruction, loss, damage or delay to cargo is set at 17 SDRs (approximately AUD\$39) per kilogram unless the consignor made a special declaration of interest at the time the cargo was handed over to the carrier.</p> <p>(c) Liability for damage caused by delay of a passenger is limited to 4,150 SDRs (approximately AUD \$9,500).</p> |

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| 5  | It protects passengers on one tier liability system.                                                                                                                                                                                                                | It protects passengers by introducing a two-tier liability system and by facilitating the swift recovery of proven damages without the need for lengthy litigation.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| 6  | The Convention was amended several times. However, not all signatories to the original ratified all amendments.                                                                                                                                                     | The Montreal convention addresses these problems by raising carriers' liability limits, presenting the liability frame work in a single consistent Convention and updating the technology used. Liability limits every five years.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| 7  | The provision of the claim at passengers' domicile was not included in the Warsaw convention.                                                                                                                                                                       | The ability for a damages claim to be brought in the country where the passenger resides at the time of the accident if it is a country from which the carrier operates and where it has premises.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| 8  | The provisions of Articles 12, 13 and 14 can only be varied by express provision in the <b>air consignment note</b>                                                                                                                                                 | Allowing for simplified documentation including electronic ticketing. What you need to do With increasing liability limits, carriers need to consider the adequacy of their existing insurance cover.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| 9  | <b>Code-Sharing liability</b> The contracting details of operating carrier and operating carrier were not clearly defined in Warsaw Convention. There were ambiguities regarding passenger deaths and injuries, as well as for loss or damage to baggage and cargo. | Article 40 of the 1999 Montreal Convention makes clear that <b>both</b> the actual or operating carrier, and the contracting carrier whose code is used on the operating carrier, are jointly liable for passenger deaths and injuries, as well as for loss or damage to baggage and cargo. The contracting carrier is liable for the full scope of its contract. The operating carrier is liable only for that segment in which it performs the carriage. This provision is to be distinguished from successive carriage under Article 36, the normal interlining service, under which a carrier writing an interline ticket on another carrier does so only as agent, and the carriers are normally liable only for that portion of the journey performed by them. Of course, under Article 36(3), the passenger with respect to baggage, and the shipper or consignee with respect to cargo, have a right of action against the first and last carrier. |
| 10 | <b>Evidentiary value of documentation</b> The <b>air consignment note</b> is prima facie evidence of the conclusion of the contract.                                                                                                                                | The <b>air way bill or the cargo receipt</b> is prima facie evidence of the conclusion of the contract, of the acceptance of the cargo and of the conditions of carriage mentioned therein.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |

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|----|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 11 | <p><b>Responsibility for particulars of documentation (Article 10)</b></p> <p>(a) The consignor is responsible for the correctness of the particulars and statements relating to the goods which he inserts in the air consignment note.</p> <p>(b) The consignor will be liable for all damage suffered by the carrier or any other person by reason of the irregularity, incorrectness or incompleteness of the said particulars and statements.</p> | <p>(a) In addition the consignor is responsible for the correctness of the particulars and statements relating to the cargo inserted by it or on its behalf in the air waybill or furnished by it or on its behalf to the carrier for insertion in the cargo receipt or for insertion in the record preserved by the other means referred to in paragraph 2 of Article 4. The foregoing shall also apply where the person acting on behalf of the consignor is also the agent of the carrier.</p> <p>(b) The consignor shall indemnify the carrier against all damage suffered by it, or by any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor or on its behalf.</p> <p>(c) Subject to the provisions of paragraphs 1 and 2 of this Article, the carrier shall indemnify the consignor against all damage suffered by it, or by any other person to whom the consignor is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements inserted by the carrier or on its behalf in the cargo receipt or in the record preserved by the other means referred to in paragraph 2 of Article 4.</p> |
| 12 | Liability was based on Negligence.                                                                                                                                                                                                                                                                                                                                                                                                                     | Strict liability based on possession.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| 13 | <p>Exoneration from liability for all kinds of claims:</p> <p>(a) All necessary measures to avoid loss have been taken, or could not be taken</p>                                                                                                                                                                                                                                                                                                      | <p>Exoneration from liability for all kinds of claims:</p> <p>(a) Inherent vice of goods.</p> <p>(b) Defective packing by person other than the carrier.</p> <p>(c) Act of war.</p> <p>(d) Act of authority in connection with entry/exit of cargo.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| 14 | Liability for:                                                                                                                                                                                                                                                                                                                                                                                                                                         | Liability for:                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |

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|----|-------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------|
|    | (a) Loss of goods.<br>(b) Financial loss following loss of goods.<br>(c) Delay.<br>(d) Pure financial loss. | (a) Loss of goods.<br>(b) Financial loss following loss of goods.<br>(c) Delay. |
| 15 | No liability limits in case that no Air Way Bill was issued.                                                | Limited liability even if no Air Way Bill was issued.                           |

The Montreal Convention is not an amendment to the Warsaw Convention. Rather, the Montreal Convention is an entirely new treaty that unifies and replaces the system of liability that derives from the Warsaw Convention. The Montreal Convention entered into effect on November 4, 2003 and only governs international transportation between signatories after the effective date. The Convention is not without its pros and cons for example: A principal feature of the Montreal Convention is its recognition of code-sharing.

Chapter 5 of the Montreal Convention provides that a passenger injured or killed in international air transportation can bring suit against both the carrier that issued the ticket and the operating carrier ie the carrier through which the transportation was performed. In short under Montreal, a code share partner or a carrier that simply sells an airline ticket is responsible for passenger injuries and deaths arising from the actions of the operating carrier. One might say that this pro-passenger language further burdens airlines with additional liability exposure for acts over which they have minimal or no control in an already struggling industry. On the other hand the liability in relation to delays and damage to cargo is not strict and in the event of a claim, there may be defenses available, a pro airline approach. One might feel that a one sided document, be it towards the airlines or the passengers, is not a fair document. In the fast changing world of aviation what is correct today might just not hold ground tomorrow. But review of laws and assumptions which become thing of the past is the only way to go.

The consensus between the provider and the acceptor is the crucial factor through which stalemates can be sorted out. We are going through a “Consumer is King Era” and certain tilt towards him is natural. This unification of private law of international carriage by air has been a success, although it is by far not perfect and many opportunities have been missed in its drafting, but at least we now have a single instrument instead of a patchwork of a Convention. . In India the Montreal Convention Bill was passed by the Lok Sabha on 30th April, 2008. The new agreement introduces a new comprehensive legal framework for entire South Asian aviation scenarios, being one of the largest and growing aviation networks.

## Conclusion

**The Montreal Convention**, formally the **Convention for the Unification of Certain Rules for International Carriage**, is a treaty adopted by a Diplomatic meeting of ICAO member states in 1999. It amended important provisions of the Warsaw Convention's regime concerning compensation for the victims of air disasters. The Convention re-establishes urgently needed uniformity and predictability of rules relating to the international carriage of passengers, baggage and cargo. Whilst maintaining the core provisions which have successfully served the international air transport community for several decades (i.e. The Warsaw regime), the new convention achieves the required modernization in a number of key areas. It protects passengers by introducing a **two-tier liability system** and by facilitating the swift recovery of proven damages without the need for lengthy litigation. It is far from perfect but the airlines and their users will have to live with its flaws – possibly for decades to come. It is doubtful that the Convention would diminish the number of litigations – the litigations will target the concept of “accident”, “bodily injury”, quantum of damages in the second tier and – thanks to EC attitude – also the issue of delay. However, on the whole the airlines have a more solid and reliable legal regulation than that provided under the antiquated “Warsaw” system. In the interests of global unity of the legal regulation the airlines should press their governments to expedite the ratification of the 1999 Montreal Convention.

The Montreal Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on May 28, 1999, (Montreal Convention of 1999) entered into force on November 4, 2003, 60 days following ratification by the United States and Cameroon, the 30<sup>th</sup> and 31<sup>st</sup> countries to ratify (30 ratifications were needed for it to enter into force). The Montreal convention has been ratified by India and has become effective from 30 Jun 2009. The Montreal convention has been incorporated into the Carriage by Air(Amendment) Act, 2009 in India. As of July 2010, 97 countries signed the Montreal Protocol treaty which included the United States, European Union (EU), Australia, Canada, China, India, Japan, Korea and Mexico.

## CASE STUDY

### AIR INDIA TRAIL CASE 4 (KANISHKA)

Canadian Prime minister Stephen Harper promised to respond positively to the damning report into the 1985 Kanishka bombing, specifically on the call for compensation, as the families torn apart by the tragedy said the word 'closure' still haunts them. The final report into the Air India tragedy that killed 329 people recommended ex-gratia payment to families of victims, mostly of Indian-origin, and blamed government for its failure to prevent the country's worst terrorist attack. “Our government launched this inquiry to bring closure to those who still grieve and to ensure that measures are taken to prevent such a tragedy in the future”.

The four-year inquiry calls for a powerful national security czar with direct access to the PM to sort out disputes between the police and Canada's spy agency - an ongoing turf war that it said continues to this day. "For too long the greatest loss of Canadian lives at the hands of terrorists has somehow been relegated outside the Canadian consciousness," justice John Major, who led the committee, said as he announced his findings.

The report recommended appropriate compensation for the families.

"The families in some ways have often been treated as adversaries, as if they had somehow brought this calamity upon themselves," he said. The report elicited a positive response from families, who said they were relieved that most of their concerns were addressed but maintained that "closure" was a far-fetched term. "I think closure is a word that continues to haunt us," Lata Pada, who lost her teen-aged daughters and husband in the bombings, said. "We can never have closure from a tragedy of this enormous devastation. What we can have is the satisfaction that we've come to a point where an inquiry has actually happened and an extensive report with recommendations has actually become a reality," she was quoted as saying by the CBC news. Speaking to reporters in Ottawa, family members said the inquiry into federal mismanagement of the probe answers many of their concerns and confirms it was not an accident.

"I think the report addresses most of the concerns that the families raised... It confirms what families suspected when asking for the inquiry: that it was not a sheer accident, that it was a compounding of mistake after mistake after mistake," said Bal Gupta, who lost his wife in the bombings. The report and the government's acknowledgement of the tragedy has been a long time coming, added Gupta.

"We were not allowed to meet any government minister for almost 10 years... "The first time we met with the government was in 1995. We were treated like troublemakers," he was quoted as saying by CBC. To prevent the intelligence sharing error that marked the incident, the report recommends that the National Security Advisor, a job that currently exists in a much more diminished role, would be the ultimate security authority. The NSA would help shepherd terrorism prosecutions through courts, as would a new director of terrorism prosecutions. "The time to right that historical wrong is now... This was the largest mass-murder in Canadian history," justice major observed.

Ontario's former lieutenant-governor James Bartleman, had stunned the Air India inquiry when he disclosed that Ottawa knew about a terrorist threat to the airline days before the 1985 bombing. Bartleman stood vindicated as justice major dismissed government attacks challenging him as "ineffectual" while the commission's lead counsel called his testimony "courageous." Bartleman delivered the most stunning testimony at the Air India inquiry three years ago. In 1985, Bartleman was director of security and intelligence for the department of external affairs, a position that involved reviewing raw intelligence reports from the Communications Security Establishment. Justice major suggested that agents with the Canadian Security Intelligence Agency should get with the times and lose their longstanding aversion to the courts.

The Kanishka flight 182 from Montreal to Delhi was blown off mid air near the Irish coast by Khalistani elements seeking revenge for the June 1984 Indian Army operation at the Golden Temple in Punjab. Another bomb, meant for another Air India flight, also went off at Tokyo airport the same day, killing two baggage handlers. Years of criminal investigation have yielded just one conviction, for manslaughter, against a British Columbia mechanic Inderjit Singh Reyat who assembled bomb components. Two other men - Rupinder Singh Malik and Ajaib Singh Bagri- were acquitted due to lack of evidence. Another suspect Talwinder Singh Parmar died in police custody in 1992.

## **LOCKERBIES CASE**

### **Background of the case**

In the weeks before the bombing in December 1988 there had been a number of very specific warnings that a bomb would be placed on a Pan Am aircraft. On 5 December 1988 the Federal Aviation Administration (FAA) issued a security bulletin saying that on that day a man with an Arabic accent had telephoned the U.S. Embassy in Helsinki, Finland, and had told them that a Pan Am flight from Frankfurt, West Germany to the United States would be blown up within the next two weeks by someone associated with the Abu Nidal Organization. He said a Finnish woman would carry the bomb on board as an unwitting courier.

The anonymous warning was taken seriously by the U.S. government. The State Department cabled the bulletin to dozens of embassies. The FAA sent it to all U.S. carriers, including Pan Am, which had charged each of the passengers a \$5 security surcharge, promising a "program that will screen passengers, employees, airport facilities, baggage and aircraft with unrelenting thoroughness" (The Independent, 29 March 1990); the security team in Frankfurt found the warning hidden under a pile of papers on a desk the day after the bombing. One of the Frankfurt security screeners, whose job it was to spot explosive devices under X-ray, told ABC News that she had first learned what Semtex (a plastic explosive) was during her ABC interview 11 months after the bombing (Prime Time Live, November 1989)

On 13 December, the warning was posted on bulletin boards in the U.S. Embassy in Moscow and eventually distributed to the entire American community there, including journalists and businessmen. As a result, a number of people allegedly booked on carriers other than Pan Am, leaving empty seats on PA103 that were later sold cheaply in "bucket shops". PA103 investigators subsequently said the telephone warning had been a hoax and a chilling coincidence.

Among them was a photograph of a bomb in a Toshiba cassette radio wired to a barometric timer switch; a number of such bombs had been found earlier in 1988 in the possession of members of a small group with a history of successfully carrying out bombings, primarily of American targets. One group member told police that five bombs had been made; at least one was missing at the time of the Lockerbie disaster and never recovered. The warnings were sufficiently exact that the staff of the American Embassy in

Moscow, who usually travelled by Pan Am when they returned to the US for Christmas, used a different airline. Flora Swire, who was travelling to New York to spend Christmas with her boyfriend, found it surprisingly easy to buy a ticket

**Facts of the case:** Pan Am Flight 103 was a Boeing 747-100 named Clipper Maid of the Seas. The jumbo jet was the fifteenth 747 built and was delivered in February 1970, one month after the first 747 entered service with Pan Am. On Wednesday 21 December 1988, Clipper Maid of the Seas touched down at London Heathrow Airport at noon (GMT) after a flight from Los Angeles and San Francisco, California, USA. The aircraft was parked at stand K14, Terminal 3, where it was guarded for two hours by Pan Am's security company, Alert Security, but was otherwise not watched. The first leg of Pan Am Flight 103 was a feeder flight, Pan Am Flight 103A, from Frankfurt International Airport, West Germany, to London Heathrow. Forty-seven of the 89 passengers on the Boeing 727, which was parked at stand Kilo 16 adjacent to the Boeing 747, transferred to Pan Am Flight 103 for the transatlantic flight from London Heathrow to New York JFK.

There were 243 passengers and 16 crew members on board, led by pilot Captain James Bruce "Jim" MacQuarrie, First Officer Raymond Ronald "Ray" Wagner, and Flight Engineer Jerry Don Avritt. Mary Geraldine Murphy, 51, served as the head purser. The flight was scheduled to depart at 18:00 GMT, and pushed back from the gate at 18:04 GMT, but because of a rush-hour delay, it took off from runway 27R at 18:25 GMT, flying northwest out of Heathrow, a so-called Daventry departure. Once clear of Heathrow, the crew steered due north toward Scotland. At 18:56 GMT, as the aircraft approached the border, it reached its cruising altitude of 31,000 feet (9,400 m), and MacQuarrie throttled the engines back to cruising power. At 19:00 GMT, PA103 was picked up by the Scottish Area Control Centre at Prestwick, Scotland, where it needed clearance to begin its flight across the Atlantic Ocean. Alan Topp, an air traffic controller, made contact with the 747 as it entered Scottish airspace.

Captain MacQuarrie replied: "Good evening Scottish, Clipper one zero three. We are at level three one zero." Then First Officer Wagner spoke: "Clipper 103 requesting oceanic clearance." These were the last words heard from the aircraft. Explosion: A Boeing 747-100 similar to Pan Am 103. The explosion occurred almost directly under the 'P' in the Pan Am logo of the plane.

At 19:01 GMT, Top watched Flight 103 approach the corner of the Sol way Firth on his screen and observed as it crossed the coast at 19:02 GMT. On his scope, the aircraft showed transponder code or "squawk"—0357 and flight level—310.[citation needed] When the airliner's transponder stopped transmitting, it was flying at 31,000 feet (9,400 m) on a heading of 316 degrees magnetic, and at a speed of 313 knots (580 km/h) calibrated airspeed, at 19:02:46.9. Subsequent analysis of the radar returns by RSRE concluded that the aircraft was tracking 321° (grid) and travelling at a ground speed of 434 knots Contact is lost: At that moment, SSR contact with the aircraft was lost. Topp tried to make contact with Captain MacQuarrie, and asked a nearby KLM flight to do the same, but there was no reply. Where there should have been one radar return on his screen, there were four, and as the seconds



passed, the returns began to fan out. Comparison of the cockpit voice recorder with the radar returns showed that eight seconds after the explosion, wreckage had a 1-nautical-mile (1.9 km) spread. Disintegration of aircraft: Lockerbie Pan Am Flight 103 crash site. The explosion punched a 20-inch (0.51 m)-wide hole on the left side of the fuselage, almost directly under the 'P' in Pan Am. The disintegration of the aircraft was rapid.

Investigators from the U.S. Federal Aviation Administration (FAA) were lowered into the cockpit in the wreckage before it was moved from the crash site and while the bodies of the flight crew were still in the cockpit. They concluded that no emergency procedures had been started. The pressure control and fuel switches were both set for cruise, and the crew had not used their oxygen masks, which would have been required within five seconds of a rapid depressurization of the aircraft. Investigators from the Air Accidents Investigation Branch (AAIB) of the British Department for Transport concluded that the nose of the aircraft separated from the main section within three seconds of the explosion. The cockpit voice recorder, a recording device in the tail section of the aircraft, was found in a field by police searchers within 24 hours of the bombing. There was no evidence of a distress signal: a 180-millisecond hissing noise could be heard as the explosion destroyed the aircraft's communications centre. The nerve centre of a 747, from which all the navigation and communication systems are controlled, is below the cockpit, separated from the forward cargo hold by a bulkhead wall. Investigators concluded that the force of the explosion broke through this wall and shook the flight-control cables, causing the front section of the fuselage to begin to roll, pitch, and yaw.

These violent movements snapped the reinforcing belt that secured the front section to the row of windows on the left side and it began to break away. At the same time, shock waves from the blast ricocheted back from the fuselage skin in the direction of the bomb; meeting pulses still coming from the initial explosion. This produced Mach stem shock waves, calculated to be 25% faster than, and double the power of, the waves from the explosion itself. These shock waves rebounded from one side of the aircraft to the other, running down the length of the fuselage through the air-conditioning ducts and splitting the fuselage open. A section of the 747's roof several feet above the point of detonation peeled away. The Mach stem waves pulsing through the ductwork bounced off overhead luggage racks and other hard surfaces, jolting the passengers.

Although the explosion was in the aircraft hold, the effect was increased by the large difference between aircraft cabin pressure and the outside air pressure (the latter is about a quarter of the former). The front section of the aircraft, containing the flight deck with crew and the first class section, broke away, striking the No. 3 Pratt & Whitney engine as it snapped off. Fuselage (wing section) impact: Investigators believe that within three seconds of the explosion, the cockpit, fuselage, and No.3 engine were falling separately. The fuselage continued moving forward and down until it reached 19,000 ft (6000 m), at which point its dive became almost vertical.

As it descended, the fuselage broke into smaller pieces, with the section attached to the wings landing first (46.5 seconds after the explosion) in Sherwood Crescent, Lockerbie, where the 200,000 lb (91,000 kg) of aviation fuel contained inside ignited. The resultant fireball destroyed several houses and was so intense that little remained of the left wing of the aircraft. No remains were ever found of any of the passengers who were seated over this section of the wing. Investigators were able to determine that both wings had landed in the crater after counting the number of large steel flap drive jackscrews that were later found there - indeed there were no finds of wing structure outside the crater itself. The British Geological Survey at nearby Eskdalemuir registered a seismic event measuring 1.6 on the Richter scale. British Airways pilot Captain Robin Chamberlain, flying the Glasgow–London shuttle near Carlisle, called Scottish authorities to report that he could see a huge fire on the ground. The destruction of PA103 continued on Topp's screen, by now full of returns moving eastwards with the wind.

### **Victims**

All 243 passengers and 16 crew members were killed. Eleven residents of Lockerbie also died. Of the total of 270 fatalities, 190 were American citizens. A Scottish Fatal Accident Inquiry, which opened on 1 October 1990, heard that, when the cockpit broke off, tornado-force winds tore through the fuselage, tearing clothes off passengers and turning insecurely-fixed items like food and drink trolleys into lethal objects. Because of the sudden change in air pressure, the gases inside the passengers' bodies would have expanded to four times their normal volume, causing their lungs to swell and then collapse. People and objects not fixed down would have been blown out of the aircraft into the  $-46^{\circ}\text{C}$  ( $-50.8^{\circ}\text{F}$ ) outside air, their 31,000-foot (9,400 m) fall lasting about two minutes. Some passengers remained attached to the fuselage by their seat belts, crashing in Lockerbie strapped to their seats.

Although the passengers would have lost consciousness through lack of oxygen, forensic examiners believe some of them might have regained consciousness as they fell toward oxygen-rich lower altitudes. Forensic pathologist Dr William G. Eckert, director of the Milton Helpen International Center of Forensic Sciences at Wichita State University, who examined the autopsy evidence, told Scottish police he believed the flight crew, some of the flight attendants, and 147 other passengers survived the bomb blast and depressurization of the aircraft, and may have been alive on impact. None of these passengers showed signs of injury from the explosion itself, or from the decompression and disintegration of the aircraft. The 270 victims of the bombing came from 21 countries.

### **Passengers and crew**

Dr Eckert told Scottish police that distinctive marks on Captain MacQuarrie's thumb suggested he had been hanging onto the yoke of the plane as it descended, and may have been alive when the plane crashed. The captain, first officer, flight engineer, a flight attendant and a number of first-class passengers were found still strapped to their seats inside the nose section when it crashed in a field by a tiny church in the village of Tundergarth. The inquest heard that the flight attendant was alive when found by a farmer's wife, but died

before her rescuer could summon help. Prominent among the passenger victims was the 50-year-old UN Commissioner for Namibia, Bernt Carlsson, who would have attended the signing ceremony at UN headquarters on 22 December 1988 of the New York Accords. Paul Avron Jeffrey's, former bass player with the UK group Cockney Rebel, was on the flight with his new wife Rachel, en route to their honeymoon celebration. Another victim was poet Joanna Walton, main lyricist of Robert Fripp's 1979 Exposure album. Jonathan White, aged 33, the son of actor David White (who played Larry Tate on Bewitched), was also killed. He had recently graduated from UCLA.

### **Students and families**

Thirty-five students from Syracuse University, four from Colgate University, four from Brown University, two from Seton Hill University in Greensburg, Pennsylvania, and two from the State University of New York at Oswego were on board, flying home from overseas study in London. There was also one student from Hampshire College flying home from a field study in Nigeria. Ten of the victims were residents of Long Island—including father and son, John and Sean Mulroy—and were returning home for seasonal celebrations with families and friends, as reported by Newsday of 27 December 1988. Five members of the Dixit-Rattan family, including 3-year-old Suruchi Rattan, were flying to Detroit from New Delhi. They were supposed to be on Pan Am Flight 67, which had left Frankfurt for New York earlier in the day, but one of the children had fallen ill with breathing difficulties, and the pilot had taken the plane back to the gate to allow the family to disembark. The boy soon recovered, and the family was transferred to PA103 instead. Suruchi was wearing a bright red kurta and salwar—a knee-length tunic and matching trousers—for her journey. She became associated with a note left with flowers outside Lockerbie town hall that said "To the little girl in the red dress who lies here who made my flight from Frankfurt such fun. You didn't deserve this. God Bless, Chas.

### **Investigation**

A charred piece of shirt, a shred of green plastic the size of a fingernail, the letters MEBO and a cryptic diary entry. Those were the clues that finally unlocked the mystery after the three years of the incident: Who planted the bomb that blew up Pan Am Flight 103 over Lockerbie, Scotland, just before Christmas in 1988, killing all 259 people aboard and 11 more on the ground. The initial investigation into the crash site by Dumfries and Galloway Constabulary involved many helicopter surveys, satellite imaging, and a fingertip search of the area by police and soldiers. More than 10,000 pieces of debris were retrieved, tagged and entered into a computer tracking system. The perpetrators had apparently initially intended the plane to crash into the sea, destroying any traceable evidence, but the late departure time of the aircraft meant that its explosion over land left a veritable trail of evidence.

The fuselage of the aircraft was reconstructed by air accident investigators, revealing a 20-inch (510 mm) hole consistent with an explosion in the forward cargo hold. Examination of the baggage containers revealed that the container nearest the hole had blackening, pitting, and severe damage indicating a "high-energy event" had taken place

inside it. A series of test explosions was carried out to confirm the precise location and quantity of explosive used.

Fragments of a Samsonite suitcase believed to have contained the bomb were recovered, together with parts and pieces of circuit board identified as part of a Toshiba Bombeat radio cassette player, similar to that used to conceal a Semtex bomb seized by West German police from the Palestinian militant group Popular Front for the Liberation of Palestine - General Command two months earlier. Items of baby clothing, which were subsequently proven to have been made in Malta, were also thought to have come from the same suitcase. The clothes were traced to a Maltese merchant, Tony Gauci, who became a key prosecution witness, testifying that he sold the clothes to a man of Libyan appearance, whom he later identified as Abdelbaset Ali Mohmed Al Megrahi. However, an official report providing information not available during the original trial stated that Gauci had seen a picture of al-Megrahi in a magazine which connected al-Megrahi to the bombing, a fact which could have distorted his judgment.

A circuit board fragment, allegedly found embedded in a piece of charred material, was identified as part of an electronic timer similar to that found on a Libyan intelligence agent who had been arrested 10 months previously, carrying materials for a Semtex bomb. The timer allegedly was traced through its Swiss manufacturer, Mebo, to the Libyan military, and Mebo employee Ulrich Lumpert identified the fragment at al-Megrahi's trial. Mebo's owner, Edwin Bollier, later revealed that in 1991 he had declined an offer from the FBI of \$4 million to testify that the timer fragment was part of a Mebo MST-13 timer supplied to Libya. On 18 July 2007, Ulrich Lumpert admitted he had lied at the trial. In a sworn affidavit before a Zurich notary public, Lumpert stated that he had stolen a prototype MST-13 timer printed circuit board from Mebo and gave it without permission on 22 June 1989, to "an official person investigating the Lockerbie case". Dr Hans Köchler, UN observer at the Lockerbie trial, who was sent a copy of Lumpert's affidavit, said: "The Scottish authorities are now obliged to investigate this situation. Not only has Mr Lumpert admitted to stealing a sample of the timer, but to the fact he gave it to an official and then lied in court".

In a documentary entitled "Lockerbie revisited" aired on 27 April 2009, the film's director and narrator, Gideon Levy, interviewed officials involved with the case. Former FBI laboratory scientist Fred Whitehurst described the FBI laboratory itself as a "crime scene", where an unqualified colleague Thomas Thurman would routinely alter his scientific reports. The interviews also revealed that the timer fragment had never been tested for explosives residue due to "budgetary reasons". Thurman, who led the forensic investigation and identified the fragments' Libyan connection, confirmed that it was the "only real piece of evidence against Libya" and when asked of the importance of the timer in the conviction of al-Megrahi, FBI Task Force Chief Richard Marquise stated, "It would be a very difficult case to prove I don't think we would ever (have) had an indictment".

Investigators also discovered that an unaccompanied bag had been routed onto PA 103, via the interline baggage system, from Luqa airport on Air Malta flight KM180 to

Frankfurt, and then by feeder flight PA 103A to Heathrow. This unaccompanied bag was shown at the trial to have been the suitcase that contained the bomb. In 2009 it was revealed that security guard Ray Manley had reported that Heathrow's Pan Am baggage area had been broken into 17 hours before flight 103 took off. Police lost the report and it was never investigated or brought up at trial.

### **Air Concorde Crash Trail**

Almost a decade after the crash that marked the end of the Concorde legend a four-month trial based in Paris will be faced with 90 volumes of investigations, 534 pieces of evidence and several conflicting explanations of the crash, which happened in July 2000 as an Air France Concorde took off from Charles de Gaulle airport. The plane, which took off with a plume of flames from its tail, flipped over and crashed into a motel a few minutes later, killing all 100 passengers and nine crew on board and four people on the ground. At the heart of the hearing is whether the aircraft caught fire after a tyre burst when it hit a strip of titanium dropped from a previous American Continental Airlines plane. The official conclusion of a 10-year investigation is that pieces of rubber from the burst left-hand undercarriage tyre were projected into a fuel tank, causing a massive leak of kerosene, which caught fire. The pilot, who was by then beyond the point of no return on takeoff, struggled to keep the plane in the air and headed for the nearby Le Bourget airport. But, just two miles from the end of the runway at Charles de Gaulle, the Concorde, carrying German holidaymakers on their way to New York for a Caribbean cruise, plunged into the motel.

But conflicting reports will suggest the Concorde was badly maintained and serviced, had inherent design weaknesses and was overloaded. Several witnesses claimed they had seen the plane on fire before it hit the titanium strip. These allegations throw part of the blame on to Air France, which is not subject to any legal proceedings, leading some to claim a cover-up. Air France admits some mistakes were made in repairing the plane's undercarriage, but say they could not have caused the tyre to burst.

Continental Airlines and five individuals will be on trial for involuntary manslaughter in a specially enlarged courtroom at Cergy- Pontoise in the west of Paris. The defendants are two of Continental's Paris ground staff, a retired senior French air safety official and two members of the Concorde programme. They all face up to five years in prison and a maximum fine of €75,000 (£66,000) if found guilty. Continental faces a maximum fine of €375,000. Continental and its two employees are accused of allowing the 43cm piece of titanium, known as a wear strip, to drop off one of its DC-10 planes as it taxied down the runway ahead of the Concorde. The other defendants are Concorde's former head of testing and former chief engineer, both in their 70s, and the retired head of France's civil aviation authority, accused of having failed to detect and repair faults in the aircraft that investigators claim contributed to the crash.

Olivier Metzner, the lawyer for Continental Airlines, denies the US Company was responsible for the crash. "There are numerous witnesses, professionals like fire officers, pilots, who state that Concorde caught fire 700 metres before contact with the [titanium]

strip," he told France Soir newspaper. Metzner said there had been 33 incidents of Concorde's tyres bursting between 1980 and 2000 and those recommendations to modify the plane had not been carried out. After the crash Air France immediately halted all Concorde flights. The last British Airways Concorde flew its final commercial flight in October 2003.

### **Mangalore Air Crash Case**

As many as 158 people were killed today when an Air India Express flight No IXE 812 from Dubai overshot the runway at the Bajpe airport in Mangalore, plunged into a valley and burst into flames in the worst air disaster in a decade. Of the 166 on board, seven survived with severe injuries while one escaped unhurt in the crash that happened around 6 a.m. All of them have been admitted to various hospitals in Mangalore. The aircraft was carrying 137 adults, 19 children and six infants. Most of the passengers were from Dakshina Kannada and Udupi districts of Karnataka, or from Kasaragod district in northern Kerala. The aircraft was commanded by Capt Z. Glucia, a Serbian pilot with 10,200 hours of flying experience. Capt H. S. Ahluwalia, who was the co-pilot, was based in Mangalore and had 3,650 hours of flying experience. Capt Glucia has landed at Mangalore 19 times and had last flown from the town in November 2009. Capt Ahluwalia, who has 3,350 hours of flying experience on Boeing 737 aircraft, had landed 66 times in Mangalore. The ill-fated aircraft, bearing call sign VT-AXV, joined the fleet on January 15, 2008, and had no history of defects and malfunctions.

Insurance firms are already feeling the heat with the national carrier, Air India, and relatives of the passengers who died in the ill-fated Mangalore air disaster set to claim compensation worth hundreds of crores of rupees in the coming days. It is estimated that INSURERS may have to collectively shell out compensation claims to the tune of Rs 350-400 crore for loss of 158 human lives and the total destruction. The Air India (AI) Express aircraft was provided a comprehensive insurance coverage by four private sector general insurance companies led by Reliance General Insurance Co Ltd and co-insured by HDFC Ergo, Bajaj Allianz and Iffco Tokio. The entire AI fleet of 136 aircraft was insured for a total of \$8.59 billion at an annual premium of around 24.3 million. Industry experts say that Air India will make insurance claims of at least Rs 300 crore as damages and another Rs 100 crore for passenger and cargo compensation claims according to the International Montreal convention for accident compensation treaty, which has 95 signatories including India. Victims of an Air disaster can claim Rs. 75 Lakh per passenger from the airline.

This compensation amount is a pittance compared to the conditions stated under the Montreal convention. The victims can sue the airlines for gross negligence and human error. There is bound to be a long bitter legal battle ahead both for the airline and the private insurance company, admits an insurance official. Meanwhile, private insurance companies who are part of the consortium said that the insurers had transferred the majority of the risk to re-insurers based in London and to the general insurance corporation ( GIC) of Mumbai which has around 14% of the reinsurance policies which were in the lime light so as to

compensate the following liabilities of various regimes and also the considerations "We will suffer only a loss of around Rs 5-7 crore as we have re-insured this aviation portfolio," an insurance official who was part of the consortium said. A senior GIC official said that they may incur a loss of around Rs 15 crore. Industry experts say that it will be interesting to see how the consortium of private sector insurance firms will settle the damage.

### **Aviation Cargo Liabilities**

Air France-KLM and Martinair have agreed to pay an \$87 million fine to settle charges of breaching antitrust rules in the cargo sector, but are still awaiting a resolution of the issue from European regulators. The fine relates to charges of price fixing on air cargo shipments to the U.S. between 2000 and 2006 brought by the U.S. Justice Department. The group that owns all three already took a provision for potential liabilities in has been an intact resolution of the year of the justice 2008.

Air France-KLM, Martinair Settle U.S. Justice Dept. Charges A U.S. court still must approve the settlement agreement, which the group says is being paid "in exchange for a release from all claims by direct purchasers of air cargo shipping services to and from the United States between the states as to find out the ratio of the concepts of the 2000 and 2006." At issue was whether fuel surcharges were raised or lowered in a coordinated manner. In 2006, officials raided the offices of several airlines and investigated more than 20 airlines about potential wrongdoing.

### **Limitation of liability of air carrier for personal injury or death**

The Montreal Convention requires that the passenger be given written notice to the effect that where the Montreal Convention is applicable it governs and may limit the liability of carriers in respect of death or injury and for destruction or loss of, or damage to, baggage, and for delay. The Montreal Convention preserves the validity of a contract for air carriage, notwithstanding noncompliance with the Convention's documentation provisions. The Montreal Convention similarly specifies that the Convention's provisions, including liability limits for baggage, delay and cargo, will govern notwithstanding such noncompliance.

In contrast, the provisions of the Warsaw Convention required, as a condition precedent to its taking effect, that a carrier —deliverl a passenger ticket to the passenger and that such ticket contain certain particulars. All that was required was that the passenger be delivered a ticket which gives him or her reasonable opportunity to learn of the limitations and to take steps to obtain additional protection, if desired. The requirement of the delivery of the ticket was only a condition determinative of the applicability of the limited liability rules. Actual notice of the limitation of liability provision was not required.

An airline's failure to comply with the passenger ticket requirement of the Warsaw Convention does not affect the Convention's applicability, only the airline's ability to avail itself of the limits imposed on its potential liability. While an airline's delivery of a passenger ticket with inadequate notice that transportation is subject to the Warsaw Convention's liability provisions does not result in forfeiture of the carrier's limitation of damages, failure

to include certain particulars in a baggage check, including notice of the Convention's liability limitations, results in loss of limitation of liability. A —limited release identification tag that a flight attendant hands a passenger in return for a bag that was temporarily lost and damaged does not contain the notice required for an airline to invoke the Warsaw Convention's limited liability provision.

## **Damages**

Under the Montreal Convention, air carriers are strictly liable for proven damages up to 100,000\$ Special Drawing Rights (SDR), a mix of currency values established by the International Monetary Fund (IMF), approximately \$138,000 per passenger at the time of its ratification by the United States in 2003 (as of June 2009, around \$154,800). Where damages of more than 100,000 SDR are sought, the airline may avoid liability by proving that the accident which caused the injury or death was not due to their negligence or was attributable to the negligence of a third party. This defense is not available where damages of less than 100,000 SDR are sought. The Convention also amended the jurisdictional provisions of Warsaw and now allows the victim or their families to sue foreign carriers where they maintain their Principal residence, and requires all air carriers to carry liability insurance. The Montreal Convention changes and generally increases the maximum liability of airlines for lost baggage to a fixed amount 1000 SDR (the amount in the Warsaw Convention is based on weight of the baggage). Montreal Convention was brought about mainly to amend liabilities to be paid to families for death or injury whilst on board an aircraft. The signatories for the as of April 2010, 95 countries signed the Montreal Protocol treaty which included the United States, European Union (EU), Australia, Canada, China, India, Japan, Korea and Mexico

## **Conclusion**

The aviation industry has emerged as a fastest growing pace, in India various foreign companies eyed on the aviation Industry as it is a emerging field If 1% of the population use the aviation Industry it will become a lucrative business as above reflect the many benefits that will accrue under the Convention to the air transportation industry and its consumers. If we look into the provisions and treaties there should be strong commanding sovereign laws in order to govern the commercial business one key benefit not reflected in the provisions themselves is the benefit of uniformity. Based upon the response to the Convention at the diplomatic conference and communications with other governments since that time, I believe that U.S. ratification of this Convention will encourage ratification by a number of other States and will lead to a much-needed and long sought after modernized unification of the liability regime applicable to international air carriers. Certain of the passenger benefits codified in the Convention already are provided for under the IATA/ATA Agreements. However, those agreements are voluntary on the part of carriers; they are not embodied in law. Also, while airlines that have signed those agreements uniformly waive the Warsaw



liability limits, they do not all accept strict liability up to 100,000 SDR. Furthermore, the inter-carrier agreements do not contain provisions to protect against inflation. In addition, those agreements do not contain the invaluable supplementary "fifth" jurisdictional provision codified at Article 33(2) of the Convention. Finally, in the case of code-share operations, the IATA/ATA Agreements do not assure passengers and cargo consignors of recourse against both the contracting carrier and the actual carrier operating the flight.

A more detailed article-by-article analysis of the provisions of the Convention is enclosed for the information of the Senate. The Department of Transportation and the Department of State cooperated in the negotiation of the Convention. Together with the Department of State, the Departments of Defence, Justice, and Transportation all concur in the submission of the Convention to the Senate for its advice and consent to ratification. Support for the Convention within the United States is broadly based and includes groups representing families of aircraft accident victims, the carriers, manufacturers, and lawyers specializing in representing plaintiffs and defendants in aviation accidents. Responses from all fronts have been positive. The entry into force of the new Convention would represent the culmination of four decades-long effort by the United States and other countries to persuade the international aviation community to provide increased economic protection for the international air traveller and shipper with a regime of liability and modernized procedures that match the developments in today's aviation industry. I therefore recommend that you transmit the new Convention to the Senate at an early date with the recommendation that the convention be approved at the earliest possible time, subject to a declaration on behalf of the United States that the Convention shall not apply to international carriage by air performed and operated directly by the United States for non-commercial purposes in respect to its functions and duties as a sovereign State.

## **AVIATION INSURANCE: ISSUES AND CHALLENGES**

### **Introduction:**

Aviation insurance is insurance coverage geared specifically to the operation of aircraft and the risks involved in aviation. Aviation insurance policies are distinctly different from those for other areas of transportation and tend to incorporate aviation terminology, as well as terminology, limits and clauses specific to aviation insurance.

Aviation insurance has come to acquire an increasingly broad scope, and is sometimes referred to in modern times by the wider term 'Aerospace insurance'. This is because of the presence of insurance policies that cover a wide range, from privately-owned ultra-lights to entire airline jet fleets, from maintenance shops to airframe and engine manufacturers, from small general aviation airfields to major airports, and from micro-satellites to commercial space launchers.

## **Types of Aviation Insurance**

Aviation insurance normally covers physical damage to the aircraft and legal liability arising out of its ownership and operation. Specific policies are also available to cover the legal liability of airport owners arising out of the operation of hangars or from the sale of various aviation products. These latter policies are similar to other types of liability contracts. Aviation insurance is divided into several types of insurance coverage available.

### **Public Liability Insurance**

This coverage, often referred to as third party liability covers aircraft owners for damage that their aircraft does to third party property, such as houses, cars, crops, airport facilities and other aircraft struck in a collision. It does not provide coverage for damage to the insured aircraft itself or coverage for passengers injured on the insured aircraft. After an accident an insurance company will compensate victims for their losses, but if a settlement cannot be reached then the case is usually taken to court to decide liability and the amount of damages. Public liability insurance is mandatory in most countries and is usually purchased in specified total amounts per incident, such as \$1,000,000 or \$5,000,000.

### **Passenger Liability Insurance**

Passenger liability protects passengers riding in the accident aircraft who are injured or killed. In many countries this coverage is mandatory only for commercial or large aircraft. Coverage is often sold on a "per-seat" basis, with a specified limit for each passenger seat.

### **Combined Single Limit (CSL)**

CSL coverage combines public liability and passenger liability coverage into a single coverage with a single overall limit per accident. This type of coverage provides more flexibility in paying claims for liability, especially if passengers are injured, but little damage is done to third party property on the ground. Combined Single Limit Liability cover for a total amount covering carrier's entire liability which includes:

- General Legal Liability
- Third Party Legal Liability
- Passenger Legal Liability
- Registered Baggage or
- Unregistered Baggage in the charge of the passenger
- Cargo Legal Liability
- Mail Legal Liability

These liabilities result from the operations the operator is set up to perform and are normally are the subject of a contract of carriage like a ticket or airway bill.

### **Ground risk hull insurance not in motion**

This provides coverage for the insured aircraft against damage when it is on the ground and not in motion. This would provide protection for the aircraft for such events as fire, theft, vandalism, flood, mudslides, animal damage, wind or hailstorms, hangar collapse or for uninsured vehicles or aircraft striking the aircraft. The amount of coverage may be a blue book value or an agreed value that was set when the policy was purchased.

The use of the insurance term "hull" to refer to the insured aircraft belies the origins of aviation insurance in marine insurance. Most hull insurance includes a deductible to discourage small or nuisance claims.

### **Ground risk hull insurance in motion (Taxing)**

This coverage is similar to ground risk hull insurance not in motion, but provides coverage while the aircraft is taxiing, but not while taking off or landing. Normally coverage ceases at the start of the take-off roll and is in force only once the aircraft has completed its subsequent landing. Due to disputes between aircraft owners and insurance companies about whether the accident aircraft was in fact taxiing or attempting to take-off this coverage has been discontinued by many insurance companies.

### **In-flight insurance**

In-flight coverage protects an insured aircraft against damage during all phases of flight and ground operation, including while parked or stored. Naturally it is more expensive than non-in-motion coverage since most aircraft are damaged while in motion.

### **Hull "ALL Risks"**

The hull "All Risks" policy usually pertains to chances of physical loss or damage to the aircraft. These policies are subjected to a standard level of deductible (uninsured amount borne by the Insured) applicable in case of partial loss. This deductible presently ranges from US \$ 50,000 (in case of Twin Otter) to US \$ 1,000,000 (in case of Boeing 747). The term "all risks" can be misleading and it should be cleared that the term is not subjected to any kind of consequential loss, or loss of use and delay. The term addresses to the restoration of the aircraft to its previous condition before the loss. Presently the bulk of airline hull "all risks" policies are formed on the basis of agreement between the insurers and the insured covering the policy period, the value of the aircraft and in any case of total loss the agreed value should be payable in full. There is no option for replacement under such an agreement.

### **Liability Insurance**

Liability is basically categorized in two aspects. With regard to passengers, it is limited to baggage and cargoes carried on the aircraft. The second aspect is Aircraft Third Party

Liability, which is the liability for any sort of property damage or to the people outside the aircraft. This is similar to the third party insurance that is required under the Indian Motor Vehicles Act, 1989.

### **Hull Total Loss Only Cover**

Hull total loss only cover is subjected solely to total loss of the aircraft and is particularly formed for the old aircrafts as the condition of such are very poor and are insured for low amount the premium of which would also be very low. The proportion of partial losses to total losses in case of such aircraft is very inadequate.

Aviation insurance is insurance coverage geared specifically to the operation of aircraft and the risks involved in aviation. Aviation insurance policies are distinctly different from those for other areas of transportation and tend to incorporate aviation terminology, as well as terminology, limits and clauses specific to aviation insurance.

Just as with insurance for other types of vehicles, there are a number of levels of coverage in aviation insurance policies, including liability coverage for accidents when the policyholder is at fault, theft and loss coverage, life insurance riders, and insurance for other types of situations, such as loss of cargo. The more services requested on a policy, the more expensive it will be. Coverage also varies depending on the type of craft: helicopters, sport planes, commercial airliners, and so forth are all covered differently.

Aviation Insurance was first introduced in the early years of the 20th Century. The first aviation insurance policy was written by Lloyd's of London in 1911. The company stopped writing aviation policies in 1912 after bad weather and the resulting crashes at an air meet caused losses on many of those first policies. The first aviation policies were underwritten by the marine insurance underwriting community. The first specialist aviation insurers emerged in 1924.

In 1929 the Warsaw convention was signed. The convention was an agreement to establish terms, conditions and limitations of liability for carriage by air, this was the first recognition of the airline industry as we know it today. In 1931, Captain A. G. Lamplugh, the British Aviation Insurance Company's chief underwriter and principal surveyor, said of the new industry: "Aviation in itself is not inherently dangerous. But to an even greater degree than the sea, it is terribly unforgiving of any carelessness, incapacity or neglect." Realizing that there should be a specialist industry sector, the International Union of Marine Insurance (IUMI) first set up an aviation committee and later in 1933 created the International Union of Aviation Insurers (IUAI), made up of eight European aviation insurance companies and pools.

The London insurance market is still the largest single centre for aviation insurance. The market is made up of the traditional Lloyd's of London syndicates and numerous other

traditional insurance markets. Throughout the rest of the world there are national markets established in various countries, this is dependent on the aviation activity within each country, the US has a large percentage of the world's general aviation fleet and has a large established market.

No single insurer has the resources to retain a risk the size of a major airline, or even a substantial proportion of such a risk. The catastrophic nature of aviation insurance can be measured in the number of losses that have cost insurers hundreds of millions of dollars (Aviation accidents and incidents), most airlines arrange "fleet policies" to cover all aircraft they own or operate.

### **Exceptions under Aviation Insurance Policies**

There are a number of exceptions which apply under an aviation insurance policy. Following is a list of some of the common exceptions. It must, however, be noted that such exceptions vary from policy to policy, and that the following list is only illustrative and not exhaustive.

- Wear, tear and gradual deterioration, ingestion damage caused by stones, grit, dust, ice etc. which result in progressive engine deterioration (Considered wear and tear), Mechanical Breakdown. War and Allied Perils are also excluded from the standard policy. These can be, and indeed are insured by way of a separate policy.
- Claims arising whilst the aircraft is being used for any illegal purpose.
- Claims arising whilst the aircraft is outside the agreed geographical limits (unless due to force majeure.)
- Claims which are payable under any other insurance.
- The hull "All Risks" policy will pertain to the exclusion of war damages. War here means any kind of civil war, strikes, riots, disturbances, confiscations, hi-jacking or any kind of political or terrorist attacks.
- Noise and pollution unless resulted from crash, fire or any kind of explosions registered inside the air plane,
- Any kind of loss incurred by the own property of the insured.

### **Legal Concerns**

In many cases, changes in other areas of our society have a great influence over aviation. This is the case with our court system. The trend towards unreasonable verdicts and ridiculous awards has forced many aircraft owners to create shell corporations to front as the registered owner of their aircraft. Owners today are uncertain as to how much liability insurance is adequate protection, a situation made far worse by the growing reluctance of

insurance underwriters to offer higher liability protection at any price. The underwriters explain that it is impossible for any aviation insurance company to predict an adequate liability premium rating structure when the court decisions are so volatile and erratic. All aviation insurance companies are heavily reinsured by companies in London and other foreign markets, and those foreign insurers usually charge passenger liability premiums for aircraft operated in the United States that are three to five times as much as those paid by non-U.S. operators. And so it goes for the owner of general aviation and commercial aviation aircraft in the United States. Aircraft owners seem to be trapped between inadequate coverage limits, high-priced liability insurance premiums, and the perils of the U.S. court system. The recent volcanic ash clouds from the eruption in Iceland have wreaked, and continue to wreak, havoc on air travel for millions of passengers and also disrupted businesses throughout the world. On April 14, 2010, the Eyjafjöll volcano in Iceland erupted and began sending dust and ash into the atmosphere. The ash cloud was carried by the wind and soon covered large areas of Europe, resulting in the closure of European and United Kingdom airspace. An early estimate of the financial impact on airlines by the International Air Transport Association (IATA) was in excess of \$200 million per day in lost revenues alone. In addition to loss of revenue, airlines have incurred costs in connection with legal obligations to stranded passengers under the governing EC Regulation 261/2004 as well as costs and expenses in connection with re-routing aircraft and stranded aircraft at various airports.

As with most high profile events involving significant and wide-ranging financial impact, an important issue is whether there is any available insurance coverage in connection with the expected losses and incurred costs. Some potential aviation insurance issues are: coverage in connection with the mandatory grounding of aircraft; damage to aircraft and engines in flying through volcanic ash clouds; and defense and liability obligations in connection with claims as a result of stranded passengers and cargo. While each policy of insurance is an individual contract between parties and subject to its own terms, conditions and exclusions, it can safely be said that virtually no airlines are covered for the financial consequences arising from the mandatory grounding of aircraft due to the volcanic ash cloud, other than possibly through the lay-up provisions of their policies. A lay-up credit is a return of some portion of aircraft insurance premium if the aircraft is not flying for an extended period of time – usually at least 90 days. In the absence of physical damage to aircraft, there is no coverage trigger under most aviation hull insurance policies.

### **Survival of small aviation players**

In the future, some sectors of the aviation community may simply cease to exist as a result of the threat of financial devastation due to lawsuit. We've had a glimpse of this already when the escalating cost of products liability insurance practically stopped the production of light aircraft in the mid-1980s. It was only after a change in legislation limiting the time an aircraft manufacturer could be held responsible for products liability that our industry resumed

production of new light aircraft. In the future, such sectors of general aviation as the small piston repair shop and the small flight training school may not be able to afford the increasing insurance premiums and in some cases may not be able to buy adequate insurance at any price. This may spell the end for many in these businesses.

### **Global Aviation Insurance: What Lies in Store**

What, then, is the outlook in the year 2011 and ahead? The short answer is that it very much depends on the level of claims for the rest of the year. Fundamentally the airline insurance market is healthy at this point, capacity is strong and as a result following markets can be used to generate enough competition to ensure that the cost of insurance is fairly closely aligned to the risk being represented.

At the same time, the market is perilously close to suffering a fourth consecutive year without return. There is now very little room for manoeuvre and further losses are likely to confirm 2010 as a loss making year for the airline insurance market. If this is the case, then commitment to the sector may fall in 2011 and prices could rise as a result.

What this means for airlines renewing during the final quarter of the year, as stated earlier, is that negotiations are likely to be tough. Underwriters are going to need to be convinced of the merit of an insurance programme before they commit to supporting it, let alone offering reduced prices. The evidence of 2010 so far is that there are few reductions available for airlines even if they offer a positive risk profile and good loss history. While the market does not appear to be softening, it is at least stabilizing after the high rate of increases in 2009.

The beginning of the year saw the discussion of the potential for equilibrium in the airline insurance market, and the point still stands. The market now appears to be reacting far more to what is happening in the industry today rather than responding to past premium trends. Unfortunately with losses relatively high in 2010, it means that conditions are likely to remain challenging for some time.

### **Conventions and Liability Involved in Air Law**

The Chicago Conference called by the United States at the time of World War II. The Conference at Chicago lasted for 37 days from 1st November to 7th December, 1944. Among the major achievements of the Conference were the drafting, adoption and opening for signature of one major convention, three Agreements, a standard form of bilateral for provisional air routes and the text of 12 technical Annexes. The Convention was intended to formulate certain agreed principles and agreements to ensure safe and orderly development of international civil aviation on the basis of equality of opportunity and to ensure that the air transport service might operate “Soundly and economically”. In fact, the Chicago constitution became a viable constitution for post-war global air world.

The Final Act of the Chicago Conference was adopted and signed by 52 States. The Final Act contained 12 Resolutions and the following five appendices.

- i) The interim agreement on the international Civil Aviation
- ii) The convention on the international Civil Aviation
- iii) The international air service transit agreement (Two Freedoms Agreement)
- iv) The international air transport agreement (Five Freedoms Agreement)
- v) Drafts of Technical Annexes
- vi) a standard form of Bilateral Agreement

### **The Warsaw Convention, 1929**

With the blossoming of commercial air transport in the 1920s, governments and transport industry alike began to inquire into the ramifications of an aviation accident. The French government, in response to this concern, convened the first international conference on private air law, in 1925, primarily to consider the creation of a uniform system of aviation law.

The second international conference on private air law was held in Warsaw from October 4 to 12, 1929. Its main purpose was to unify the rules on the international transport of persons and property by air, fix the damages for loss or injuries sustained and create a presumption of liability against the carrier on the happening of an injury to or death of a passenger, or damage to or loss of property.

The Warsaw Convention of 1929, formally known as the Convention for the "unification of certain rules relating to international carriage by air", was signed in Warsaw on 12 October 1929 and came into force on 13 February 1933. This convention established the international liability of air carriers and the monetary limits of damage, delay or loss. The legal regime governing the liability of air carriers in the carriage of passengers, baggage and cargo comprised a number of international instruments, collectively known as the Warsaw system.

The Warsaw system consists of the original Warsaw Convention of 1929, a series of protocols amending the Warsaw Convention provisions, as well as one supplementary convention to the Warsaw Convention, commonly known as the Guadalajara supplementary convention of 1961. In its practical application, the Warsaw Convention has been amended de facto by a private agreement of air carriers operating to, from or via the territory of the US. Some components of the Warsaw system are in force for a considerable number of countries; the other instruments have not yet been enforced, although they were adopted by a diplomatic conference many years ago. Guadalajara Convention 1961 are in force; Guatemala City Protocol, Additional Protocols nos.1-4 are not in force.



The Warsaw Convention of 1929 is a basic document on an air carrier's liability, although it has been amended by other subsequent treaties too. According to Article 17, an air carrier is liable to death or injury sustained in an accident on board the aircraft unless, under Article 20, the carrier establishes that he has taken all necessary measures to avoid the damage, or that it is impossible for him to do so.

A condition precedent to the carrier's responsibility to the passengers is that the damage must take place on board the aircraft, or in the course of any of the operations of embarking or disembarking ([Article 17(1)]. Under Article 21, if the carrier proves that the damage has been caused by or contributed to by the negligence of the injured person, Court may, in accordance with the provisions of its own law, exonerate the carrier wholly, or partly, from liability.

The central underpinning of the Warsaw Convention is Article 22, which places a maximum ceiling on the damages recoverable from an air carrier when a passenger has been injured, or killed, in an international air travel. The internationally established rule is that subscribing air carriers are liable to damage sustained by a passenger during the course of international transport up to an amount not exceeding 1,25,000 princare francs (at that time equal to about \$ 8,300).

The willful misconduct exception to the liability limitation, under Article 25 of the Warsaw Convention has been a cause of concern and extensive debate since its promulgation. According to the original draft of the treaty written in French, the carrier cannot invoke liability Limitation provisions if the damage has been caused by dol or by such default on the carrier's part as considered equivalent to dol (or "wilful misconduct" for French). However, even this translation does not seem to conform to the original intent of the treaty draftsmen, who selected the word dol. Even so, the conflict emerging over the years in those Warsaw Convention cases, where "wilful misconduct" is alleged against a carrier, has not focused so much on the question of translation as it did on the case-by-case factual issues of what constitutes a "willful misconduct".

Special contracts, ticket conditions or other provisions designed to reduce or limit this liability were declared void by Article 23. Under Article 24 all sanctions arising out of the convention, were subject to the terms of the convention.

### **The Hague Protocol, 1955**

The Hague Protocol, 1955, has changed those provisions of the Warsaw Convention which were found incompatible with the changed situation of international air transport, or were unclear or subject to different interpretations. It doubles the original Warsaw limits of liability by amending Article 22, to increase the gold franc limit from 1,25,000 to 2,50,000 (approximately \$ 16,000 in 1955). This was accompanied by a revision of Article 25. Under the original text, a claimant could recover unlimited damages if he established that the

accident was the result of "wilful misconduct". [Dol in the original French text is an admittedly loose term, which has been subject to widely differing interpretations].

The Hague Protocol changed this to a more precise standard, permitting unlimited recovery if the plaintiff could establish that "the damage resulted from an act or omission of the carrier, his servants or agents done with intents to cause damage or recklessly and with knowledge that damage would probably result". It also simplified documentation, provided for more adequate "notice" to passengers and permitted the attorney's fees and other costs of litigation to be awarded separately from the limit if permitted by the law of the forum.

### **The so-called Montreal Agreement of 1966**

The so-called Montreal Agreement of 1966, which is not an intergovernmental agreement but only an arrangement on liability among air carriers operating passenger transport, to, from or with an agreed stopping place in the United States, was adopted on 13 May 1966.

This was necessitated by the withdrawal of the denunciation of the Warsaw Convention by the US which was to take effect on 16 May 1966. By this agreement, the parties have de facto amended the application of the Warsaw Convention as changed by the Hague Protocol, 1955, by providing for a limit of liability for each passenger in the case of death, or bodily injury, of US\$ 75,000, inclusive of legal fees and costs and \$ 58,000 exclusive of legal fees and costs.

### **The Guatemala City Protocol in 1971**

The rapidly changing nature of international air transport necessitated the Guatemala City Protocol in 1971, which effected a far-reaching revision of the Warsaw Convention, 1929, as amended by the Hague Protocol, 1955, particularly the provisions on the concept of liability and the limitation of the air carrier's liability.

The Guatemala City protocol mainly provides for a regime of absolute liability of the air carrier; an unbreakable limit of the carrier's liability at the maximum amount of 1,50,000 Poincaré francs (US \$ 100,000) per person; a domestic system to supplement, subject to specified conditions, the compensation payable to claimants under the convention in respect of the death or personal injury of passengers; a settlement inducement clause, conferences for the purpose of reviewing the passenger limit; and an additional jurisdiction for suits pertaining to passengers and baggage.

### **The Montreal Protocols of 1975**

The 1975 'diplomatic conference on air law' drafted and adopted four protocols to the Warsaw Convention. The protocols did not raise the limit of liability, but changed the Expression from Poincaré francs to special drawing rights (SDRs) as defined by the International Monetary Fund (IMF). Additional Protocol No. 1 establishes the liability limit

at 8,300 SDR, or 1, 25,000 monetary units (MU) per passenger. Additional protocol No. 2 limits the liability at 16,600 SDR, or 2, 50,000 MU, per passenger. Additional Protocol No. 3 establishes 100,000 SDR, or 1, 50,000 MU, per passenger in the case of injury or death. Additional Protocol No. 4 revises various provisions relating to air cargo regulations. To protect third parties on the ground, the Rome Convention of 1933 and the additional Insurance Protocol of Brussels, 1938, were drafted to establish the absolute but limited liability of an aircraft operator with respect to damage caused to third parties on the surface of the earth. These agreements did not receive sufficient adherence. Today they have been replaced by the Rome Convention of 1952, amended by the Montreal Protocol of 1978 and now amended to Montreal convention 1999.

The difference between the Warsaw system and the Rome Convention is that while the Warsaw Convention relates to the liability of the carrier with a contractual relationship to the passenger, the Rome Convention sets the liability of carrier to persons with whom they have no contractual relationship. The operator of an aircraft is liable to damage claims, on the proof by the injured person that the damage has resulted and is attributable to the aircraft. These are in force, but with a rather limited adherence.

### **Lockerbie Case**

In application, the Montreal Convention has also been problematic, as demonstrated by contentious litigation before the International Court of Justice (ICJ). This case arose out of a dispute between the United States and Libya in 1971, following the explosion of Pan Am flight 103 over Lockerbie, Scotland, in which two Libyan nationals were suspected of putting a bomb onboard. When the United States sought extradition of the Libyan nationals, Libya refused, reasoning that it would prosecute the alleged perpetrators under its domestic law in accordance with the Montreal Convention. Relying on Article 14 of the Montreal Convention, Libya brought the United States before the ICJ on grounds that the United States had breached the arbitration requirements for disputes arising out of the Montreal Convention.

Indeed, it appeared that Libya had complied with the Montreal Convention and the United States, by refusing to go to arbitration on the issue, had not. But there were suspicions that the Libyan government was complicit in the bombing and would not adequately prosecute the suspects. To further confuse the matter, the United Nations Security Council intervened, issuing two resolutions regarding Libya's alleged role in the Lockerbie bombing and mobilizing economic sanctions.

When the dispute finally came before the ICJ, the Court ruled that under Article 25 of the United Nations Charter, both states were obliged to follow the decisions of the Security Council, despite any other obligations expressed in international agreements, including the Montreal Convention. Various forms of Security Council sanctions followed, and

eventually, Libya surrendered the two suspects to the United Kingdom to be tried and convicted before a Scottish court in the Netherlands. The United States and Libya never went to arbitration on the dispute, despite the explicit provisions of the Montreal Convention.

In sum, the Lockerbie case demonstrates two problems with the Montreal Convention. First is the problem of inconsistent treaty enforcement under certain circumstances. For example, Libya's apparent complicity in the airline bombing contributed to the United States' decision to breach the explicit arbitration provision in the Montreal Convention. Second is confusion over the hierarchical nature of various sources of international law. The ICJ decision on the Lockerbie incident provided a controversial determination that the legal authority of the Montreal Convention is diminished when read in light of related United Nations Security Council resolutions.

### **Analysis of the Global Aviation Insurance Market from 1995-2010**

At the beginning of the year 2009, the aviation and airline industry itself was in disarray, and the depression seemed to be the harbinger of death for the aviation insurance industry. For, without airlines, what would be left to be insured? However, a recent market study has shown that this has not been the case. In terms of airlines ceasing operation, overall the industry appears to have weathered the economic storm relatively well so far, despite the many augurs of doom being delivered 3 years ago. According to the data that was studied from the insurance markets, just over US\$16 million has come out of the lead hull and liability premium total so far this year as a result of airlines going out of business, joining group programmes or seeing their AFV drop below US\$150 million, the criteria for inclusion in the data set.

The majority of lost premium, US\$8 million, comes from four airlines that have gone out of business, although a further US\$7 million has been the result of four other airlines going into group programmes. The growth of group programmes is perhaps unsurprising given that the airline insurance market tends to reward economies of scale. At the same time, around US\$9 million has come into the sector as a result of five new airlines joining the data set.

Four of these are the result of AFV growth while the fifth is a new airline. The US\$7 million difference between airlines leaving and joining the industry so far this year is something of a turnaround on the full year data from 2009, when US\$41 million of lead hull and liability premium left the industry and US\$91 million joined. The high number of airlines joining the sector in 2009, 26, was the result of fleet growth but also restructuring and airlines taking their insurance policies out of group programmes. It may be that if the economic position is stabilizing and passengers returning, restructuring becomes less urgent and as a result the number of new airlines in 2010 will be lower. There are still a number of airlines that could be described as being distressed, however. If the economic downturn is protracted as some experts are suggesting, it could well be that there will be further airlines leaving the industry.

## **Aviation Insurance Industry in India: An Overview**

Indian Insurers have come a long way in developing the market capacity for aviation insurance business and as India's growth story continues, Insurers have kept pace with the growing demand from buyers in India. Today the Indian market is playing a key role in supporting not only buyers in India but also buyers in the sub-continent, including major support to the SAARC region.

As the Indian aviation industry continues to grow, many new buyers have entered the insurance market with requirement for different types of products. Apart from traditional airline and aircraft related insurances, Insurers are now covering different verticals of aviation industry ranging from airports to aircraft manufacturers with bigger risks appetite. The past few years have seen heightened level of competition amongst both Public and Private Sector Insurance Companies in an attempt to retain the current market share and to fulfill an ever increasing desire to participate in the aviation growth story.

This is more so in the General Aviation (generally aircraft with less than 61 seats) segment where the sum insured limits are within the capacities of many Indian Insurers. General Aviation buyers in India have enjoyed substantially lower premium payouts compared to their world and regional peers, as buyers have bargained hard taking advantage of the soft market conditions and excess market capacity. In the process, quite a few buyers have switched their insurers.

On the Airline front, pricing continues to be driven by leading international markets especially in London, as Indian Insurers continue to off load major risks to international companies mainly in the European sub-continent, with insurance brokers playing a very important role in the entire process.

## **Aviation Insurance in India: Laws and Regulations**

The Indian Government ratified "Montreal Convention 1999" in March 2009 and currently it applies to international travel. There is nothing on record at this stage to show that the revised liability limits are applicable to domestic sectors. In brief, the Convention has increased compensation levels for international passengers in the event of death or bodily injury and damage and delay to the passenger baggage and cargo. While the compensation for death or bodily injury has increased almost 7 times from the existing levels of approximately USD 20,000 to around USD 140,000, the compensation for damage to the checked baggage has increased from approximately USD 20 per kg to around USD 1,400 per passenger.

The compensation for damage to cargo has increased from USD 20 per kg approximately to USD 24 per kg. The Warsaw System, which is in force in India by way of Carriage by Air Act, 1972(amended in 2009) had allowed four choices of jurisdiction for filing of a claim by

the passenger, namely, place of issue of ticket, principle place of business of the carrier, the place of destination of the passenger and the place of domicile of the carrier.

Before the boom in the Indian aviation sector, the airline insurance market was dominated by the four state-owned general insurance companies: New India Assurance Company, Oriental Insurance Company, National Insurance Company and United India. However, with the growth in the Indian aviation story, private players like ICICI Lombard, Bajaj Allianz, Iffco Tokyo General Insurance and Reliance General Insurance Company are also trying to muscle their way into this lucrative sector. The unprecedented growth in this sector is also seeing private players join hands with each other to bid for accounts. The latest such case is the ICICI Lombard-Bajaj Allianz tie-up where they are jointly bidding for Air India's Insurance account which includes providing cover for 50 planes valued over \$3 billion.

In India, this segment is highly reinsurance-driven. A majority of the players have re-insured the value of risk covered with foreign companies. Take the case of Air India where almost 90% of the risk is insured overseas through reinsurance arrangements, while the remaining cover rests domestically. Indian insurance companies do not have the financial muscle to address claims of airlines and generally go in for reinsurance which means sharing the risk of loss with another insurance company. The role of a reinsurer is important in the Indian context as most of the companies do not have the requisite experience of handling a market of this size.

Out of the eight private players, Bajaj Allianz General Insurance Company and ICICI Lombard General Insurance Company Limited are most active in this segment. Although there are no official estimates, industry players put a ballpark figure of the Indian aviation insurance market at somewhere around Rs 400 cr to Rs500 cr. With new aircraft being bought by new players entering the sky and the existing one in expansion mode, this segment will only grow.

According to Ernst & Young, a global consultancy firm, Indian skies would have over 700 aircraft - from 235 currently - by 2012, an increase of almost 200%. The numbers speak for the potential of this segment in the market, which is one of the fastest growing in the world. The total premium figures for aviation insurance in India for 2006-07 stood at Rs 417.29 cr. typically, the premium depends upon underwriting factors such as age of the aircraft, experiences of the pilot flying the aircraft, make and model and use of the aircraft. It is generally 1% to 3% of the aircraft value.

The aviation insurance market is looking up and is currently at Rs 350 crore. But with new aircraft being bought by new players entering the business and the existing one on an expansion mode, the aviation market is set to take off. Through the Montreal Convention a fifth jurisdiction is added which is the place of domicile of the passenger, provided the airline has a presence there. Therefore an Indian would be able to file claim in India even if the

journey was undertaken outside India. Liability Limit for domestic passengers in the event of death or bodily injury continues to be at the old level of Rs.750,000 for passengers above 12 years of age and Rs.350,000 for below 12 years.

As regards damage and delay to the passenger, baggage compensation is Rs.4,000 per passenger for hand baggage and Rs.450 per kg for registered baggage. So far, Insurers have responded very positively by covering their customers based on the revised limits for international travel and it remains to be seen whether new limits will be applicable for domestic travel as well and its impact on the liability claims scenario.

Western European countries including countries in the Far East namely Hong Kong, Singapore have adopted regulations specifying minimum liability insurance limits for aircraft based on the “maximum takeoff weight of the aircraft” and “passenger seating capacity”, however India is yet to adopt any such regulations. Even neighboring countries like Sri Lanka and Nepal have minimum liability insurance requirements for aircraft and it may not be too long before India adopts such requirements. While Airlines and Corporate Jet owners are buying liability limits in line with the international trend, there is no similar trend when it comes to helicopter operators. Like Airline policies, liability limits on Corporate Jets many times are driven by financing /purchase agreements; however helicopter operators tend to buy low limits.

### **Claims Scenario in India**

Each Insurer will have its own underwriting experience to show and can vary from its peers considerably depending on their participation on the policies that has produced losses. General Aviation claims in 2008 are expected to exceed Rs. 500 million and 2009 has started on a bad note with claims in first five months exceeding Rs.350 million. As against this, past 10 years average general aviation losses are hovering around Rs.400 million. When we compare these claim figures against the total general aviation premium in India, one may come to a conclusion from the insurer’s perspective that general aviation is profitable over the last 10 years period. This may not be true for all insurers, especially considering the fact that 10 years average loss figure consists of two or three major losses in each year. Insurers participating on these losses would have been hit hard. Majority of the losses in the last 10 years are on account of aircraft damages and liability claims form a very small portion of it. However, by no means does this give any indication into the future considering the catastrophic nature of aviation business. The Airline segment in India over the last 10 years has been relatively stable. However, the claims experience varies from airline to airline and one of the disturbing trends in India is „bird hit“ losses in the recent past.

### **Aviation Insurance in India: Latest Data and Trends**

Aviation direct premium income in India is circa INR 3,750 million and this includes buyers from all segments including airlines, general aviation, aerospace, airports, ground handlers,

catering companies etc but excluding satellite. Over 75% of the total premium comes from the airline segment with another 23% from General Aviation. A very small portion of 2% is contributed by airport, ground handlers, catering segment etc. In addition, National Reinsurer, “GIC Re” writes substantial international aviation business (mainly by way of inward reinsurance) coming into the country and gradually other insurers are following suit, but with caution.

Over the last 10 years GIC Re has emerged as one of the largest aviation reinsurer in the international market and is playing a key role in supporting Indian Insurers. Currently there are over 200 buyers of aviation insurances in the country who need aviation products in one form or other. Many new buyers have entered the market in 2008-09 and the trend is expected to continue in 2010-11 albeit at a slow pace. For the airline sector, customer base and number of aircrafts has increased significantly in the past three years but current economic situation is taking a toll on its future growth.

When one compares the overall aviation premium compared to total non-life premium in India, it forms a very small portion of less than 2% of total Non-Life premium income, however winning or retaining an aviation client has always made big headlines and the glamour attached to aviation industry is keeping Insurers competing stronger day-by-day even at the cost of a shrinking premium base.

Collectively, the Indian market has capacity to insure General Aviation aircraft valued around USD 50m and Liability limit around USD 275m. Capacity for airlines is very similar, but reduced to some extent with limitations of percentage share restrictions when it comes to aircraft with seating capacity in excess of 61 passenger seats.

The situation with regard to claims, however, is more important. Each Insurer will have its own underwriting experience to show and can vary from its peers considerably depending on their participation on the policies that has produced losses. General Aviation claims in 2008-09 are expected to exceed Rs. 500 million and this year has started on a bad note with claims in first five months exceeding Rs.350 million.

As against this, past 10 years average general aviation losses are hovering around Rs.400 million. When we compare these claim figures against the total general aviation premium in India, one may come to a conclusion from the insurers’ perspective that general aviation is profitable over the last 10 years period. This may not be true for all insurers, especially considering the fact that 10 years average loss figure consists of two or three major losses in each year.

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years has been relatively stable. However, the claims experience varies from airline to airline and one of the disturbing trends in India is 'bird hit' losses in the recent past.

### **Aviation Insurance in India: Laws and Regulation**

The Indian Government ratified "Montreal Convention 1999" in March 2009 and currently it applies to international travel. There is nothing on record at this stage to show that the revised liability limits are applicable to domestic sectors. In brief, the Convention has increased compensation levels for international passengers in the event of death or bodily injury and damage and delay to the passenger baggage and cargo. While the compensation for death or bodily injury has increased almost 7 times from the existing levels of approximately USD 20,000 to around USD 140,000, the compensation for damage to the checked baggage has increased from approximately USD 20 per kg to around USD 1,400 per passenger. The compensation for damage to cargo has increased from USD 20 per kg approximately to USD 24 per kg. The Warsaw System, which is in force in India by way of Carriage by Air Act, 1972 had allowed four choices of jurisdiction for filing of a claim by the passenger, namely, place of issue of ticket, principle place of business of the carrier, the place of destination of the passenger and the place of domicile of the carrier. Through the Montreal Convention a fifth jurisdiction is added which is the place of domicile of the passenger, provided the airline has a presence there. Therefore an Indian would be able to file claim in India even if the journey was undertaken outside India. Liability Limit for domestic passengers in the event of death or bodily injury continues to be at the old level of Rs.750,000 for passengers above 12 years of age and Rs.350,000 for below 12 years. As regards damage and delay to the passenger, baggage compensation is Rs.4,000 per passenger for hand baggage and Rs.450 per kg for registered baggage. So far, Insurers have responded very positively by covering their customers based on the revised limits for international travel and it remains to be seen whether new limits will be applicable for domestic travel as well and its impact on the liability claims scenario.

Western European countries including countries in the Far East namely Hong Kong, Singapore have adopted regulations specifying minimum liability insurance limits for aircraft based on the "maximum takeoff weight of the aircraft" and "passenger seating capacity", however India is yet to adopt any such regulations. Even neighboring countries like Sri Lanka and Nepal have minimum liability insurance requirements for aircraft and it may not be too long before India adopts such requirements. While Airlines and Corporate Jet owners are buying liability limits in line with the international trend, there is no similar trend when it comes to helicopter operators. Like Airline policies, liability limits on Corporate Jets many times are driven by financing /purchase agreements; however helicopter operators tend to buy low limits.

## **Aviation insurance to hit airlines in the pockets**

A flurry of plane crashes across the world this year will find its echo in the domestic aviation insurance premium rates in the form of a 25-40 percent hike. The year 2009 has gone down as a bad year for airlines with three major accidents - Air France, Yemenia and Caspian Airlines - killing around 550 people. There were several other minor incidents too. "The Air France and Yemenia losses in June 2009 have set the agenda for the airline insurance market potentially well into 2010 and 2011. Estimates for Air France and Yemen Air loss have been put in the range of \$700-800 million and \$250-300 million respectively," Bhargav Dasgupta, managing director and CEO, ICICI Lombard General Insurance Company, told IANS. According to him, the losses incurred by the global aviation insurance market this year excluding minor losses are estimated at \$1.32 billion till June 2009, as against a premium income of \$416 million.

"Nearly half of the airline placements so far globally have seen their hull and liability premium costs rise by more than 25 percent compared to the previous year. This pattern is likely to continue for the rest of the year. As airlines insurance in India follows global trends, we expect a price rise for Indian carriers as well," he added. According to Dasgupta, the aviation premium rate is primarily driven by the global trends owing to the large values for the aircraft and liability covers for which international reinsurance capacity is required. The global aviation premium and claims for 2007-08 are estimated at \$1.6 billion and \$1.4 billion respectively. Considering the acquisition and operating costs, the insurers have been incurring losses resulting in hardening of premium rates from the last quarter of 2008, he added.

"Typically the premium rate would vary from 0.5 percent to 2.5 percent of the aircraft value. The law of large numbers does not apply to this segment as each aircraft is of high value. An Airbus or Boeing would cost anything from Rs.200 crore to Rs.1, 000 crore. Even minor damage - technically called attrition loss - would amount to Rs.100 crore," T.A. Ramalingam, head of underwriting at Bajaj Allianz General Insurance Company, told IANS.

According to Dasgupta, during 2008-09 Indian non-life insurers booked a premium of Rs.343 crore under the aviation portfolio, up from Rs.304 crore booked the previous year. "About Rs.200 crore (previous year about Rs 175 crore) pertains to aircraft while the balance pertains to general aviation. Our market share last fiscal was 16 percent with a premium income of Rs.55 crore as against 14 percent and Rs.41 crore in 2007-08."

Market leader New India earned a premium of around Rs.110 crore under this portfolio in FY08. If one takes into account the inward reinsurance premium, the company's market share will be more than 50 percent, a company official said. Meanwhile, the aviation insurance segment in India is set to boom with around 450 aircraft valued around Rs.49, 200 crore to be added to existing fleet over the next five years, he added.

"With various airlines going for major expansion and new airlines starting operations, the aviation sector is growing at 15 percent per year and the growth is faster than any other country," the official said, speaking on condition of anonymity.

It is this potential that is attracting United India to focus in a major way on this segment. Another official said that the company has set up a core group to get a firm foothold in this segment.

## **Conclusion**

With excessive insurance market capacity and heightened level of competition the gap between General Aviation premiums and claims is narrowing very fast and it remains to be seen which direction the market will move in the near future. The Airline market worldwide is witnessing rate hardening and airline buyers in India are expected to follow the international trend and treatment of their peers globally. The unbridled growth in the aviation sector has come as a bonanza for the insurance sector. Thanks to capacity addition and the entry of new aviation players, a host of insurance companies are eyeing this growing market to offer insurance cover to new planes that are being brought to India.

“The aviation insurance market is looking up and is currently at more than Rs 350 crore. But with new aircraft being bought by new players entering the business and the existing one on an expansion mode, the aviation market is set to take off,”. Industry trackers believe that with several airlines including East West Airlines and Magic Air set to enter the market in the coming weeks, the airline premium income could be up 50 per cent in the next two years.

General aviation buyers may see another year of hard bargaining, as there are no immediate indications of rates hardening in India but at the same time major loss can always influence the overall dynamics. Though India's contribution to the total global insurance premium paid by airlines which stands at US \$ 5.86 billion is miniscule, the growth in aviation premium payout is highest in China followed by India.

Clients are also demanding cost effective insurance programs with efficiency in service delivery and as the size of individual risks and buyers continues to grow, broker's intermediaries are expected to play a key role in distributing the risks in India and internationally.



**MODULE V**

**CONTEMPORARY  
ISSUES IN AVIATION  
LIABILITY**



**MODULE V:  
CONTEMPORARY ISSUES IN AVIATION LIABILITY**

**LIABILITY FOR SURFACE DAMAGE**

**INTRODUCTION**

As a starting point to any consideration on the necessity of a specific regime of liability in this field, an assessment of how damage can be inflicted by aircraft is necessary in order to determine the potential scope of such a regime. Thus, the first issue raised in this study concerned the question which range of conduct of aircraft is capable of inflicting which types of surface damage. Although the potential scenarios of surface damage are innumerable if taken strictly on a case by case basis, a choice was made to narrow all such scenarios down to three main scenarios in this study. Such a classification was deemed to be a useful tool to help any legislature determine the scope of a potential liability regime in this field.

The scope of the first and potentially most severe scenario of surface damage was determined by the yardsticks of ‘direct contact’ or ‘impact’ of the aircraft or parts, components, objects, persons, or cargo carried by the aircraft. The first scenario thus primarily covers cases of genuine accidents of one or more aircraft, in which the damage on the ground is caused by the impact of the aircraft or its parts, objects, persons on board, or cargo. Cases of damage inflicted by the activity of crop dusting could also be categorized under the first scenario, since direct contact with the sprayed chemicals can also lead to damage on the ground.

The second and third scenarios involved surface damage inflicted by aircraft in situations of overflight without any physical contact between the aircraft and persons or property on the ground. A rather broad distinction has been made between a second scenario of aircraft flying in non-conformity with air traffic regulations and a third scenario of aircraft flying in conformity with air traffic regulations. The second scenario refers to aircraft flying too low. Too low overflight, whether repetitive or sudden, can lead to various forms of personal injuries or property damage. The element of suddenness, for instance, can lead to reactions of fright and subsequently to damage. Examples of bolting horses and of a person driving her car against a tree out of fright have been given in the sphere of personal injuries. In the area of property damage, an example of a roof that partly collapsed due to the rotations of the blades of a low-flying helicopter has been described. The criteria of ‘too’ low overflight or flight ‘in non-conformity with air traffic regulations’ have deliberately been used to distinguish this scenario from damage caused by ‘normal’ overflight in conformity with air traffic regulations. For the former scenario can generally be qualified as unlawful, unless the alleged tortfeasor can justify his conduct by invoking a defence under the liability regime at hand, whereas the latter scenario is generally lawful. Another presumption underlying the distinction between the two scenarios is that damage caused by normal overflight will

generally be less severe than damage caused by too low general and especially too low sudden overflight. For normal overflight will normally only give rise to more intangible forms of damage arising from nuisance or noise, loss of enjoyment of property or property devaluation, whereas too low overflight can potentially lead to more serious forms of personal injury or tangible property damage. However, borderline cases between lawful and unlawful overflight can easily be envisaged in which the subsequent damage is strongly comparable in terms of severity, for instance in cases of damage caused by sonic boom of aircraft.

In sum, no definitive distinctions can be made between the second scenario and third scenario. Criteria such as ‘suddenness’, ‘too low overflight’ and ‘in non conformity with air traffic regulations’ are only meant to serve as potential yardsticks for determining the potential scope of a specific liability regime in this field. As a whole, the most important distinction between the first scenario on the one hand and the second and third scenarios on the other hand lies in the ‘impact’ criterion. The ‘impact’ criterion can both serve as an important justification for more a specific regime based on absolute or strict liability and as a workable tool to narrow down the scope of a specific regime.

### **Liability Based On Fault or Negligence**

The second main question that was raised in this study concerned the question which regimes can be codified to cover third party liability of operators or owners of aircraft and what the scope of such regimes is.

As a starting point on the first part of the question whether specific liability regimes are deemed necessary for surface damage inflicted by aircraft, a brief description was given of the general headings of fault liability and negligence under civil and common law jurisdictions. Despite their inherent differences, these general headings of fault liability have in common that they are based on the requirements of unlawfulness, fault, damage, and a causal connection between the unlawful act and the damage under civil law systems and a breach of the duty of care, causation, and damage under common law systems. Furthermore, these general headings of general fault liability and negligence both allow potential defendants to disprove their fault or negligence by invoking a number of defences, such as force majeure or Act of God, act of a third party, and contributory negligence.

One could argue that no special rules are needed for the specific problem of surface damage inflicted by aircraft to third parties, as the latter can base their claims against implicated aircraft owners or operators on the applicable rules of fault liability under civil law systems or negligence or other applicable headings of liability under common law systems. For one of the great advantages of the rather amorphous headings of fault liability and negligence is that they are potentially applicable to any scenario of potential harm inflicted by any alleged tortfeasor.



Dependant on the circumstances of the case, the burden of meeting all of the necessary criteria of fault liability or negligence can even be softened by presumptions of fault under the former or the doctrine of *res ipsa loquitur* under the latter.

Dependant on the common law jurisdiction at hand and the court seized of the case, the doctrine of *res ipsa loquitur* either gives rise a presumption of negligence, a reversal of the burden of proof, or simply a possibility for the defendant to give his view on the alleged cause(s) of the accident. However, the doctrine does not automatically apply to all cases of damage inflicted by aircraft, but can depend on a number of criteria which have to be met. In a number of aviation cases, courts have rejected application of the doctrine on the grounds that the aircraft was not established to be under exclusive control of the defendant or that it was not an unusual occurrence for an airplane to crash without the intervention of a human agency. Another reason for rejection of the doctrine was based on the notion that court experience was not qualified as sufficiently uniform to justify a presumption that aviation accidents do not happen in the absence of negligence.<sup>6</sup> And even in cases where a reversal of the burden of proof or invocation of the doctrine of *res ipsa loquitur* have been permitted, disproof of alleged fault or negligence is still allowed. This could succeed by claiming that the accident was inevitable or unavoidable. The doctrine is not often relied upon in aviation litigation in the United States nowadays, since plaintiffs' attorneys fear that the defendants may indeed convince the jury that the accident was caused by events other than a lack of due care of the operator.

Furthermore, the general regimes of negligence or fault liability provide alleged tort feorsors with a number of important defences such as Act of God or force majeure in order to escape liability.

In short, the application of general rules of fault liability or negligence can lead to situations in which victims of surface damage may have difficulties in positively proving that the operator, owner, and/or pilots were at fault or negligent. Specifically in cases of surface damage caused by the first scenario of actual aviation accidents, proof of the exact causes and of fault or negligence of the implicated pilot(s) or operator(s) can be difficult to obtain in view of the inherent complexities of most aviation disasters. Potential causes can include bird strikes, pilot errors, meteorological conditions, faulty engineering, construction and/or maintenance errors or intricate combinations of such causes. Plaintiffs may then be forced to rely on aircraft accident investigation reports of national accident investigation agencies in their quest for proof, which can give rise to other problems. For such reports are officially not intended for the purpose of establishing civil liability, often take a while to be released, and need not necessarily be accepted as evidence by courts.

If persuaded by such arguments against the application of general negligence or fault liability in this field, the fictitious legislator could decide to address the problem of liability for

surface damage by means of a tailor-made regime of liability. This brings the alternative of regimes based on absolute or strict liability and their justifications in the picture.

### **Meaning & Scope of Strict or Absolute Liability**

Although the concepts of absolute and strict liability are often defined synonymously as liability without fault, their subtly differing distinctions have been evaluated on the basis of the definitions put forward by Bin Cheng. Strict liability has thus been held to be based on the criteria of an author of an act – causing – damage, while all similar defences of fault liability or negligence except those aimed to disproving fault have been maintained. Absolute liability, on the other hand, arises when the criteria person in a prescribed relationship to a specific circumstance – such circumstance arising and causing damage are met. As opposed to strict liability, the requirement that the damage has to be caused by the person to be held liable has thus been abandoned, nor are the normal defences available. However, regimes based on absolute liability do not dispense with all potential defences. Defences such as contributory negligence, armed conflicts, and grave natural disasters can be made available to the person(s) addressed by the absolute liability regime.<sup>9</sup>

Furthermore, the requirement of causation is less pronounced under absolute liability, although causal requirements will generally be linked to the circumstances that have to be met in order for liability to arise. However, it should be borne in mind that the aforementioned definitions need not be applied rigidly and that the best guidelines for the type of liability are provided by the actual regime at hand.

In order to address the question what range of conduct should be covered by specific regimes based on absolute liability, a combination must be made between the sketched scenarios of aircraft inflicting surface damage and the arguments that have been enumerated in favor of absolute liability. Furthermore, the comparative overview of international and national regimes in force in this field can provide guidelines in that area.

As has been described, the first scenario of surface damage inflicted by direct contact or impact of one or more aircraft or parts, components, objects, or persons (falling) from the aircraft is capable of inflicting the most severe forms of potential personal injuries and property damage. Practically all of the arguments raised in the previous paragraph justify that this scenario should be brought under the scope of absolute liability. The only controversial argument against absolute liability that aviation is no longer considered an ultra hazardous activity has been exposed as unjust on the grounds that aviation disasters should not be considered statistically, but on a case by case basis. And on that basis, absolute liability guarantees that potential victims are not bothered by problems of proof of the exact causes of the accident in order to substantiate their claims against the implicated operator(s) or owner(s) of the aircraft. It is therefore not surprising that the scope of all specific

international and national absolute liability regimes under review in this study encompasses the first scenario.

The next two scenarios, although categorized separately as surface damage caused by too low overflight in non-conformity with air traffic regulations and surface damage caused by 'normal' overflight in conformity with air traffic regulations, at least have in common that the implicated aircraft stay in the air and do not crash.

Is it justifiable that under certain conditions a mere causal link between an aircraft in flight and subsequent surface damage should automatically give rise to liability of the operator(s) or owner(s) of the implicated aircraft? That question has proven difficult.

Useful discussions on this issue have been derived from the drafting procedures of the Rome Convention of 1952. At that time, the drafting Sub-Committee was in favor of limiting the scope of absolute liability to the first scenario of damage arising from direct contact with the aircraft or things or objects, etc. falling therefrom. However, a number of delegates opposed such a limited scope of liability on the grounds that that would exclude damage caused by scenarios such as airstream of propellers, fire, explosions, or extra-ordinary noise. At this stage, it should be remarked that scenarios involving fire or explosions of the aircraft can be categorized under the first scenario. For such scenarios can be construed as the result of impact of the aircraft or parts of the aircraft.

The core problem thus comes down to the question whether and if so, under which precise circumstances, damage caused by mere overflight should lead to absolute liability. The Rome Convention of 1952 provides an interesting test case for that problem. The scope of absolute liability of the Rome Convention at least makes clear that damage resulting from the mere fact of passage of the aircraft through the airspace in conformity with air traffic regulations has been excluded. Ergo, the third scenario of 'normal' overflight can not give rise to absolute liability, even if the subsequent surface damage can be qualified as serious.

The question of scope of absolute liability is thus narrowed down to scenarios of potential damage inflicted by aircraft in non-conformity with air traffic regulations. Although earlier drafts of the Rome Convention of 1952 completely excluded recoverability of damage caused by noise, the current wording of Article 1(1) of the Rome Convention remains ambiguous.

The problem was neither resolved during the International Conference on Air Law in 1978, in which the Montreal Protocol was drafted. Another related unresolved issue that came up during that Conference concerned the potential recoverability of damage caused by sonic booms of supersonic aircraft. However, it did become apparent during that Conference that a number of important aviation nations, such as the United States and Great Britain, were

opposed to a regime of absolute liability which encompassed surface damage inflicted by noise.

A number of national air law regimes based on absolute liability that have been reviewed in this study allow recoverability of surface damage inflicted by noise under certain conditions. Examples include the French, German and Austrian regimes. The French regime only permits claims based on extremely serious cases of noise-related surface damage, e.g. sonic booms. The German and Austrian regime have based the scope of their absolute liability regimes in this field on the criterion of an 'accident', which has been defined as a sudden external and unforeseeable event causing personal injuries or property damage, including sonic booms.

On the other hand, the Australian regime has completely excluded scenarios of surface damage caused by noise by making absolute liability dependant on the impact with an aircraft or from contact with objects or parts that have fallen from the aircraft.<sup>16</sup> In my opinion, a lot can be said for this solution. For it should be borne in mind that absolute liability is the most severe form of liability possible with practically no defences left to the operators or owners of aircraft except contributory negligence. And an important justification for absolute liability in this field lies in the notion that fault or negligence can be difficult to prove. This is certainly true in many cases involving genuine accidents in which one or more aircraft actually crash. But the argument is less convincing in cases of noise-related damage, however severe. For in such cases, the pilots will always be able to testify, the CVR and FDR data of the flight will be easily obtainable, and the aircraft will always be intact. In other words, proof that an aircraft operator or owner unlawfully inflicted noise-related damage is far more easy to furnish than in cases of genuine aviation accidents. In my view, the scope of any regime of absolute liability in this field should thus be narrowed down to the first scenario of damage caused by impact of (parts of) the aircraft or things falling from the aircraft. Such a narrow scope of absolute liability could also serve as a first justifiable 'quid pro quo' for the severe basis of absolute liability.

Another issue related to the scope of absolute liability concerns the question to what extent damage caused by the aircraft whilst not yet airborne should be encompassed in the regime. Criteria such as 'operational movements' employed by the German regime can be of aid. Under the German regime, operational movements are held to commence whilst the aircraft is stationary and being loaded or unloaded and when passengers are embarking or disembarking and end when the aircraft is finally parked or towed away. The English regime specifically encompasses the scenarios of flight, take-off and landing. The Australian regime makes use of an even more detailed categorization of the phrase 'in flight', dependant on the type of aircraft involved. However, normal taxiing maneuvers have been specifically excluded from the scope of the Australian regime.

### **Persons Liable: Types of Aircraft**

The third question posed in the introduction to this study concerned the issue which persons or entities should be addressed and which types of aircraft should be covered by the specific regimes of liability for surface damage. The main options consist of the operators and owners of aircraft.

The operator can generally be defined as the entity (person, organization, or enterprise) engaged in, or offering to engage in an aircraft operation. Although the operator will normally be the entity that both uses the aircraft and profits economically from such use, difficulties can arise if the aircraft is controlled by one entity, whereas another entity profits economically.<sup>19</sup> Plain logic would dictate that the actual user/operator should be held absolutely liable as the person in control of the aircraft at the time of the accident or incident involving surface damage. Under French legal doctrine, this problem has not been clarified. The German liability regime has opted for joint and several liability of the user and the original operator in cases of short use.

The other main entity is the owner of the aircraft. If the owner and operator of the aircraft are one and the same person or entity, no specific difficulties will arise. If the owner of the aircraft is not engaged in the operation of the aircraft, but can merely be qualified as the financier or lessor, the legislature should specifically make a distinction between those two entities in order to guarantee that the specific liability regime does not apply to the financiers or lessors of the aircraft.

Under the Rome Convention of 1952, the regime of absolute liability is primarily attributed to the operator of the aircraft. The main rule holds the operator to be the person who was making use of the aircraft at the time the damage was caused. However, if control of the navigation of the aircraft was retained by the person from whom the right to make use of the aircraft was derived, that person is considered to be the operator. The registered owner is presumed to be the operator and can be held liable upon proof of the contrary.

Under most of the national liability regimes that have been reviewed, liability is also primarily attributed to the operators of aircraft, although the exact definitions of that entity vary slightly per regime. In some cases, the owner can also be held liable under the regime at hand under certain conditions.

In the aftermath of the terrorist attacks of '9/11' in the United States, the problem of liability of aircraft operators for unlawful use and/or wrongful taking of aircraft has regained enormous importance. Incidentally, that problem provides yet another implicit argument to enact specific regimes of liability in this field. For if surface damage is governed by general and unlimited fault liability or negligence, that could lead to potential bankruptcy of the implicated aircraft operators in case they are held to be negligent in relation to unlawful use of the severity of '9/11'. A possible solution to the problem is to limit liability of the aircraft operator for unlawful use up to the level of obtainable insurance coverage for the risks posed

by war and terrorism. Such a solution was adopted by U.S. Congress , albeit after the events took place, in the aftermath of ‘9/11’ by means of the Air Transportation Safety and System Stabilization Act.<sup>25</sup> In the preliminary ICAO Draft Convention which is meant to update the system of Rome, damage relating to acts of unlawful interference, war, and terrorism, has also been limited up to a capped maximum level.<sup>26</sup> And on the basis of the justification that catastrophic events should not be borne by aviation alone, such solutions seem the most feasible manner to deal with the problem of unlawful use in the sphere of liability.

As to the types of aircraft that fall under the regime, the ideal starting point for any legislature would be to define the term ‘aircraft’ and to subsequently determine which types of aircraft and their function (military, civilian, state, etc.) fall under the regime at hand.

In the Rome Conventions, the term aircraft has not been defined, but left to the discretion of the court seized of the case. The discussed national regimes apply slightly varying definitions of the term aircraft. The French regime, for instance, defines aircraft as all machines capable of rising into-or circling in the air and the German regime comes close by defining aircraft as instruments designed to move in the air.

On the question of scope of types of aircraft and their functions that are encompassed by existing regimes, variations prevail. The Rome Convention of 1952 does not apply to military, customs, or police aircraft, as the jurisdiction of the International Civil Aviation Organization is limited to international civil air transport. This sheds light on an inherent advantage that national legislatures have above the international legislature in this field: a broader scope of types of aircraft can be brought under the framework of national regimes. For national regimes can be made to cover (inter) national civil aircraft as well as military and state aircraft, as the French regime does.<sup>29</sup> Furthermore, the potential scope of types of aircraft covered by the regime can also be broadened by national legislatures. The regime of the Civil Aviation Act of the United Kingdom can serve as an example, which covers surface damage caused by balloons, kites, gliders, airships, aeroplanes, powered lift and rotorcraft.

Generally speaking, one could argue that the broader the scope of types of aircraft covered, the better the regime. For it does not make much difference whether the surface damage is inflicted by an F-16 or a Boeing 747 from the perspective of third parties. Another inherent advantage of a broad scope of types of aircraft that fall under a regime is that potential collision cases between all those types of aircraft can also be encompassed by the regime by means of a rule of joint and several liability. Liability regimes that cover as broad a scope of types of aircraft as possible are therefore held to create the most feasible and uniform approach to liability in this field for all parties concerned.

### **Unlimited or Limited Liability**

The fourth question posed in the introduction of this study concerned the problem whether a specific regime in this field should be based on unlimited or limited liability.<sup>31</sup> Unlimited liability implies that the person or entity addressed by the regime will have to pay full compensation for damage that can be attributed to him on the basis of the liability regime at hand. As that person or entity will generally also have to pay full compensation if he is established to be at fault or negligent in absence of any regime, a regime based on the combination of absolute and unlimited liability would merely fortify the position of third parties in the establishment of liability and ultimately lead to the comparable result of full compensation. Dependant on the legal system at hand, the only difference would then lie in the fact that the scope of the protective norm of fault or duty of care under negligence could be drawn more broadly in terms of types of recoverable damage and persons entitled to claim than under regimes based on absolute liability. Such a narrowed down scope of the protective norm or duty of care under absolute liability could automatically serve as an important *quid pro quo* for that more severe basis of liability.

However, the legislature could also decide to grant aircraft operators addressed by a specific regime more protection by legally limiting the regime. The following justifications have been enumerated by Drion for legally limiting liability in this field:

- 1      Analogy with maritime law with its global limitation of the shipowner's liability;
- 2      Necessary protection of a financially weak industry;
- 3      Catastrophic risks should not be borne by aviation alone;
- 4      Necessity of the carriers or operators being able to insure themselves against these risks;
- 5      Possibility for potential claimants to take insurance themselves;
- 6      Limitation of liability as a counterpart to the aggravated system of liability imposed upon the carrier and operator;
- 7      Avoidance of litigation by quick settlements;
- 8      Unification of the law with respect to the amount of damages paid.

As has been established, most of these arguments do not stand the test of closer scrutiny. In short, the inadequacy of a system of legally limited liability is specifically revealed under an international regime of liability on the grounds that the potential damage can vary so widely worldwide and in due course of time. For legal limitation of liability can lead to the situation whereby the limits are grossly inadequate to cover the amount of surface damage inflicted by an aviation accident in a developed country, whereas those same limits would easily cover the amount of surface damage inflicted by a similar aviation accident in an underdeveloped country. This means that a just unification of the law with respect to the amount of damages paid is never adequately possible in practice.

The *quid pro quo* of absolute liability on the one hand and limitation of liability on the other hand could be justified to a certain extent if claimants could fall back on the applicable rules

of fault liability or negligence in order to claim for damage in excess of the legal limits. Such a solution has been opted for in the German and Austrian regimes in this field. However, the Rome Convention of 1952 has been based on a practically unbreakable system of limitation of liability by making unlimited liability dependent on proof of a deliberate act or omission of the operator as opposed to his mere fault or negligence!

Notably, liability of the implicated air carriers arising from '9/11' has been limited after the event took place under 'Air Transportation Safety and System Stabilization Act.'

The International Law Association's proposals for an integrated system of civil aviation liability in international carriage by air and in respect of surface damage were also based on the principle of unlimited liability. The predicted effects of a combination of absolute and unlimited liability would be the channeling of liability to the operator, who in turn would be able to (re)claim from other liable parties by means of the applicable rules of subrogation.

The only really valid exception to the basic principle of unlimited liability lies in the third assertion that catastrophic risks should not be borne by aviation alone. That assertion has specifically regained its importance after the terrorist attacks on the United States of September 11, 2001. For under such a scenario, the combination of absolute and unlimited liability would be too much to bear for the aviation industry. Thus, liability could justifiably be legally limited up to the level of insurance coverage in cases of unlawful use. As has been argued in the previous paragraph, such a regime of legal limitation in the specific area of liability for unlawful use or wrongful taking of aircraft should be enacted by all legislatures, even those who rely on the general rules of fault liability or negligence. This is recommended in order to protect the implicated aircraft operator(s) from bankruptcy, especially as such events may now be perceived as foreseeable by courts in the aftermath of '9/11'.

### **Insurance and Insurability**

In this study, a number of issues relating to aviation third party liability insurance have been dealt with on the basis of the fifth question if insurance coverage should be compulsory in this field.<sup>39</sup> The issues under consideration concerned the question how insurance contracts can be defined and which scenarios are covered or excluded by insurance policies in this field. Further-more, the links that exist or are presumed to exist between insurance law and liability law have been explored. Such links include the notion that unlimited liability is not insurable and the link that can be made between insurers and third parties by means of direct actions.

Recapitulating, the following picture emerges. As a starting point, the situation in absence of any legislative interference has been described in which aircraft operators are free to take out insurance coverage for third party liability from aviation insurers. The rationale for not requiring compulsory insurance or other security requirements lies in the notion that aircraft operators will generally take out liability insurance coverage anyhow.



It is important to bear in mind that third party liability insurance can only be obtained to certain levels of coverage and that blanket coverage is not obtainable. This means that there is always a risk that the actual damage will exceed the obtained level of coverage by aircraft operators and that they will have to bear the extra loss above coverage themselves. The level of coverage obtainable will depend on factors such as the weight of the aircraft and the type of policy opted for.

Legislatures faced with the problem of liability for surface damage can opt for compulsory insurance mechanisms or other security requirements for third party liability for those operators addressed by the regime at hand as an extra financial safeguard for compensation of victims.

In this study, such requirements have been discussed on three levels: the international level of the Rome Convention of 1952 and the suggestions made by the International Law Association; the supranational level of European community law; and the national level of the states within the scope of this study.

*Third party liability insurance requirements under the Rome Convention and the ILA Draft Convention.*

Under the Rome Convention of 1952, a compulsory system of insurance or other security requirements was not achieved. For the general rule holds that contracting states may require the operators of aircraft of other contracting states to be insured for damage as specified by the Convention and up to the limits set out in the Convention.

The Draft Convention proposed by Cheng and Dutheil de la Rochère under auspices of the International Law Association set out to make such requirements mandatory by requiring every operator to maintain insurance or other forms of security in such amount, of such type and in such terms as the State of registry and/or the State of the operator may specify.<sup>43</sup> This can be hailed as a more constructive move in view of the fact that a facultative option is effectively of little use to guarantee that potential liability of the operator will be met financially. However, the other idea proposed in the Draft Convention to hold the states of registry responsible for liabilities of the operator and of the persons furnishing financial security to the extent that such liabilities have not been met, is more controversial. According to the Draft Convention, such responsibility also arises if the state of registry only allows the operator to obtain financial security only up to specified maximum levels.<sup>44</sup> The latter scenario can of course be easily circumvented by the requirement of specified minimal levels of coverage as opposed to compulsory maximum levels, which is a far more logical move for any legislature. But to automatically shift responsibility to the State of registry in cases of damage in catastrophic cases which cannot be met by the operator and its insurers seems a bridge too far, especially in light of the terrorist attacks of September 11, 2001 on the United States. An ad-hoc scheme of partial compensation by means of specific government funds,

as has been enacted by the United States government in the aftermath of '9/11', seems more likely to gain acceptance by States of registry worldwide. The suggestion of an international common fund for catastrophic aviation accidents, which was also proposed under the Draft Convention, has also become of renewed interest in view of those terrorist attacks and deserves closer scrutiny.

### *Direct actions*

The possibility of direct actions was first considered during the drafting period of the Rome Convention of 1933, but turned out to be controversial, which led to the codification of the Brussels Protocol of 1938. Under the regime of the Rome Convention, direct actions were only permitted under certain conditions. The ILA Draft Convention only allows a direct action if the law of the competent court so provides.

Three main objections to the possibility of direct actions can be raised: first, that it would be unfair to insurers if third parties could potentially obtain more rights than the insured parties. Scenarios could easily be envisaged in which certain contractual provisions in the policy would bar compensation to the operator, for instance, if the contract has expired or does not cover certain forms of suffered damage (e.g. noise).

Second, that the only case in which a direct action can be of interest, that is, when the operator at hand faces potential bankruptcy, can also be dealt by the legislature without resorting to the possibility of direct actions. This has been achieved under the Rome Convention of 1952 by enacting the rule that any sums due to an operator from an insurer shall be exempt from seizure and execution by creditors of the operator until claims of third parties under the Convention have been satisfied.<sup>48</sup> Third, that if the possibility of a direct action implies that the claim against the operator has to be abandoned, this could turn out to be disadvantageous for claimants in cases where the total amount of damage exceeds the level of coverage. For in such cases, claimants will be deprived of a part of their claim from the operator, even if the operator does not risk potential bankruptcy in spite of the fact that he will have to grant a certain percentage of compensation above his insurance coverage. In practice, insurers will often take over claims handling in the aftermath of aviation accidents from the implicated operators and other potential liable parties. However, that should not imply that third parties are automatically deprived of their right to claim from the implicated aircraft operators directly if they so desire.

### *Third party liability insurance requirements under European Community law*

European Community law in this field currently merely consists of the air carrier licensing requirement that air carriers and operators falling under the scope of Community law should be insured to cover liability in case of accidents; in particular in respect of passengers, luggage, cargo, mail, and third parties. Remarkably, no minimal levels of compulsory coverage have been codified. This means that an aircraft operator could theoretically obtain

insurance coverage for potential liability for a single Euro in order to comply with European licensing requirements.

However, a proposal for a regulation of the European Parliament and of the Council on insurance requirements for air carriers and aircraft operators was launched on 24 September 2002, which aims to fill in the basic requirement of compulsory insurance by means of various tiers of compulsory insurance coverage, dependant on the MTOW of the aircraft. As has been discussed, a number of facets of the proposed regulation are still under discussion, such as the question to what extent market failure should be taken into account.<sup>50</sup> A remarkable difference between the proposal and the current status quo is that the proposal is also meant to govern non-Community air carriers and aircraft operators flying to or from Community airports as well as over territory of Member States. This has been interpreted as being in conformity with the Chicago Convention of 1944.

The proposal can be hailed as a move toward a greater degree of harmonization and a level playing field in the European Community. For it manages to clarify to what level of liability coverage the aircraft operators and air carriers that fall under its scope should be insured or backed up by other securities.

#### *Third party liability insurance requirements under national law*

Aside from the aforementioned general insurance requirement prescribed by European Community law, most states of registry prescribe compulsory insurance or other security requirements for third party liability for aircraft operators within the scope of their jurisdiction. Exceptions include the United Kingdom, France, and Australia. But even in the United Kingdom, such requirements are implicitly compulsory, since the granting of an air service license depends on aircraft operators being able to satisfy the Civil Aviation Authorities that they can meet their financial obligations in case of liability.

In many cases, compulsory levels of minimal insurance coverage have been linked to the weight of the aircraft, such as in the German, Austrian, Swiss, and United States requirements. Under the limited third party liability regimes of Germany and Austria, the prescribed levels of compulsory insurance coverage correspond with the legal limitations.<sup>53</sup> Notably, the Swiss regime has combined a main rule of unlimited liability with certain minimal levels of compulsory insurance coverage, but has legally limited liability up to those levels in cases of damage caused by illegal users or other persons not employed by the operator.<sup>54</sup> Such a rule is of comparative importance to other legislators and could regain importance in the aftermath of the terrorist attacks of September 11, 2001 on the United States.

### *Final remarks and recommendations on insurance*

Whether on an international, supranational, or national level, insurance or other security requirements are only deemed useful if made compulsory and filled in by certain minimal levels of coverage dependant on the varying weight of aircraft. However, legislatures should bear in mind that insurance coverage is often obtained in combined policies with a single maximum. In such cases, both the required level of second and third party liability coverage will have to be specified. This can be done by also specifying the level of required coverage per passenger. The International Law Association proposals for updating the system of Rome in this respect are not all satisfactory. In my view, the proposed automatic link between insurance requirements and potential liability of the States that have enacted such requirements under certain conditions, such as when maximum levels of coverage are only allowed, is not recommendable. At most, States can create specific funds to help compensate victims of surface damage in cases of catastrophic disasters, such as the September 11 attacks on the United States. But not many States will be keen to adhere to automatic liability in such cases. As has also been argued, the legal right to direct actions is not recommended either. In the normal aftermath of aviation accidents or incidents, a system whereby insurers grant indemnity to insured operators that subsequently grant compensation to those legally entitled to such compensation, seems workable and fair enough. De facto claims handling by which insurance companies, as opposed to the insured operators, grant compensation directly to the victims can always be arranged under such a system.

Finally – and in conjunction with the arguments raised against limitation of liability in this field – it has to be conceded that unlimited liability cannot be completely insured in view of the fact that insurers do not provide for unlimited coverage in any field of endeavor. However, in my view this objection does not satisfy a structural link to a legally limited liability regime. Only in extremely catastrophic cases, such as the September 11 attacks, should such links play a role. The discussed Swiss provision in which liability is limited up to the compulsory levels of coverage could provide a solution in such cases. But for ‘normal’ aviation accidents, the risk of flying uninsured from a certain level of coverage onward should preferably fall on those parties taking that risk, as opposed to those suffering from it.

A more feasible solution for such cases, without necessarily having to fall back on any statutory limitation liability, has been enacted in Article 6:109 BW of the Dutch Civil Code, which allows judges to moderate the extent of liability whenever full liability would lead to unwanted consequences. Factors that are taken into consideration include the circumstances of the case, the relationship between the parties concerned, and their financial capabilities. However, liability cannot be moderated to a level which is lower than the applicable level of insurance coverage. The great advantage of such a solution is that liability is then only limited on a case by case basis after the event took place and not beforehand.

## **The Feasibility Of Regimes On An International, Supranational Or National Level**

The question whether a regime of liability in this field should be enacted on an international and/or supranational and/or national level will be dealt with in sub-paragraphs 6.9.1–6.9.3 respectively.

### The feasibility of the Rome Convention of 1952 as amended by the Montreal Protocol of 1978

#### *Basis and scope of absolute liability*

The basis of absolute liability should be maintained as a central pillar of the system of Rome in view of the arguments raised in its favor in this study. Unfortunately, the scope of absolute liability of the system has not been resolved satisfactorily as to the question whether damage caused by flight in non-conformity with air traffic regulations is covered or not. As has been argued in view of the severe basis of absolute liability, such noise-related claims (including sonic boom) should not be covered by the absolute liability regime.

In my opinion that scenario should be completely left to general principles of applicable fault liability, negligence, or other existing headings of liability as a *quid pro quo* to the severe basis of absolute liability. The main argument for this plea lies in the notion that absolute liability should serve as a useful alternative to negligence or fault liability in view of difficulties that can arise in proving negligence or fault liability as well as the number of defences that can be invoked under those bases of liability, such as Act of God or force majeure. But these problems are mainly perceived to play a role in cases of genuine aviation accidents or at most cases where parts of the aircraft or things or persons transported by the aircraft fall from the aircraft and cause personal injuries or property damage.

In any case, however severe, of damage caused by noise or sonic boom, on the other hand, the aircraft will remain intact, the pilot can be heard, and the Flight Data Recorder and Cockpit Voice Recorder are easily accessible. Such a limited scope of absolute liability also concurs with the outcome of Article 1(1) of the earlier Montreal Draft of the Rome Convention of 1952, which read:

any person who suffers damage on the surface, other than damage due to noise or to passage by aircraft in normal flight, shall be entitled to compensation upon proof only that the damage was caused directly by an aircraft in flight or by any person or thing falling therefrom.

Another way of making even more absolutely sure that damage caused by aircraft in flight is excluded can be achieved by narrowing down the absolute liability regime by means of the ‘contact’ or ‘impact’ criterion (e.g. by codifying ‘upon proof only that the damage was caused by the impact of the aircraft’).

Complete exclusion of noise and sonic boom also corresponds to the opinions of the delegates of important aviation nations such as the United States, Canada, Great Britain during the Montreal Conference of 1978. Such an exclusion has also been made under the Australian national regime of the Damage by Aircraft Act 1999 through application of the 'impact' criterion.<sup>60</sup>

### *Defences*

The current defences available under the Rome Convention(s) are not felt to raise great difficulties. In view of the terrorist attacks of September 11, 2001 on the United States, the potential liability of operators of aircraft for damage caused by unlawful users has become of importance. Evidently, absolute liability for damage caused by such unlawful use could lead to unwanted effects such as potential bankruptcy of the implicated operators, if such liability were to be unlimited. Such scenarios of unlawful use should thus either be left out of the regime of absolute liability entirely or at least limited to the extent of obtainable insurance coverage. In that respect, the current defence that the operator can prove that he has exercised due care to prevent such use could regain importance if the Rome Convention manages to attract more ratifications in the future. But as proven lack of due care may then lead to unlimited liability, a preference can be made to limit liability under the scenario of unlawful use, irrespective of the basis of liability that governs it.

### *Limitation of liability*

The objections against limitation of liability have been dealt with in paragraph 6.7 of this chapter. The key objection to the legal limitation provisions of the Rome Convention of 1952 and their update in the Montreal Protocol of 1978, is that the level of potential surface damage can vary enormously worldwide. This would thus place surface victims of the more developed countries in a less advantageous position than those in less developed countries. In short, uniformity can never be realized fairly on an international level by means of any system of limitation of liability.

The other main objection lies in the fact that in order to escape the limited liability regime, claimants will have to prove that the damage was caused by a deliberate act or omission of the operator or his servants or agents done with the intent to cause damage.<sup>61</sup> The least one would expect is that claimants can fall back on the general rules of fault liability or negligence in such cases.

Therefore, the suggestions made under auspices of the International Law Association to completely dispense with the provisions on limitation of liability are to be hailed. At most, a specific provision could be introduced by which the judge seized of a case can reduce the legal obligation to repair damage if awarding full compensation would lead to clearly unacceptable results on a case by case basis.

In the first preliminary draft of Article 3 of the ICAO Draft Convention, such a laudable move toward unlimited liability has been made. Hopefully, that draft will survive later stages of drafting discussions.

### *Insurance*

The main objection to the insurance and security provisions of the Rome Convention of 1952 is that they have been codified in a complex, but non-compulsory fashion.

In my view, they should either be made compulsory as an extra safeguard for actual compensation in order to have any effect, or otherwise dispensed with altogether. If made compulsory, certain minimal levels of required cover-age based on MTOW of the aircraft can be introduced. Another alternative could lie in merely requiring adequate insurance coverage or other guarantees, and leaving more specific requirements to the adhering States of registry of the aircraft.

### *Jurisdiction*

The single forum solution involving the loci delicti under the Rome Convention of 1952 was perceived as the best way to guarantee that the limitations set out in the Convention were distributed fairly amongst claimants. In view of the objections raised against limitation of liability in general as well as the objections raised against the single forum in this study, a more feasible alternative would be to reinstate the so-called forum rei, that is, the defendant's ordinary place of residence. That solution would correspond with the jurisdictional provision of the Rome Convention of 1933.

An even more bold suggestion would be to also include the more controversial so-called forum actoris under certain conditions in cases where the victim of surface damage is not a resident of the loci delicti, nor of the of the de-fendant's ordinary place of residence. Such a solution would be comparable to the so-called fifth jurisdiction of Article 33 of the Montreal Convention of 1999. Conditions to be fulfilled could include criteria such as the fact that the operator in question operates to or from the country of principal and permanent residence of the third party.

The greatest advantage of the forum actoris would be that that forum is best equipped to determine the level of damages suffered by the third party, as it can easily apply the damage laws of his place of principal and permanent residence.

### *Necessity and feasibility*

Even if the system of Rome were to be modernized satisfactorily, the question of necessity and feasibility of such a uniform regime of liability in this field remains difficult to resolve. The main arguments in favor of uniformity hold that international civil aviation as well as potential victims on the surface are then subjected to the same standards of liability for

surface damage worldwide, which would create a global level playing field. But even if such an objective were realized, the problem remains that the scope of such an international regime ultimately remains limited to cases of foreign civil aircraft from Contracting States causing damage in the territory of other Contracting States.

Another argument against the real necessity of such an international regime is the notion that the international character of damage to third parties is by its very nature far less pronounced than the international character of damage to, for instance, passengers. Generally speaking, third parties will be of the nationality of the place of the accident or incident. And even the more exceptional cases in which the victim is of another nationality than the *loci delicti*, do not necessarily justify the application of an international regime. For both the determination of liability of the implicated operator(s) as well as subsequent damage suffered by such a victim could also be made by the court seized of the case if liability in this field is governed by national law. The court would simply have to appoint experts in the field of damage law of the nationality or place of permanent residence of the victim in order to assess the level of compensation due. From a perspective of insurance, the point can also be raised that the necessary coverage for third party liability is underwritten satisfactorily to this day, despite the fact that national liability legislation in this field varies.<sup>66</sup> These arguments, specifically that of the limited scope of an international regime in terms of aircraft operators covered by it, point to more feasible alternatives on a national level.

A perhaps more spurious argument concerns the notion that the biggest aviation-generating country in the world, the United States, has generally moved away from specific absolute liability regimes to general negligence in this field. The United States may thus be found unwilling to adhere to any international instrument founded upon absolute liability in the future. And the level of success of any international air law instrument largely depends on adherence by the United States, in view of its prime importance as an aviation nation.

## **A Number of Effects Of Terrorism**

### *General observations*

The terrorist attacks on the United States of September 11, 2001 have had an enormous impact on the aviation industry as a whole and more in particular on the aviation insurance industry. As to that date, the aviation world had not been confronted by the use of aircraft as bombs and by the subsequent enormity of the level of damage to third parties and property on the surface. The short and long term effects of this calamity are so complex and profound as to justify a whole series of economical, legal, political, and psychological studies and cannot be done justice in the framework of this study. However, a number of important aspects need to be dealt with in conjunction with the main theme of this study – the general plea for absolute, unlimited, and secured liability of aircraft operators for damage to third parties on the surface. Clearly such a regime would lead to disastrous results if applied to severe cases



of terrorism as the damage inflicted can vastly exceed normal levels of insurance coverage of the implicated air carriers.

Even if such cases were to be governed by general fault liability or negligence that could lead to disastrous results for the implicated airlines if proven successfully. That helps to explain the described move of US Congress to limit negligence by means of the regime of the Air Transportation Safety and System Stabilization Act, albeit that this was done after the events of '9/11' took place. Such legislative action can serve as a firm recommendation to national legislatures without any specific limitation provisions in force in the area of liability for unlawful or wrongful use. Notably, a number of discussed national regimes in this field have enacted similar solutions. The Swiss absolute liability regime can serve as an example in which the operator of an aircraft can only be held liable up to the applicable level of mandatory insurance coverage in cases of unlawful use.<sup>69</sup> Alternative measures in cases of catastrophic aviation accidents related to terrorism include the instruments of victim compensation funds and measures of temporary State aid to guarantee continued viability of the aviation industry. These alternatives will be briefly discussed in the next two sub-paragraphs.

#### *Victim Compensation Funds*

The only feasible alternative to the applicable rules of liability, which has also been followed by the United States government, is to create a specific compensation fund for the victims of the attacks and their relatives. The primary aim of such a fund is to compensate certain closely defined damages of a closely defined scope of victims and their relatives.<sup>70</sup> The secondary aim is to try to dissuade potential claimants from going to court and accepting pay-ment from the Fund instead. For any claim under the Fund will result in a waiver of right to file a civil action. The success of any victim compensation fund will largely depend on the number of rightful claimants willing to give up the right to file a civil action in favor of the perhaps more limited compensation available on the basis of the Fund. This will depend largely on the level of generosity of the fund at hand.

#### *Insurance coverage for risks posed by war and terrorism. Governmental measures*

In the immediate aftermath of the terrorist attacks, the aviation insurance industry made the move to narrow down third party liability coverage to \$ 50 000 000 in cases of loss arising from risks such as war and terrorism. This move could have lead to the grounding of entire fleets if governments worldwide had not intervened by taking care of the terrorism coverage that was terminated by the insurance industry. In the immediate aftermath of the attacks, U.S. Congress adopted a number of emergency measures. These measures included a direct and immediate aid of \$5 billion to compensate the American airlines for direct losses resulting from the closure of airspace and the consequences of the attacks on air traffic for the last four months of 2001, the allocation of federal credit instruments in the form of Treasury loans or

loan guarantees of approximately \$ 10 billion, and the allocation of \$ 3 billion for safety and security of air transport from the Victim Compensation Fund of \$ 40 billion.

In the same period of time, all Member States of the European Union introduced temporary insurance mechanisms for coverage of third party war and terrorism risks. The initial period of 30 days of coverage was eventually prolonged up to June 2002. These measures were approved by the Council of Ministers on September 22, 2001 on the conditions that they were temporary, strictly regulated and notified to the European Commission.<sup>74</sup> State aid was also granted by the European Commission on certain conditions, such as the condition that compensation was paid in a non-discriminatory manner to all airlines in a given Member State and that it only concerned the costs incurred during the period 11-14 September 2001 following the grounding of air traffic by the American authorities.

Although difficult to predict the long term future, it is safe to say that the normal route of coverage of risks posed by war and terrorism will have to be taken up by the aviation insurance market on the longer run, even if at higher premiums than in the past. But even then, 'normal' coverage will not even come close to the potential level of damage that can be potentially be inflicted by terrorists, as has been demonstrated by '9/11.' For such exceptional cases, extra measures on a governmental level will most likely remain necessary, albeit on an ad-hoc basis and not necessarily as a codified right. However, a more structured approach may also be opted for, for instance by a specific Convention that governs war and terrorism as 'sovereign risks' provided for by adhering States under certain conditions.

## **AVIATION PRODUCT LIABILITY**

This article addresses selected topics of current interest and recent developments in the field of aviation products liability. The cases and legislation discussed below touch upon a wide variety of topics, including: pleading requirements arising out of *Iqbal* and *Twombly*; the General Aviation Revitalization Act of 1994 (—GARA); federal preemption; the government contractor defense, the educational malpractice doctrine and duty to train; the recently enacted Federal Courts Jurisdiction and Venue Clarification Act of 2011; and removal of aviation products liability cases based on federal question jurisdiction. To conclude, we briefly address recent developments in electronic discovery that have the potential to alter case strategy and the landscape of the cost of defending aviation products liability and commercial litigation cases.

### **Pleading Requirements after *Iqbal* and *Twombly* Cases**

The United States Supreme Court decisions of *Bell Atlantic Corporation v. Twombly* and *Aschcroft v. Iqbal* and their progeny have altered the interpretation of the liberal pleading

requirements of the Federal rules in ways that can be of benefit to aviation manufacturers. This section discusses two recent cases that address what it now means to

—state a claim to relief that is plausible on its face. At a minimum, plaintiffs must sufficiently identify the component or components that are claimed to be defective, the manner in which the components failed, and who is responsible for the failure.

*Sikkelee v. Precision Airmotive Corporation* involved a Complaint against many Defendants for strict liability, negligence, breach of warranty, misrepresentation, and concert of action related to a 1976 Cessna aircraft accident that resulted in the death of plaintiff's husband. The accident allegedly was caused by a malfunctioning carburetor.

On July 10, 2005, the decedent was flying the accident aircraft when its Lycoming engine allegedly lost power due to a fuel system malfunction shortly after takeoff. The aircraft had been overhauled —to a factory new condition, which included a carburetor rebuilt or overhauled by the Kelly Defendants. Among other things, Plaintiff asserted that Defendants were aware of numerous problems and defects with the screws and locking mechanism for the carburetor, but failed to disclose that information. Defendants filed a joint motion for judgment on the pleadings, which was granted in part, as to allegations about state common-law standards of care, since the Court found that the field of aviation safety is preempted by federal law and regulations. However, the Court also granted Plaintiff's request for leave to amend the complaint to assert violations of federal standards of care.

Defendants' subsequent motion to dismiss Plaintiffs' amended complaint asserted, among other things, that Plaintiff had failed to allege that Lycoming had manufactured, sold, or supplied the allegedly defective parts. Plaintiff argued that *Twombly* and *Iqbal* should not apply to the Amended Complaint since the original Complaint was filed before those cases were issued. Disagreeing with the Plaintiff, the Court applied the heightened pleading standards set forth in *Twombly* and *Iqbal*. As to Lycoming, the Court held that although Plaintiff alleged the collective responsibility for the carburetor by other parties, she also provided numerous detailed allegations which supported a claim that Lycoming was the manufacturer (or was in the chain of production) of the carburetor.

*American Guarantee & Liability Insurance Company, v. Cirrus Design Corporation* involved claims seeking to recover money that was paid to tenants of the Belaire Manhattan Condominium after a Cirrus aircraft had crashed into the building. The crash allegedly was caused by —certain defects|| in the steering controls that prevented proper control of the airplane. Cirrus argued that the insurance companies had not stated a claim upon which relief could be granted, and sought dismissal of the complaint. The Court granted the Cirrus motion, noting that the plaintiffs had not specified —...the actual defective component or the nature of the defect.||<sup>9</sup> Accordingly, to satisfy the plausibility requirement set forth in

Twombly and Iqbal, plaintiffs' amended complaint would have to state specific allegations as to the alleged airplane defects.

*Burton v. Twin Commander Aircraft,*

After an airplane crash in Aguascalientes, Mexico that killed seven people and allegedly was caused by a rudder malfunction, Plaintiffs brought wrongful death actions against Twin Commander. Plaintiffs argued that although Twin Commander held the Type Certificate for the accident aircraft, it was not the —manufacturer|| of the aircraft and thus not protected by GARA. Twin Commander argued that for GARA purposes, it was the—manufacturer|| because it was the successor-in-interest to the Type Certificate even though it did not continue producing the aircraft. The Court concluded that the meaning of —manufacturer|| under GARA is a question of law and not fact. In a well reasoned opinion, the Court reversed the Court of Appeals and held that Twin Commander should be considered a —manufacturer|| under GARA since it stepped into the shoes of an original manufacturer and assumed all its duties and obligations.

Crouch v. Teledyne Continental Motors addressed claims made as a result of a 1977 Piper PA-32RT-300 Lance II Cherokee single-engine airplane crash in 2006 that allegedly was caused by defects in the housing of a recently overhauled Lycoming IO-540-K1G5D engine and Teledyne Continental Motors, Inc. (—TCM||) magneto. The airplane originally was sold in 1978, and the engine was overhauled in April 2005 by John Jewell Aircraft, Inc. Additionally, at the same time the engine was overhauled, the TCM magneto was replaced with the same type of magneto—and which had been factory rebuilt by TCM in 2005. Plaintiffs asserted that due to defective design, the mounting flanges on the TCM magneto housing broke as a result of fatigue fractures in the flanges, which caused the Cherokee to lose power and crash. The manufacturer argued that GARA prevents the Plaintiffs from asserting claims based on the alleged defects and that GARA's 18-year rolling provision for new parts should not apply, because the allegedly defective part was replaced with one of materially the same design, and because the fractures were the result of crash impact, and not fatigue. In denying TCM's motion for summary judgment, the Court cited the plain language of GARA's rolling provision and held that the time period for GARA is restarted when an old part is replaced with a new one, and that GARA did not require that a part be newly designed. The Court further held that since a genuine dispute of material fact existed as to the cause of the crash, TCM's motion for summary judgment relating to causation also would be denied.

*Agape Flights, Inc. v. Covington Aircraft Engines, Inc.* involved claims against an aircraft engine and fuel pump manufacturer as a result of a Cessna Grand Caravan model 208B airplane crash in 2007. In 2007, Agape rented the Pratt & Whitney Canada(—P&W) PT6A-114A engine, which included a Sundstrand fuel pump, from Covington Aircraft Engines, Inc. Agape asserted that the crash was caused by the fuel pump drive shaft splines being severely

worn, which allegedly resulted in an in-flight engine power loss. The Court ruled that plaintiff's claims against P&WC and Sundstrand were barred by GARA because both the engine and fuel pump had been sold and delivered to the aircraft manufacturer beyond the 18-year statute of repose. Moreover, although Agape's facts suggested that the drive gear might or should have been replaced given historical data of wearing of the drive gear splines, the Court held that GARA's rolling provision did not apply since it was Agape's burden to show that the rolling provision should apply.

Moreover, plaintiff offered no maintenance record or other similar document which could establish that the fuel pump (or its components) had been replaced within 18 years of the mishap.

*Scott v MD Helicopters* involved a lawsuit arising from a military OH-6A helicopter crash in 2007 that allegedly was caused by malfunctioning helicopter rotor blades and associated parts. Plaintiff argued that MD Helicopter (—MDHI||), as the type certificate holder, had a duty under the Federal Aviation Regulations to provide instructions and maintenance manuals for continued airworthiness. MDHI filed a motion for summary judgment, which was granted in part and denied in part. As to GARA, the Court held that since maintenance manuals are not considered —parts,|| claims based on maintenance manuals are not barred by GARA. The Court also held that a genuine issue of material fact existed as to the extent of any regulatory duty MDHI owed to provide instructions for continuing airworthiness.

*Garcia v. Wells Fargo* is a case that addressed the distinction of parts sellers vice GARA protected parts manufacturers. *Garcia* arises from a Cessna Model 650 Citation III crash in 2008 that killed three people. In 2006, Cessna sold an Actuator Control Unit(—ACU||) to the Citation's maintainer, Southern Jet Center, who then installed the part in the mishap aircraft. Plaintiff brought suit against Cessna for negligence and strict liability as the manufacturer, designer, and seller of the Citation and its respective components. Plaintiff claimed that the crash was caused by a malfunctioning ACU, which provides warning to the aircrew when a runaway trim condition exists. According to the plaintiff, the alleged malfunction prevented the pilot from properly responding to an emergency runaway trim condition. Cessna asserted a number of affirmative defenses, including GARA, arguing that the protections of GARA apply since even though Cessna did not manufacture the ACU, the sale of the ACU was incidental to its role as the airplane manufacturer. Cessna further asserted that it had an ongoing duty to provide replacement parts and that the crash was caused by pilot error, and not a mechanical failure. The Court granted plaintiff's motion for partial summary judgment and denied Cessna's motion for summary judgment, holding that GARA is inapplicable where a Defendant is sued in the capacity of a seller, rather than as a manufacturer. The Court reasoned that the legislative intent of GARA was not to make a special exception for airplane manufacturers who then sell replacement parts, but that —[GARA's]...protections begin and end with a Defendant's role as a manufacturer.

Moore v. Hawker Beechcraft arises from a Beechcraft model 69 Duke aircraft accident in 2007, which allegedly was caused by an asymmetric flap condition. The mishap aircraft was manufactured in 1969 and sold in 1970. According to the plaintiff, the knowing misrepresentation exception to GARA applied because the manufacturer allegedly had knowingly misrepresented, concealed, or withheld required information concerning the flaps from the FAA during the airplane's initial certification. Specifically, the plaintiff asserted that Hawker Beechcraft misled the FAA by incorrectly representing that the flap system was interconnected. Plaintiff also argued that Hawker Beechcraft failed to disclose: (1) that the flap system was prone to disengagement; (2) that the Duke was uncontrollable in a right side split flap condition; and (3) that information on how to cope with an unsafe flap condition in its Pilot's Operating Handbook or Airplane Flight

Manual purposefully was omitted. Moreover, plaintiff contended that it was important to have done different or additional flight testing on the flap system. The Court noted that plaintiff's flight testing assertions on the flap system were irrelevant for purposes of a misrepresentation claim, and that since the plaintiff was not able prove that a new part—a 90 degree flap drive—was added within the 18-year statute of repose, Plaintiff's motion for summary judgment should be denied. Additionally, the Court held that pursuant to GARA's Section (2)(b)(4), the 18-year statute of repose does not apply to actions brought under a written warranty and that an airworthiness certificate does not constitute a written warranty under GARA.<sup>20</sup>

In *Nowicki v. Cessna*, strict liability and negligence claims that were brought on behalf of a passenger that was killed in a Cessna Model 414 crash were barred under GARA.

The passenger's representative argued that although the airplane had crashed because of insufficient fuel, the actual cause of her spouse's death was a defective passenger seat that had detached from its rails on impact, hitting him in the head. The representative argued that although the manufacturer had manufactured and delivered the plane in 1970

(beyond the period allowed for claims under GARA's statute of repose), the claim should be permitted under GARA's fraud exception. In the representative's view, since the manufacturer allegedly had not disclosed to the FAA an airworthiness directive pertaining to the seat rail and locking mechanism for crew seats, GARA's fraud exception applied to her claim. The Court found that the representative's claims should be barred by the 18-year statute of repose because the airworthiness directive applied to crew seats as opposed to passenger seats. The Court also held that GARA's fraud exception did not apply since the manufacturer had not misrepresented, concealed, or withheld required information concerning the airplane's passenger seats.<sup>22</sup>

In *U.S. Aviation Underwriters, Inc. v. Nabtesco Corporation*, a Washington federal court barred claims against the manufacturer of an allegedly defective landing gear actuator that

had been removed from the Cessna aircraft on which it originally was installed, and then was installed on another aircraft. The actuator initially was manufactured and installed on an aircraft in 1990, then was removed, overhauled, and installed on another aircraft in 2006—which then crashed in 2007. The Court analyzed the effective triggering date under GARA and determined that the 18-year statute of repose had run. According to the Court, the triggering date under GARA is the date from which the component(s) were originally installed (1990), as opposed to when the part was overhauled and later installed. Moreover, the Court emphasized that an overhauled component (vice a new one) does not restart the GARA repose period.

Plaintiff in *Inmon v. Air Tractor Inc.* sued Air Tractor, the manufacturer of an aircraft that he had been flying and using for crop dusting, when one of the aircraft's wings failed and caused him to crash. The plane had been manufactured in 1982 and was purchased by the plaintiff with no warranty in 1998. Plaintiff alleged that the crash was caused by a defective wing assembly and a defective factory modification kit. The primary issue was whether Air Tractor's design and sale of a new part for the wing in 1993 restarted the GARA or the applicable Florida repose period. To increase the safe life of the airframe, the manufacturer had issued Service Letter 70. Service Letter 70 illustrated how designing a new spar splice with an additional fifth bolt hole further out from the centerline of the aircraft, and installing it on the existing lower wing, would help extend the safe life of the airframe. The Court addressed whether the aircraft manufacturer's design and sale of the new part for the wing assembly in 1993—the five-bolt spar splice—restarted GARA or the applicable Florida 12 year repose period. The Florida Court of Appeals affirmed the earlier decision by the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County, dismissing plaintiff's claims, holding that (1) service bulletins do not constitute new part(s), and (2) even though a new part was installed, it did not replace an original item with a new item, but rather modified the original design. The Court also found that the plaintiff had failed to demonstrate that the new part actually caused the accident.

*Moyer v. Teledyne Continental Motors, Inc.* is a case that arises from a 2003 Beech Bonanza crash that resulted in the deaths of Ronald and Judy Moyer. According to the Plaintiffs, the airplane crash was caused by an engine failure that was the result of a fatigue crack in a repair weld in the crankcase of the Teledyne Continental Motors (—Teledyne||) designed and manufactured engine. The crankcase was a weld-repaired replacement that was supplied by a company called Div Co, and then was installed in the accident aircraft by Piedmont Aviation Services (—Piedmont||) in 1998. Teledyne also issued maintenance instructions and service bulletins—including multiple service bulletin revisions—which provided inspection criteria for the welding of cracked crankcases, as well as warning against the welding of cracks in certain areas. In a service bulletin issued in 1990 (the guidance used by DivCo in making its weld repair), Teledyne modified prior guidance and advised that the welding of crankcases was an acceptable repair process under certain circumstances.

Plaintiffs argued that Teledyne was responsible for product defects due to crankcase cracks, that the 1990 service bulletin was inherently defective, and that contrary to

Teledyne's assertions in its motions for summary judgment, GARA should not apply. Plaintiff contended that the statutory protections of GARA should not be available to Teledyne because (1) it allegedly had publicly misrepresented its internal policy regarding crankcase welds, and (2) the issuance of the 1990 service bulletin restarted the 18-year statute of repose because it should be considered a —part|| under GARA.

On May 29, 2007, the trial court granted Teledyne's summary judgment motion under

GARA. The trial court held that the 18-year GARA repose period began to run on the original date of sale of the engine, rather than on the date when the allegedly defective service bulletin was issued. The Court further noted that a service bulletin is not considered a part for GARA purposes, and that the misrepresentation exception to GARA was not applicable because there was insufficient evidence to show that Teledyne had misrepresented or withheld required information from the FAA.

The Pennsylvania Superior Court, ultimately in an en banc opinion, affirmed the trial court's decision not to apply GARA's rolling provision to the service bulletin as well as the Court's rejection of the misrepresentation claim. In upholding the trial court's granting of summary judgment, the Superior Court pointed out that if the rolling provision of GARA were triggered every time a service bulletin was issued, it would eviscerate GARA's intent. The Court also found that plaintiffs did not present evidence of active obstruction to support a misrepresentation claim under GARA.

On January 25, 2011, the Pennsylvania Supreme Court agreed to hear plaintiffs' appeal from the Superior Court's en banc affirmance, limited to one issue as it had been stated by plaintiffs:

Did the Supreme Court improperly afford blanket immunity to manufacturers for negligence and strict liability in their written instructions under GARA's rolling provision under the guise of fostering a non-existent federal policy to vindicate rights of manufacturers over those of accident victims?

On September 27, 2011, the Pennsylvania Supreme Court affirmed the Superior Court's order in a per curiam order, advising that the Court was equally divided on this one issue presented, which resulted procedurally in the intermediate appellate court's order being affirmed.

On December 20, 2011, plaintiffs filed a petition for Writ of Certiorari in the Supreme Court of the United States. They asked the U.S. Supreme Court, among other things, to determine: (1) if the lower courts had improperly granted blanket immunity to a general aviation



manufacturer for negligence and strict liability in its written instructions under the rolling provision of GARA; and (2) if the lower courts had misinterpreted the GARA knowing misrepresentation exception by applying a heightened, fraud-like standard. As of this writing, the Supreme Court has not yet acted on the petition.

### **Federal Preemption of State Law Related to Product Design**

One of the most significant issues in aviation products liability in recent years revolves around the question of whether, and the extent to which, federal law preempts state law standards of care applicable to manufacturers. What appeared to be a relatively dead issue just a few years ago is again showing signs of life. Supreme Court cases have recognized implied preemption in situations where application of state tort law would conflict with specific federal aviation statutes and regulations. Recent Supreme Court and intermediate appellate court cases may call into question the vitality of prior federal appellate decisions rejecting preemption as to aircraft products liability claims.

In *Hart v. The Boeing Company*, the United States District Court for the District of Colorado addressed claims arising from a Boeing 737 takeoff accident. On December 20, 2008, Continental Airlines Flight 1404 was departing from Denver International Airport for Houston, Texas. On departure, the 737 veered off the runway and crashed. Plaintiffs asserted claims for negligence and strict liability relating to the design, manufacture, testing, inspection and sale of the 737's directional control and stabilization systems. Specifically, plaintiffs contended that the airplane's directional control mechanisms were designed such that it makes it difficult for pilots to maintain heading during high crosswind takeoffs. Defendant Boeing argued that plaintiffs' claims were preempted by the Federal Aviation Act,<sup>29</sup> and that their failure to allege a violation of a federal duty of care was fatal to their claims. Based on Tenth Circuit precedent, the

Court denied Defendant's motion to dismiss. The Court noted that although other jurisdictions had taken —an arguably more nuanced approach to the issue of implied preemption under the [Federal Aviation Act] the Tenth Circuit in *Cleveland v. Piper Aircraft Corp.* had set precedent that it was bound to follow. Thus, Boeing's motion for summary judgment on federal preemption grounds was denied.

In *Damian v. Bell Helicopter Textron, Inc.*, the Court of Appeals of Texas addressed

Defendant Bell's contention that plaintiffs' design-defect and negligence claims related to a Bell 407 helicopter crash were preempted by federal law. The crash happened on January 27, 2000, during a short flight from Sona, Panama to Panama City when the Bell

407 helicopter hit a vulture. The large bird penetrated the helicopter's windshield, resulting in a fatal crash. Consequently, plaintiffs' claims against Bell alleged product design defects in the helicopter's windshield and seatbelts. Bell's defense relied on its contention that the Federal Aviation Act and related federal regulations, such as the FAA certification process for helicopters, impliedly preempts common-law claims relating to the field of helicopter design and airworthiness.

Regarding Bell's field preemption argument, the Court acknowledged that the FAA regulates many aspects of aviation safety, but concluded that there is insufficient evidence, including relating to the certification process, to show that Congress intended to regulate the entire aviation field. Additionally, the Court held that since there are no federal statutes or regulations governing the minimum standards for bird-strike resistance under Part 27 of the Federal Aviation Regulations, Bell's conflict preemption argument failed.

Pease v. Lycoming Engines involved Plaintiffs' design defect claims arising from a Piper PA-32R-301T crash that allegedly was caused by a faulty oil-drain and transfer tube. According to the pleadings, the tube on the oil drain tank failed due to an overhung load and engine vibrations. Plaintiffs asserted that the oil leak caused engine failure due to oil starvation, which ultimately led to the airplane crash.

Regarding Plaintiffs' state law claims, Lycoming contended that the Federal Aviation Act of 1958 preempts state standards of care regarding aviation safety, and that the issuance of a type certificate proves as a matter of law that the engine design had complied with all applicable FAA regulations. Plaintiffs argued that the Federal Aviation Act does not preempt state standards of care regarding aviation safety, and that a type certificate should not foreclose them from proving that Lycoming violated the applicable FAA regulations.

Lycoming's motion for summary judgment based upon federal preemption grounds was granted with respect to plaintiffs' alleged violation of certain federal regulations, but denied in all other requests.<sup>36</sup> To explain its holding, the Court considered prior preemption cases including; *Abdullah v. American Airlines, Inc.*, *Elassaad v. Independence Air, Inc.*, and *Williamson v. Mazda Motor of America, Inc.*<sup>39</sup> According to the Court, the broad language of *Abdullah* did not permit a restrictive interpretation of the Third Circuit's analysis in *Elassaad*, which slightly narrowed but did not overturn *Abdullah*. Additionally, the Court noted that *Williamson*—a case where state tort law was not preempted by the Federal Motor Vehicle Safety Standard 208, did not affect the validity of *Abdullah*. The Court concluded that federal regulations established the safety standards in the field of aviation safety, and that these standards may not be supplemented or varied by the states. Notably, the Court urged the Third Circuit to clarify *Abdullah*'s application to aviation products liability cases. The Court also commented that the —issue of whether federal law preempts state standards of care in aviation products liability cases deserves individualized consideration based on the

specific regulations promulgated by the FAA relating to certification of airplanes and airplane component parts.

*Morris v. Cessna Aircraft Co.* arises from a Cessna C208B crash on January 24, 2003 near San Angelo, Texas which injured its two occupants. On January 4, 2005, plaintiffs filed suit asserting, among other things, claims for strict products liability and negligence. Plaintiffs contended that the aircraft was unreasonably dangerous, defective, and not fit for its intended purposes. In its motion for summary judgment, Cessna argued that the

Federal Aviation Act of 1958 preempts the Plaintiffs' products liability claims. The Court rejected Cessna's implied field preemption argument, and focused on the Federal

Aviation Act's structure and legislative history, as well as the lack of other evidence of clear congressional intent to preempt the field of air safety generally or aircraft design in particular.<sup>45</sup> Noting that the —ultimate touchstone|| in a preemption case is congressional intent.

### **Application of Government Contract Defense**

In *Getz v. The Boeing Co.*, products liability and duty to warn claims based on an Army MH-47E Chinook helicopter crash in Afghanistan were barred by the government contractor defense. Investigation into the cause of the helicopter crash indicated that one of the Chinook's engines suddenly flamed out. According to this investigation, the flame out was caused either by an unexpected shut-down of the engine controls system—the Full Authority Digital Electronic Control (FADEC) and Digital Electronic Control Unit (DECU), or in the alternative, because the engine ingested a substantial amount of ice.

Plaintiffs also claimed that the flameout could have been avoided if the helicopter's ignition system had been equipped with a continuous or automatic relight feature. Plaintiffs asserted design, manufacturing, and failure-to-warn defects against the government contractors who designed and manufactured the helicopter and its component parts. In granting the Defendants' motion for summary judgment under the government contractor defense, the Court relied on the framework in *Boyle v. United Technologies Corporation*<sup>49</sup> and found that the contractors had shown: (1) that the Army approved reasonably precise specifications for the ignition system and for the design of the FADEC and DECU; (2) that the Chinook Helicopter conformed to the approved specifications for the ignition system and the FADEC and DECU; and (3) that the actual knowledge of risk requirement was met since the Army already was aware of the risk of water-or-ice induced flameout, and government personnel were aware of the potential problem with the FADEC and DECU. The Army, and not the contractors, determined what warnings to provide to operators of the helicopter. Accordingly, the Court concluded that government contractors were not required to warn of dangers that already were known to the United States.<sup>50</sup>

## Educational Malpractice Doctrine and Duty to Train

There is no question that manufacturers must satisfy various duties to warn related to the use of their products. Recently a court was confronted with the issue of whether a manufacturer also has a duty to train.

*Glorvigen v. Cirrus Design Corporation* involved a product liability action in which plaintiffs alleged that Cirrus—the manufacturer of the SR22 aircraft: (1) failed to fulfill its duty to warn by providing adequate instructions for the safe use of its aircraft; and (2) precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.|| See *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). failed to adequately provide the pilot who had purchased the plane, and who was not instrument rated, with effective training on the use of the autopilot during Cirrus's transitional training program.<sup>52</sup>

On December 9, 2002, the decedent pilot took delivery of the SR-22 and participated in Cirrus's transitional training program. The program consisted of flight and ground instruction, totaling approximately 12.5 and 5.3 hours respectively, and included written and ancillary transition training regarding how to use the autopilot. Although the decedent received some autopilot instruction, the plaintiffs provided evidence allegedly showing that the training did not include one of the listed flight performance tasks, which was to effectively transition from inadvertently-entered Instrument Meteorological Conditions (IMC) to Visual Meteorological Conditions (VMC).<sup>53</sup> On January 18, 2003, following completion of the transition training, the pilot and a passenger departed from Grand Rapids to St. Cloud, Minnesota in the SR-22. Shortly after takeoff, and unable to maintain VMC, the pilot flew the airplane into the clouds, and shortly after that, allegedly stalled and crashed the airplane.

According to the plaintiffs, even though Cirrus provided the Pilot's Operating Handbook and the FAA Approved Airplane Flight Manuals for the SR22, both of which included autopilot system and operation information, Cirrus's alleged failure to sufficiently train the pilot on the autopilot system caused the SR22 crash because of the pilot's inability to escape poor weather. Cirrus argued that although it did have a duty to warn of dangers associated with the SR22, the scope of that duty did not include an obligation to train the pilot to proficiently fly the airplane.

The Court of Appeals agreed with the manufacturer and reversed the trial court's denial of judgment as a matter of law. The Court noted that although plaintiffs had cited aviation cases from other jurisdictions in support of their contentions, the Court distinguished those cases from the current one since they dealt with the sufficiency of written instruction manuals, not training services.

As to plaintiffs' educational malpractice claim, the Court of Appeals relied on prior Minnesota case law in reversing the lower court's denial of judgment n.o.v. The Court cited *Alsides v. Brown Institute, Ltd.*, and *Page v. Klein Tools, Inc.*, to illustrate

Minnesota's view that claims of educational-malpractice are barred. In *Alsides v. Brown*, the Court dismissed claims by students which challenged the general quality of the education they had received, and noted its refusal to —...engage in a comprehensive review of a myriad of educational and pedagogical factors, as well as administrative policies. In *Page v. Klein Tools, Inc.*, the Court recognized the negative public policy implications in educational-malpractice claims when it said that —allowing individuals...to assert claims of negligent instruction would avoid the practical reality that, in the end, it is the student who is responsible for his knowledge, including the limits of that knowledge.

In finding that plaintiffs' claims were barred under the educational malpractice doctrine, the Court noted that a determination of whether the transition training was ineffective would involve an inquiry into the nuances of the educational process, which is what the educational malpractice bar is meant to avoid.

### **Removal of Aviation Products Cases Based on Federal Question Jurisdiction**

Manufacturers of aviation products often prefer to defend lawsuits against their clients in federal court rather than in state court. Lawyers representing plaintiffs in these lawsuit have become particularly adept in drafting their complaints so as to avoid removal of the lawsuits to federal court. The discussion below addresses how a defendant-manufacturer's status as an Organizational Designated Airworthiness Representative (—ODAR||), and its employees' status as Designated Engineering Representatives (—DERs||) or Designated Manufacturing Inspection Representatives (—DMIRs||), can be used to support removal under 29 U.S.C. § 1442(a)(1), the federal officer removal statute.

#### **Federal Officer Removal Statute**

The federal officer removal statute provides in relevant part that

A civil action ... commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any

As a result, many aviation manufacturers employ engineers and other personnel who with FAA approval, and under FAA supervision, serve as Designated Engineering Representatives (DERs) and Designated Manufacturing Inspection Representatives

(DMIRs). A DER is an engineer who acts —under the general supervision of the [FAA] Administrator|| and certifies that an aircraft's (or component's) design meets FAA requirements.<sup>68</sup> A DMIR likewise acts —under the general supervision of the [FAA] Administrator|| and is authorized to certify aircraft and components that meet airworthiness requirements.<sup>69</sup>

Finally, ODARs are organizations (rather than individuals) that are appointed by the FAA in accordance with 14 C.F.R. § 183.233, and that possess aeronautical knowledge and experience and meet the qualifications of FAA Order 8100. ODARs act —under the general supervision of the [FAA] Administrator|| and perform examination, inspection and testing services related to the issuance of certificates.<sup>70</sup> The DER, DMIR and ODAR process is closely overseen by a supervising FAA office, which approves the training programs, procedures and the individuals themselves who are granted the delegated authority to perform FAA functions.

#### Obstacles to Federal Officer Removal

Defendants seeking to remove lawsuits to federal court based on allegations implicating the conduct of DERs and DMIRs in the aircraft certification process have encountered considerable difficulty. Much of this difficulty can be traced to reasoning in the Eleventh Circuit's decision in *Magnin v. Teledyne Continental Motors*. Although the Eleventh Circuit found that removal pursuant to the federal officer removal statute was proper in *Magnin*, it introduced a significant obstacle to future attempts by manufacturers to remove actions under the federal officer removal statute—specifically, the requirement that the DMIR (or DER) be named as an individual defendant. This requirement has allowed plaintiffs to defeat removal by not naming the DMIR or DER as a defendant in their complaints.

*Magnin* was a wrongful death action brought against an engine manufacturer and its employee, a DMIR. The complaint alleged that the crash underlying the lawsuit was proximately caused by defendants' negligent inspection and wrongful certification of the aircraft's engine as airworthy. Notably, the complaint expressly described the defendant-employee as a DMIR.

For the Eleventh Circuit, the naming of the DMIR as a defendant was critical to its decision. Because the complaint alleged that the DMIR proximately caused the crash by signing an export certificate, and because the certificate was signed only in the DMIR's capacity as an agent of the FAA, there was the requisite —causal nexus. Moreover, the defendant-DMIR could raise a colorable federal defense that he acted in compliance with and within the scope of his federal duties.

Plaintiffs' counsel and federal courts alike seized on the Eleventh Circuit's emphasis on the fact that the DMIR was named a defendant in the action to support removal under 28 U.S.C. § 1442(a). The result was a flurry of decisions remanding lawsuits to state court because the DER or DMIR was not named in the plaintiffs' complaint.

By way of example, in *Swanstrom v. Teledyne Continental Motors*, the plaintiffs alleged that the defendant-manufacturer was negligent in its failure to properly inspect the aircraft in a manner to ensure its airworthiness.<sup>76</sup> The defendant-manufacturer sought removal under the federal officer removal statute because its employees had been designated to examine, inspect, test and certify the aircraft for airworthiness. As for its colorable federal defense, the defendant-manufacturer asserted that the aircraft was designed in full compliance with applicable federal safety regulations and standards.

Relying on *Magnin*, the court in *Swanstrom* found that no DER or DMIR specifically was named in the complaint. In remanding the case to state court, the court held that the defendant-manufacturer had not established or even alleged that it had a contract or any relationship with the FAA such that substantial control was exercised over it.<sup>78</sup> Further, the court held that—it is not sufficient for the defendants to assert that their acts fall under the general auspices of a federal officer or fall within the purview of participation in a regulated industry.

An identical result—remand to state court—was reached in *Britton v. Rolls-Royce Engine Servs.*, a personal injury action arising out of a helicopter crash.<sup>80</sup> In *Britton*, the defendant-repair center argued that removal was proper because the FAA had designated private individuals, including its own employees, to serve as FAA representatives by certifying that the aircraft and engine maintenance was performed according to FAA specifications.<sup>81</sup> Like the courts in *Magnin* and *Swanstrom*, the court in *Britton* ordered a remand because the complaint did not name any individual defendants and did not expressly allege that defendant's issuance of an airworthiness certificate was a proximate cause of the accident.<sup>82</sup>

The holdings in *Magnin*, *Swanstrom* and *Britton* (among other cases) present substantial obstacles to successful federal officer removal, absent the DER or DMIR being named as a defendant. However, not every court presented with this situation has followed *Magnin*.

### **Recent Developments In Electronic Discovery**

Electronic discovery, or e-discovery, continues to evolve in ways that will impact the litigation of aviation products liability cases, both substantively and financially. Preservation, which underlies the analysis of spoliation issues surrounding electronic documents, is presently the subject of an intense debate among stakeholders as alternatives are being considered by the Federal Civil Rules Advisory Committee. The use of Rule 502(d) to protect against privilege waiver is becoming virtually indispensable in Federal Court. Judicial recognition of the effectiveness and efficiency of technology-assisted review, or predictive

coding, is on the rise. And, the assessment of certain e-discovery costs is now an accepted practice under Federal Rule 54(d) and 28 U.S.C. § 1920.

### Preservation Obligation

A short two years ago, Judge Shira Scheindlin followed up her Zubulake series of opinions on the obligation to preserve electronic evidence with her decision in *The Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*.<sup>94</sup> In essence, Judge Scheindlin mandated the issuance, implementation and maintenance of a broad written preservation notice (a litigation hold) as soon as a party reasonably anticipates litigation. Failure to do so risks not only the imposition of spoliation sanctions, certainly including monetary sanctions, but also sanctions possibly as severe as an adverse inference or, in the most egregious of circumstances, dismissal.

In the intervening time period, courts have agreed and disagreed with Judge Scheindlin, leading to general conservatism as a result of the level of uncertainty over the true timing and scope of the preservation obligation, and at significant expense. For example, in

*Huggins v. Prince George's County*, the Court recognized that —[t]he mere existence of a dispute does not necessarily mean that parties should reasonably anticipate litigation or that the duty to preserve arises. In *Surowiec, v. Capital Title Agency, Inc.*, the Court determined that the obligation to preserve was triggered upon receipt of a letter from a lawyer providing notice of —anticipated claims. However, in *Webb v. Jessamine County Fiscal Court*, the Court determined that the filing of procedural incident reports did not trigger the obligation to preserve because —[d]istrict courts have consistently looked for communication, whether it be written or verbal, by the plaintiff threatening to initiate litigation or announcing litigation against a defendant as the point at which a defendant has a duty to preserve relevant evidence. The import of the trigger and scope of the preservation obligation is illustrated in *Pippins v. KPMG LLP*, wherein KPMG was obligated to incur millions of dollars of expense to preserve the hard drives of some 2,500 former employees, with no consideration of proportionality — the relationship between e-discovery costs and the monetary value of the litigation. Conversely, in *Rimkus Consulting Group, Inc. v. Cammarata*, Judge Lee Rosenthal expressly engrafted a proportionality analysis onto the evaluation of the scope of preservation, which was echoed to some extent by Judge Paul Grimm in the seminal case of *Victor Stanley, Inc. v. Creatvie Pipe, Inc.*

In an effort to deal with the uncertainty surrounding ESI preservation, the Advisory Committee is currently considering various proposals for modifying the Federal Rules to address, inter alia, trigger and scope, with due consideration for the proportionality concerns contemplated by the Federal Rules. The Committee is considering whether the Federal Rules should specify the point in time at which the preservation obligation arises, or continue the current common law rule that ESI must be preserved when a party reasonably anticipates



litigation. Alternative triggers include the receipt of a written request or notice to preserve; the service of a complaint, subpoena, claim notice or similar formal legal document; actual notice of the commencement of formal proceedings; or steps taken in preparation for asserting a claim or defense. With respect to scope, the Committee is considering drafting the rules with as much specificity as possible. Topics addressed under a revised rule could include the subject matter of the information to be preserved; the relevant time period; the obligation to act reasonably under the circumstances; the types and sources of data to be preserved; the format of preserved data; and potential limitations on the types of data and number of custodians to be searched. These issues and others were addressed at a mini-conference held by the Advisory Committee in Dallas in September of 2010. Not surprisingly, there was little agreement among the participants representing various stakeholders, including large corporate defendants as well as the plaintiffs' bar.

### Privilege Review and Preservation

Once ESI must be reviewed and produced, the proper application of Federal Rule of Evidence 502(d) can effectively preserve both the attorney-client and attorney work product privileges, with minimal review. Indeed, by drafting a thorough electronic discovery procedure and memorializing that process in a court order issued pursuant to Rule 502(d), litigants can minimize privilege review obligations, while nearly eliminating the potential for waiver resulting from disclosure during the production process. And, pursuant to Rule 502, the privilege protection extends to any other Federal or State proceeding.

Pursuant to 502(d), —[a] Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other Federal or State proceeding.

These protections apply regardless of whether the disclosure was inadvertent, and regardless of the care taken by the disclosing party.<sup>105</sup> In order to properly invoke the protections of Rule 502(d), any agreement between counsel concerning the management of ESI should be incorporated by the Court into a Rule 502(d) Order. The agreement, however, must be comprehensive, in order to avoid having a reviewing Court interpose 502(b) considerations of reasonableness and inadvertence into the production of privileged material consistent with a 502(d) Order. Thus, any review process should be fully delineated and precisely followed. The agreement should explicitly state that even an inadvertent disclosure does not waive privilege, pursuant to Rule 502(d), and further, that the parties agree that the proposed process satisfies the obligations of Rule 502(b) as well. Counsel also should include a specific procedure for managing the assertion of privilege claims after information is produced, as well as a claw-back procedure setting forth the process for sequestration, review, and return or destruction of privileged documents if they are identified during the litigation.

The reach of a properly implemented Rule 502(d) Order is extensive. Properly implemented, it can insulate a party from waiver of the attorney-client and attorney work product privileges in a pending litigation, as well as in any other federal or state proceeding. It can also be used to protect third-parties producing information in the litigation, such as respondents to a subpoena. This can be accomplished by ensuring that a Rule 502(d) Order is in place to protect disclosure, or otherwise seeking a protective order pursuant to Rule 502(d) to obtain the full protections of the rule.

### Predictive Coding

A Rule 502(d) Order is particularly useful when machine or technology-assisted review (otherwise known as predictive coding) will be used to cull down the large set of collected ESI into something much smaller, and which may or may not be reviewed independently during discovery. Predictive coding contemplates the review of a relatively small subset of collected documents to identify which are relevant to the litigation, and which are not relevant. The software leverages that initial coding, using linguistic-based algorithms, to classify the balance of the collected documents as relevant or not relevant. Studies have shown that predictive coding software meets or exceeds the ability of human reviewers to locate responsive documents and to segregate them from non-responsive documents. The result is a much quicker and more accurate identification of the documents relevant to the litigation than could ever be accomplished by human review of the massive amounts of electronic data being collected for modern litigation.

Although there are no judicial opinions directly advocating or adopting predictive coding as a means of identifying responsive documents during litigation, judicial approval is quickly expanding. In his October 2011 article in *Law Technology News*, *Search, Forward: Time for Computer Assisted Coding*, United States Magistrate Judge Andrew Peck of the Southern District of New York advocated the merits of replacing massive human review and keyword searching with predictive coding. Judge Peck contrasted the failures of historical approaches to electronic discovery with the capabilities of modern predictive coding. He noted that the science behind the —black box|| (the algorithm) is less important in defending the use of predictive coding than a statistical demonstration that the process works, i.e., most of the relevant documents were located. Most importantly, in noting that there were no judicial opinions on which counsel could rely to implement predictive coding, Judge Peck observed that until there is a judicial opinion approving (or even critiquing) the use of predictive coding, counsel will just have to rely on his article as a sign of judicial approval.

### Cost Recovery

Whatever approach is taken to managing electronic discovery, it is clear that at least some of the costs associated with electronic discovery are recoverable by the prevailing party under Federal Rule 54(d) and 28 U.S.C. § 1920. In *Race Tires America, Inc. v. Hoosier Racing Tire*

Corp.,<sup>106</sup> Judge McVerry assessed in excess of \$350,000 of electronic discovery costs in favor of the prevailing party. Recognizing that, while only those costs that are specifically identified in 28 U.S.C. § 1920 could be taxed to the losing parties, § 1920(4) included fees for exemplification and the costs of making copies of any materials where the materials are necessarily obtained for use in the case. The Court undertook an extensive review of case law on taxing of electronic discovery costs, and concluded that the steps the third-party vendor performed appeared to be the electronic equivalents of exemplification and copying. Although Courts since then have attempted to parse recoverable from non-recoverable electronic discovery costs through the strict application of Section 1920(4), it is clear that some segment of electronic discovery costs are properly recoverable under Rule 54(d).

# **AVIATION INSURANCE**

## **INTRODUCTION**

Aviation accidents, although infrequent, have the potential to result in large property damages and losses of human life. While there have been a number of studies that examine how airline stocks react to accidents (see, for example, Chance and Ferris (1987), Davidson et al. (1987) and Walker et al. (2005)) there has been no study to date that examines how insurance companies, which ultimately pay the bills, are affected. Our intention in this paper is to provide an overview of how the airline insurance industry works. We will take a look on how the risk is spread between insurers, how insurers treat deliberate acts of violence and, lastly, how insurers price the risk. Our paper shows that the way the aviation insurance market is structured reveals highly sophisticated risk management practices. To minimize their risk exposure, large potential liabilities are shared by means of a complicated system among several insurers. Furthermore, the paper shows that the insurance market has adjusted to the post 9-11 aviation insurance realities being reasonably ready to handle events of an even more catastrophic magnitude.

### **The Aviation Insurance Market**

The fundamental principle of all forms of insurance is that ‘the premiums of the many will pay the losses of the few’. As the insurance businesses exist in the commercial realm, they use conventional business management principles applied in the way they operate. Insurance companies should cover the cost of running the business, expenses and commissions and, together with any investment income, provide a reasonable profit and return on the capital employed. Similarly, the insurance market works to spread the risk between a large number of insurers and re-insurers so that the amount any one insurer is exposed to is kept within acceptable limits.

A decade ago, ‘(by) the time a major airline risk (had) been fully re-insured, hundreds or even thousands of insurers and re-insurers (would) have (had) a share. But, nowadays, with continuing consolidation in the market, the number of participants has fallen significantly, although it will still probably be over a hundred. There are a number of features of aviation that set it apart from other classes of insurance. Perhaps the three most significant are the limited number of risks available to insure, the comparatively small size of the insurance class, and the industry’s exposure to catastrophic events.

The main characteristic of the aviation insurance segment is the relatively few risks available to insure and this is especially so if just airlines are considered. At the end of 2003 there were 765 airlines worldwide operating about 16,400 western-built jet aircraft. This number increases to 2,207 airlines operating about 26,000 aircraft if all airlines operating jet or turboprop powered aircraft of 15 seats or more are included. However, the actual number of individual risks is significantly less than this since there are several airline groups where

insurance is purchased on behalf of all the members of the group. In addition, the exposure, in terms of fleet value (or indeed size of fleet) is dominated by a few very large airlines or groups of airlines, with the 20 largest accounting for well over 50% of the total value at risk. The 100 largest airlines probably account for 90% of the exposure as measured either by value or passengers carried.

The aviation insurance market is very small in comparison with many of the other classes of non-life insurance. Currently, it is estimated that the total gross annual premium for all aviation insurance business is about \$7.5 billion (see Table 1) and '(in 2001) aviation premiums represented approximately 0.1% of the worldwide insurance market'. This is considerably smaller than, for instance, the annual premium for automobile insurance even in small countries. Examples of comparisons between aviation and other classes of business, illustrating how insignificant aviation is in the insurance world, are often quoted – one such example often used compares aviation to the cost of insuring plate glass in New York State.

Nevertheless, while aviation as a class has one of the smallest premium bases in the insurance industry, it has one of the highest exposures to potential catastrophes. Some new Boeing 747s are insured for over \$250 million and many wide-bodied jets will be insured for more than \$100 million each, while for liabilities (passengers and third party liabilities) CSLs of \$1.5 or \$2 billion will be bought.

One estimate of the total gross premium income received from airlines during the 2003 underwriting year is \$3 billion so there is potential for the single loss of a wide-bodied aircraft to account for perhaps as much as two-thirds of the total annual premium income for this class of insurance. There is, of course, always the very small chance of a collision between two such aircraft. So, how do aviation insurers plan for such possibilities?

In 1996, Lloyd's introduced a number of Realistic Disaster Scenarios (RDS), which had been developed by their Regulatory Division. Lloyd's Syndicates have to demonstrate their capability to meet all their commitments, which might arise from these prescribed scenarios, if they are to continue to do business at Lloyd's. There is currently only one RDS, which specifically addresses aviation risks. This RDS, titled 'Aviation Collision' initially ran as follows 'Assume a collision between 747s of the syndicate's two highest airline exposures occurring over a major US city; Assume liability loss of US\$1 billion per airline'. Amongst other changes, the assumed 'liability loss' has, more recently, been increased to a total of \$ 4 billion. An actual occurrence of this scenario would produce a loss equivalent to more than 130% of the 2003 gross premium income from all airline business worldwide.

With the exception of 9/11, where the currently estimated incurred loss falling on aviation policies is some \$4.3 billion, so far there has been no aviation loss which has approached these levels. Nevertheless, in any one year, while there are relatively few total losses and/or fatal accidents, there is always the potential for a 'catastrophe.' In the last ten years there

have been 31 losses of over \$100 million (see Table 2). On average this amounted to about three per year but, of course, these events have not been evenly distributed. Consequently, with a small premium base and occasional catastrophic losses, the airline insurance market can be very volatile.

An airline's various 'aviation risks' are normally insured as a whole with one combined policy covering loss or damage to the aircraft in its fleet and its legal liability to passengers and third parties (see Figure 1). No single insurer has the financial resources to retain a risk of the size of a major airline, or even a substantial proportion of such a risk. Except at the 'local' level, which generally only applies in countries with a legal requirement to place insurance with insurers based in that country, and where insurers will retain none or very little of the risk, very many insurers/re-insurers will be participating in the risk at each step. Each step, each link in the chain, is brought together by a broker.

The risk will be insured by a number of co-insurers each of whom enters into a separate contract of insurance with the insured. One of the co-insurers will act as the 'leader' for the risk and will negotiate the terms and conditions for the cover provided. This lead insurer will typically also be responsible for handling any claims that may arise. The other insurers, known as the 'following market', will normally conform to these conditions, as it would be impractical to have different ones for each participant.

Once the leader has signed the slip, the broker will approach other underwriters at Lloyd's or insurance companies in London and elsewhere and invite them to take a part of the risk. Each underwriter (insurer) will then take a line (a percentage) of the risk. The insurance cover will be completed once underwriters accepting 100% of the risk have signed the slip.

Three of the largest aviation insurers, Global Aerospace, USAIG and La Reunion Aerieenne, are pools, each writing business on behalf of five or six different insurance companies. A smaller insurer, Aviabel, writes business on behalf of ten insurers.

For an 'international airline risk' (i.e. non-US), the London Market dominates, with nearly 60% of the 'competitive' capacity and over 50% of the total capacity. The London capacity is split, roughly equally, between insurance companies and Lloyd's Syndicates. A long way behind London is Paris with an estimated 10% of the world's competitive capacity and 12% of the total capacity for international business.

The insurance cover for most non-US airlines is led off in London, either directly or as facultative re-insurance of a local insurer. The London insurers leading the airline business include such companies as Global, AIG and Allianz and Lloyd's Syndicates, ACE, Amlin and Wellington. In Paris, La Reunion Aerieenne leads an increasing number of international airlines. The US market dominates the insurance of US-based airlines. London and, indeed other international markets, may take a share of a US airline risk but they are nearly all lead off by US-based insurance operations, which will also take a significant percentage of the

risk. Major US aviation insurance operations are USAIG, Global (Short Hills) and AIG (Atlanta). (17)

Currently, US-based aviation insurers generally do not write non-US airline business, although there is a notable exception in Houston Casualty Company, which will write 'difficult' risks in Africa, South America, the Commonwealth of Independent States (CIS) and elsewhere. There is a saying in the insurance market that 'there is no such thing as a bad risk only a bad rate,' i.e. everything is insurable for the right price. However, the price may be high – 20% for some African risks and, although not 'aviation', 30% for some space risks. Major airlines in Europe generally will be paying less than 1% and probably closer to 0.1%. One major UK airline is believed to have a rate of 0.088% for its hull cover and \$0.256 per 1,000 Revenue Passenger Kilometres (RPKs) for liability.

Currently, there are probably not more than about 50 insurers writing airline business worldwide and this number includes some who will only write risks based in certain countries (see comment above about certain US insurers) or are 'niche players.'

### **Re-insurance**

Aviation and, in particular, airline insurance, because of the small number of risks, can not provide insurers with a balanced portfolio (18) and therefore direct insurers rely on re-insurance to help smooth out the effects of random fluctuations in losses and reduce the impact of catastrophic losses.

The direct insurers on a risk will seek to limit their exposure to any loss by purchasing re-insurance. Re-insurance can be divided into two areas, proportional, which includes quota share and surplus, and non-proportional, which includes excess loss ('XL') and stop loss.

### **Proportional Re-insurance**

Proportional re-insurance, which can be either facultative or treaty, is where the reinsured agrees to cede a certain fixed share or percentage of a risk to the re-insurers. Thus, the premiums and losses resulting from the original insurance/s are shared proportionally between the cedent (insured) and the re-insurer in accordance with the percentage – or 'proportion' – set out in the re-insurance contract. Proportional re-insurance is, generally, in the form of either quota share re-insurance or surplus.

In quota share re-insurance, the re-insurer undertakes to re-insure an agreed percentage of all business of a specified kind written by the re-insured.

Surplus re-insurance is similar to quota share except that it is based on a monetary amount with the insured ceding any amount above their agreed retention subject to a minimum upper limit. Surplus re-insurance is usually re-insured with more than one re-insurer with the proportion of the surplus accepted by the re-insurer being known as a 'line'. A surplus treaty

can be made up of many lines. However, it is believed that proportional re-insurance is less likely to be used by major insurers and should, perhaps, be seen as a mechanism by which an insurer with a relatively small capacity can boost their presence in a particular class of business.

The re-insurance manager of a large aviation insurer in London has confirmed that they are currently not using any proportional re-insurance, either quota share or surplus, as part of their re-insurance program. '(With this) you end up giving away good premium. (These) are only used by insurers who would otherwise not be able to take a large line. Brokers would (otherwise) only bother coming to them with rubbish risks where they were scraping the bottom looking for everyone to complete the risk. The good risks could be completed by just going to the big boys and the tiddlers would never be shown them'.

### **Non-Proportional Re-Insurance**

In non-proportional re-insurance, the re-insurer insures a layer of the risk written by the re-insured or a portion thereof. The term 'non-proportional' refers to the fact that the premium paid to the re-insurer is not in the same proportion as the risk assumed by him.

One form of non-proportional re-insurance is excess of loss (XL). Under an XL treaty the re-insurer is only liable to pay losses over a defined amount and up to a further defined limit. Any losses falling below the lower limit therefore remain with the re-insured. XL will normally be placed in layers providing cover at different levels of loss, and, again, many re-insurers may participate.

XL programs can be divided into 'working' and 'catastrophe' covers. However, following 9/11, 'working' covers are no longer available and XL generally does not come into play until much, much higher levels of loss – catastrophes.

Prior to 9/11, cover could be bought down to \$20 or \$30 million of original loss or even lower. 'After 9/11 all this market was killed off. You cannot get XL for levels much less than \$300 or \$400 million of original loss now. (One major re-insurer (name omitted for confidentiality)) will not provide XL below \$600 or \$700 million of original loss'.

As noted previously, XL cover is structured in layers. The width of these layers can vary from approximately \$10 million upwards. A narrow layer of \$19 million might be written 100% by a single re-insurer while a wider layer, say of \$30 or \$40 million, might be written by several re-insurers together. In any XL cover, a re-insurer may participate, to a certain extent, in each layer.

After a loss that impinges on a layer of XL cover has occurred the cover has to be re-instated in case another such loss happens. These reinstatements can either be bought up front, at the start of the re-insurance program, or following the loss which exhausted the cover. At high



levels of XL cover the re-insured might pre-buy only one or perhaps two reinstatements – large catastrophes are fortunately rare. Following the events of 9/11, where the two aircraft, which hit the World Trade Centre, can be assumed to have used up the probable one reinstatement at this catastrophic level of loss, insurers would need to have brought further reinstatements or gone bare, exposed to further catastrophes. After 9/11 reinstatements are still available but their cost has increased.

Stop Loss (SL) re-insurance, which has been described as a ‘somewhat rare form of re-insurance’ is designed to provide direct insurers with comprehensive protection against fluctuations in their annual loss experience. Under this form of cover the re-insured provides cover for any part of the total annual loss burden that exceeds the agreed deductible. This deductible is defined as either a percentage of the annual premium income or a fixed sum. The cover can be triggered if the deductible is exceeded by either one large loss or an accumulation of smaller losses.

Stop Loss insurance is not intended to relieve the direct insurer of all ‘entrepreneurial risk’. The re-insurer will normally require the re-insured to incur a technical loss (i.e. losses + costs > premiums) before the cover pays.

Re-insurers are said to have reservations about providing stop loss insurance, which is the reason it is not more widely used.

### **Re-insurance of Re-insurers**

Re-insurers will themselves have insurance, sometimes referred to loosely as ‘retrocession’, although this term tends to have a more limited but specific meaning. The re-insurance programs of re-insurers can be quite varied depending on their perception of the risk and the structure of their ‘book of business’ but all can be expected to have some form of CAT (catastrophe) protection in place. However, at these levels, this protection is normally no longer class specific. The CAT protection will be covering the re-insurer’s whole book, not just their exposure to aviation risk.

Apart from ‘traditional’ forms of insurance, some of the risk may also be transferred directly to non-insurance entities through the use of ART (Alternative Risk Transfer) and CAT bonds. Broadly, these are financial instruments which investors may choose to include in their investment portfolio as a hedge against a downturn in the financial markets. (‘insurance risk’ was not thought to be linked to the risk of investing in the stock market but 9/11 has shown that, if the insurance loss is big enough, it can also impact the financial markets.) However, although used, they are probably not that significant for the insurance market.

As the risk moves through the insurance chain, from (direct) insurers to re-insurers to retrocessionaires, the insurers involved at each point will be to a lesser and lesser extent ‘aviation insurers.’ However, there are always exceptions and two of the largest re-insurers, Munich

Re and Swiss Re, are both understood to have separate facilities which allow them to write a certain amount of direct aviation business. Munich Re also provides part of the capacity used by Global. Some insurance entities which are perhaps best known as retrocessionaires may occasionally also write direct aviation business but this is believed to be rare.

## **The Cover**

Although, following an airline accident, there may be a number of different covers (insurance policies) which will ultimately respond, in the context of this summary we will limit our review to the covers bought by airlines, specifically hull insurance, which provides cover against loss of or damage to the aircraft itself, and passenger and third party liability insurance. Cover for the airline's liability will normally be arranged alongside the hull cover in a single policy with the same insurers insuring both the hull and liability risk.

Hull cover is affected on a so-called 'all risk' rather than a 'named peril' basis with, broadly, the policy responding to loss or damage to the aircraft as the result of any accident (a fortuitous event). Similarly, passenger/third party liability insurance will provide cover for all sums (up to the policy limit) the airline is legally liable to pay as damages arising from bodily injury (or death) or property damage to passengers or third parties caused by an occurrence and arising out of or in connection with the insured's operations. An occurrence is frequently defined in airline policies as 'an accident', which results in bodily injury. There has been considerable case law over the exact definition of 'an accident' and 'bodily injury' but it will suffice to take these words at face value.

## **'War' Exclusion**

As stated above, there are no restrictions on what circumstances leading to an accident are covered – an accident need only occur. However, specific exclusion clauses are always added to aviation policies, which introduce limits to what circumstances or events they will actually respond to.

The most important of these, in the context of this review, is AVN48B, the War, Hi-Jacking and other Perils Exclusion Clause (Aviation), which should be included in every aviation policy. Very briefly, the clause states that the insurance policy does not cover claims caused by deliberate acts of violence, hi-jacking, seizure, etc.

In respect of the aircraft's hull, part of the cover excluded by AVN48B may be regained – written back into the policy – by the incorporation of clause AVN51 Extended Coverage Endorsement (Aircraft Hulls) . However, this clause is normally only used for general aviation and is never likely to be included in an airline policy. Although AVN51 does reinstate cover for damage resulting from hi-jacking or any unlawful seizure of the aircraft, it does not reinstate cover for all of the 'war risk' perils excluded under AVN48 and therefore does not provide airlines with the cover they need.

Cover for full 'war risks' needed by airlines can be affected under the aviation hull 'War and Allied Perils' policy (LSW555B) written in the London War market, i.e. generally by a different set of insurers. LSW555B provides cover for loss of or damage to the aircraft '...against claims excluded from the Assured's Hull 'All Risks' policy...' by AVN48B except for 'any hostile detonation of any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter.' LSW555B also excludes losses, damages or expenses resulting from war amongst the Great Powers – United Kingdom, United States of America, France, the Russian Federation and the People's Republic of China – unless the aircraft is in the air at the outbreak of war, in which case they are covered until they have completed their first landing.

Hull 'war risk' policies usually have a fleet aggregate limit. Currently, for large international airlines, this limit lies in the vicinity of \$600 million to \$1 billion. This is equivalent to the total loss of approximately ten wide-bodied aircraft but would not cover the whole or a significant part of a large airline's fleet if it were to be caught on the ground in one place e.g. the Iraqi invasion of Kuwait. For such cases, excess aggregate war risk cover may be available. It is also understood that some war policies may provide for reinstatement at an agreed further premium but, in this case, this will not increase the policy limit for any one loss.

While 'war risk' cover for aircraft hulls may be purchased in the war market, this market will not insure liabilities. Cover for an airline's legal liability to passengers and third parties has to be obtained by 'writing it back' into the all-risk policy by incorporating Clause AVN52 'Extended Coverage Endorsement (Aviation Liabilities),' in consideration of an Additional Premium (AP). However, prior to 9/11, this liability write-back was 'given away' by all-risk insurers. Having excluded this cover by including Clause AVN48B in the policy, they then re-instated the cover in respect of liabilities free of charge or cheaply by including AVN52.

Insurers attribute the previous 'giving away' of AVN52 cover to the past 'weak' aviation market. The AP for AVN52 was typically charged at around 25% of the premium. This then 'dwindled down' to 10% and, in many cases, disappeared. It is thought that, as AVN52 was always included, the amounts originally shown as a specific AP became just an 'allocation of part of the premium'. Then, in the periodical weak market conditions that aviation (airline) insurance goes through, any allowance for AVN52 dwindled away to nothing and was lost.

Prior to 9/11, AVN52 (AVN52C) reinstated ('wrote- back') the full CSL stipulated in the policy for both passengers and third parties. But, following this catastrophic loss, the coverage afforded by this 'write-back' was limited going forward. Although it continued to re-instate the full 'all-risk' limits in respect of the aircraft's passengers, initially it was limited to just \$50 million with respect to third parties. This limit has more recently been increased to \$ 150 million or in some cases \$250 million but is still generally far below the

coverage that airlines need (see further discussion following the section ‘Changes After 9/11’ below).

In summary, an airline’s fleet and its legal liability to passengers and third parties in the event of an accident is covered by a combined hull and liability policy for ‘all risks.’ However, any loss as the result of deliberate acts of violence is excluded by the standard inclusion of Clause AVN48B. In the case of a loss resulting from an act of violence, cover for the aircraft is provided by a ‘war-risk’ policy (LSW555B), while liability cover for the passengers and third parties is written back into the ‘all-risk’ policy by the standard inclusion of Clause AVN52.

### **Policies of Indemnity**

Both an airline’s hull and liability ‘all-risk’ policy and its hull ‘war-risk’ policy are policies of indemnity, i.e., subject to any limits set out in the policies. If the claim is valid, insurers will indemnify the insured for the loss so that it is as if the loss had not occurred.

Being policies of indemnity, insurers and indeed re-insurers have the right of subrogation – ‘once the insurers have indemnified the insured under the policy they step into his shoes in relation to any rights of recovery which may be available to the insured against third parties’.

### **Changes After 9/11**

The events of 9/11 were catastrophic and, although the expected loss falling on aviation policies amounted to only around \$4 billion, which was less than 10% of the estimated total insured loss, in comparison with the premium generated by this class of business, it was by far the worst impacted by the event.

9/11, in which airliners were, in effect, used as weapons, resulting in a huge loss of life, also changed the industry’s views on this type of risk. Aviation insurers began to realize that the impact of some forms of terrorism was unquantifiable and therefore uninsurable while their capital providers realized that the magnitude of the potential exposure they had in aviation was out of proportion to the small premium income that it generated. Capital providers ceased to see aviation simply as a small ‘residual’ market they could move surplus money into and out of depending upon the attractiveness of the returns in their main property/casualty business and were suddenly confronted with the realisation that aviation could hurt them.

While the events of 9/11 were shocking in the true sense of the word and it was recognized, even in the first hours, as the largest loss ever sustained by the insurance industry, there seems to have been little or no concern amongst insurers that they would not be able to meet the financial demands arising from the event.

However, the impact on the aviation insurance market was such that insurers had to act quickly to protect their business going forward and ‘re-inflate’ the market. Insurers quickly took action to limit their exposure to this type of event in the future and to generate large amounts of additional income through the introduction of ‘surcharges.’ Other reactions included, for example:

- Immediately all outstanding quotes were withdrawn,
- Effective 23:59 GMT on September 17, 2001, insurers gave notice of cancellation of AVN52C,
- On October 1, 2001, special surcharges for passenger and cargo airlines and hull war cover were introduced, and
- Drafting of a new AVN48 began.

The aviation insurance market’s first act after the attacks was to withdraw all outstanding airline all-risk and hull war quotes, which had not been accepted. Underwriters needed time to assess their position; this was of ‘paramount importance’.

In the first week, meetings were held in London between representatives of the Lloyd’s aviation syndicates and the insurance companies to review the cover and terms of AVN52C. According to Willis, ‘(they were) determined to be in a position to be able to maintain coverage for the world’s airline communities, albeit on a more restricted basis.’ As a result of these meetings it was decided to give notice of cancellation of the coverage afforded by AVN52C to all aviation risks, as this was the only way that insurers could give notice of a review of its coverage. Letters were sent to all insureds giving them the required seven days notice of cancellation with effect from 23:59 GMT of the date of the letter. The notice given to US domiciled insureds was extended by an additional 48 hours to allow it to be made by recorded delivery.

AVN52C was subsequently replaced by AVN52D (also, in due course, by AVN52E for non-airline risks). AVN52D was almost identical to AVN52C except, most importantly, it introduced a much lower ‘sub-limit’ as far as cover for an airline’s legal liability to third parties was concerned – \$50 million – for any one occurrence and in the aggregate.

On October 1, 2001, special surcharges were introduced to ‘re-flate’ (sic) the market. These included:

- A \$1.25 charge per passenger for each departure applicable to any airline operating any one aircraft with a seating capacity in excess of 15 passenger seats,
- A 10% surcharge on the composite hull and liability all-risks premium paid by cargo airlines, and

- For hull war, a one-year special charge of 0.05% based on the declared Average Fleet Values at risk for all airlines. This was payable pro rata up to the expiry of the then existing policies and then going forward on renewal pro rata until October 1, 2002.

The most significant of these measures was the reduction of AVN52 cover for third parties to \$50 million. This would have grounded the world's airlines since they operate subject to various contractual agreements, requirements and conditions of use, which normally stipulate considerably higher levels of cover. Fortunately, the world's governments stepped in and provided either forms of 'government sponsored insurance' or gave indemnities to allow the airlines to continue operating.

Initially, no commercial insurance cover for third party legal liabilities (TPLL) above \$50 million was available but, in due course, a number of insurers began to provide separate policies with higher limits – terms and limits differed but, generally, up to \$1 billion (i.e. \$950 million in excess of \$50 million) plus, 'where appropriate' a second layer up to \$2 billion (\$1 billion in excess of \$1 billion).

Five companies – AIG, Allianz, Axis, Berkshire Hathaway and GE Frankona – with subscribing markets following – The 'excess third party liability market', provided this excess TPLL cover.

Prior to 9/11, market estimates for the 2001 premium income for the airline business was \$1.66 billion for all- risk and \$190 million for hull war, for a total of \$1.85 billion. It is estimated that, after 9/11, the surcharges and excess TPLL cover cost the airlines an additional \$3.08 billion in the year for a total cost of \$4.93 billion – more than two and a half times what had earlier been expected.

In the three years since 2001, some changes have taken place. The \$1.25 per passenger and hull war 0.05% surcharges were 'easing by the third quarter of 2002 with a trend to blend both into the base rates... in real terms the \$1.25 reduced to \$1.00 in most cases (and less in some) and hull war was down to 0.0375%.'

Reductions have continued since then. Meanwhile, the commercial TPLL market was said to be 'softening their quotes' and the third party liability limit in AVN52 has begun to edge up. In August 2004, Monarch Airlines' cover was renewed with an increased primary AVN52 limit of \$250 million. Willis places this risk but notes that 'there was and still is much discussion as to whether this limit will become the norm for future renewals.'

Underwriters have also spent time reviewing AVN48B and have produced a draft for a new version, which, once agreed, will become AVN48C and will replace the earlier exclusion clause in all aviation all-risk policies. As currently envisaged, the main difference between the clauses is the inclusion of 'new perils' including the hostile use of radioactive contamination or matter, electromagnetic pulse or chemical or biological materials for

political or terrorist purposes, and the expansion of the definition of ‘hi-jacking’ to bring it into line with the wording of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft.

It is thought likely that insurers will make further changes in policy wordings as the possible implications of ‘modern’ terrorism are more fully thought through – there is certainly a very strong belief that commercial concerns, insurers and their customers, should not bear the cost of what could be described as ‘State’ risks and that governments should take over responsibility for indemnifying victims of terrorist attacks. This already happens in certain circumstances in certain countries.

It is also possible that ‘novel’ attempts at solutions to counter acts of terrorism against civil aviation targets may require changes in policy wordings.

### **Underwriting**

‘The critical issue (for the Aviation Insurance Market) is to find a sustainable level of premium that is both justifiable to buyers and also sufficient to attract and retain the high quality capital providers necessary to cater for ever increasing risk exposures.’

There are, of course, many factors which can affect the price that an airline pays for insurance. Unfortunately, with the possible exception of its own loss experience, an airline probably has little chance of influencing many, or possibly, any of the most significant of these. There are a number of factors which are completely outside the airline’s control but which can have a major impact on the cost of insurance. Factors that can impact insurance rates include:

- 1) Money and Insurance market factors
  - The availability of capital (capacity),
  - Interest rates and available rates of return on investments,
  - The availability and price of re-insurance, and
  - Competition within the insurance market.
- 2) Factors applicable to the class as a whole
  - The claims experience for the class as a whole,
  - The size of the risk exposure (e.g. fleet value and number of passengers carried),
  - Type of aircraft operated and their age, and
  - Country/region of the world where the risk is domiciled.
  -

### 3) Factors specific to the risk itself

- Specific claims experience,
- Specific exposure profile, and
- ‘Technical factors’ such as crew training, maintenance, equipment, safety culture and financial health.

It should be noted that the ‘technical factors’ for the risk are listed last. This is because, in most cases, they probably have least impact on the airline’s insurance rate. Nevertheless, underwriting probably owes more to art than science and the final rate charged depends upon the underwriter’s judgement in respect of a number of ‘soft’ factors.

It is probable that, all else being equal, the ‘money and insurance market’ factors have had the largest impact on the cost of insurance over time. As can be seen from Figure 1, the aviation insurance market goes through very marked hard/soft cycles and, although the start of the move from a hard market to a soft market or vice versa may be triggered by a period of exceptionally good or bad claims experience, the reaction of the markets to this experience will exacerbate any tendency to move from one market state to another. Because aviation is such a small class of insurance, money flows, into or out of the class, which may represent only a relatively small percentage of the capital employed in, say, property/casualty insurance, can have a very marked impact in aviation, resulting in a high degree of volatility.

The aviation insurance cycle between hard and soft markets also modifies the degree to which underwriters may be able to reflect other factors in the price they charge for insurance. The cycle also affects the different competition strategies used in the market and this in turn further modifies or limits how underwriters do or can reflect other factors in their pricing of the risk. In a ‘hard’ market there will be less competition and therefore less need for underwriters to consider reducing their rates to win or retain business. However, in a ‘soft’ market, competition can be fierce and underwriters may feel compelled to reduce their rates to avoid being undercut. The insurance market is, after all, a market that is subject to all the usual market forces.

Whatever rate an underwriter has calculated for a risk ‘there is one other very important matter to consider. Will any other underwriter offer a lower rate, and if so is the business of such a quality that we do not wish to lose it? In other words, if there is competition, will we reduce our rates or do we feel that, regretfully, we will have to lose the business? Many underwriters will lower their rate if they believe that, despite what their limited statistics tell them, the risk in question is much better than other, similar ones. Often their intuition may be correct but in many other instances they can go very wrong.’

Brokers have and will use this competition to structure the cheapest insurance deal they can get for their clients. Depending upon market conditions, competition will tend to keep down the rate offered by the leader. But there is no need for the followers, the other underwriters



on the cover, to use the same rate. Brokers will seek to complete the cover picking the lowest rates available in the market from other, acceptable, insurers. This is known as ‘verticalisation.’

Since 9/11 the market has been ‘hard’. The availability of re-insurance has reduced, so that direct underwriters are retaining more of the risk, and the re-insurance that is available is more expensive. On top of this, capital providers, who may previously have seen aviation as a small unimportant class of business into which they could move surplus money, now realize that the class can produce huge losses. They are now treating aviation far more seriously and, if the capital used in aviation does not generate adequate returns, they will put it elsewhere. Since 9/11, a number of aviation insurers have withdrawn from the class because their capital providers did not believe that it could give them the returns they wanted. In these conditions, aviation underwriters’ competition strategies are very limited.

Apart from its effect on the market cycle, trends in the overall claims experience for the class will also impact the price individual airlines have to pay for insurance. Underwriters will determine the total amount of premium needed to meet average expected claims levels and then add an allowance for future catastrophes, commissions and expenses, and profit (return on capital employed). This total then needs to be shared between the different risks. Depending upon other factors, insurers will differentiate between risks, but, if, for instance, the recent claims experience has been bad, everyone will pay more than they would have otherwise done.

As noted above, other generic factors, which may be significant, include the size of the airline, as measured by the number of aircraft operated, the number of passengers carried, the country or, more generally, the region in which the airline is domiciled and the class of aircraft operated. The past loss experience, ‘burning rate’ or loss rate, will be calculated for each of these generic groups and then used as part of the input when calculating the rate to be paid by the airline. Note that this is independent of the airline’s own experience.

These generic groups are quite broad. Airlines may be divided between, say, four or five size groups – smaller airlines, as a group, historically have had a worse experience than larger ones. Similarly, the world may be divided into five or six regions – airlines domiciled in Latin America or, in particular, Africa, again, as a group, have historically had a worse experience than airlines from, say, Europe. And turboprop airliners, so-called ‘eastern-built’ aircraft and old, first or second generation ‘western-built’ jets, again, as a group, have tended to have a worse record than newer ‘western-built’ jet airliners.

Airline size, as measured by its fleet value and either annual number of passengers carried or RPKs, will also affect the price paid for insurance, in that the rate charged does not increase linearly with the exposure. All else being equal, an airline with a higher fleet value and/or more passenger traffic will be given a lower insurance rate. For instance, in the Marsh

August/September 2004 aviation newsletter it was noted that ‘the average hull rate reduction for September currently stands at minus 18% (but) this is indicative of the substantial growth in exposure not a weakening in the market.’

Aircraft age can also have a ‘technical’ impact on the hull insurance rate since older aircraft are normally worth less than new ones but any repairs will cost much the same. Therefore, for the same damage, the cost of repairs for an older aircraft will represent a larger percentage of its ‘agreed’ (i.e. insurance) value than for a newer aircraft. Underwriters may choose to factor this in when working out the hull rate. This is traditionally done using the so-called ‘70/30 formula’ to increase the rate for the older aircraft (although known as the ‘70/30 formula, the actual ratio can be anything depending upon the insurer’s own experience, based on his underwriting statistics).

Turning now to factors, which are specific to the risk being insured, perhaps the most significant is the airline’s loss ratio for ‘attritional losses’, excluding any major losses unless there has been more than one in the period under review. This is then factored into the calculation of the final rate. It would seem that, except for this loss experience, underwriters make the assumption that a risk will perform no better and no worse than its broad peer group.

Although major losses may be excluded in this calculation because they ‘distort the figures’, underwriters certainly will take any major losses into account when setting the rate. As common wisdom in the insurance industry goes: ‘If you’ve had a big loss you’re not going to get a reduction.’ However, although the rate may increase in the year following a ‘disaster’ and remain higher in the following years, underwriters will not be seeking to recover the full amount paid out through increasing the premium. After all, what would be the point of buying insurance if that was the case?

The next consideration, which, although specific to the individual risk, is still generic in nature, is an airline’s exposure profile (as opposed to risk profile), particularly in respect of its exposure to the different legal liability regimes. For instance, an airline which carries a relatively higher percentage of US citizens, will tend to be charged more since compensating for the death or injury of a US citizen will cost more than for some other nationalities.

Lastly, as far as ‘technical factors’ are concerned, it would seem that once underwriters have differentiated between the different risks using such generic short cuts as size, domicile, etc., there is an expectation that all airlines in a specific grouping are essentially the same.

Nevertheless, it is felt that underwriters must still differentiate to some extent between different risks within a ‘peer group’ and the airline, which better addresses safety, will have this taken into account during rate negotiations. But it is not possible to quantify what effect any particular safety initiative may have on the cost of insurance other than to say that it is probably minimal.

An airline, which fits a new device or introduces a new procedure, which is intended to reduce a particular risk, may, indeed, reduce this risk but it is probably not eliminated entirely, and, as new risks may be introduced, it is still only part of the total risk run by the airline. One underwriter commented that ‘all these goodies will not affect the rate but the proof of the pudding is in the eating – if these improve safety then it will be reflected in their loss experience.’

Although it would seem that small, incremental improvements in safety may not actually be directly reflected in the insurance rate charged, this does not mean that the opposite is also true and it is likely that it is not. Within a given ‘peer group’ underwriters expect all the airlines to have the same general safety culture – ‘they’ve all got those (EGPWS, TCAS, etc.) now’ – and might seek to charge a slightly higher rate if an airline stood out from its peers through not meeting the expected standard of safety.

These comments probably hold true for ‘normal’ situations. Underwriters are certainly more inclined to significantly penalize (or reward) airlines in more hazardous times. Following the recent destruction of two Russian aircraft, apparently as the result of two suicide bombers boarding the aircraft at Domodedovo Airport, Moscow, it is understood that underwriters now consider Russian airlines, operating from airports in CIS countries, are at much greater risk and are said to be considering increasing the AP (Additional Premium) charged for AVN52, writing back legal liability cover initially excluded by AVN48B. This particular sub-set of airlines would be penalized for the apparently perceived lack of security at CIS airports. However, if any of these airlines were able to demonstrate to underwriters that their security was good, then they would not be charged the higher AP – in effect they would be rewarded for having better security.

## **Conclusion**

In this study we gave an overview of how the airline insurance industry works. We examined how the risk is spread between insurers, how insurers treat deliberate acts of violence and, lastly, how insurers price the risk. The main finding of our study was the fact that the way the aviation insurance market is structured reveals highly sophisticated risk management practices. To minimize their risk exposure, large potential liabilities are shared by means of a complicated system among several insurers. Furthermore, we found that the insurance market has adjusted to the post 9-11 aviation insurance realities being reasonably ready to handle events of an even more catastrophic magnitude.

## **RESPONSIBILITY AND LIABILITY FOR UNLAWFUL INTERFERENCE IN INTERNATIONAL CIVIL AVIATION**

Acts of unlawful interference with civil aviation continue to have an adverse effect on the safety and efficiency of international air transport and endanger the lives of aircraft passengers and crews engaged.

The miss-happening due to the acts of such kind have an widespread impact not on the lives of passengers travelling, crew in the air and the cargo but also to the thousands of bystanders on ground, These acts cause a billion dollar damage to property and takes tolls of lives. Moreover it even affects the economy. It is evident from the repercussions of the 9/11 incident, that such acts can rock economy, as preceding the incident the aviation industry witnessed a 25% decrease in air traffic in October and November 2001 and the transatlantic market experienced a down time by 30 %. The knock-down effects on national economies have been far more than imagined. The responsibility and liability for such acts have not been willing taken by anyone, neither the states nor the manufacturers. Therefore, seeing the after effects of such acts it's the time to decide that who should be made responsible behind these acts and who should undertake the liability, attention is also to be paid on the compensation to be provided to the victims of air crashes and of unlawful interference in the International Civil Aviation.

### **DEFINING UNLAWFUL INTERFERENCE**

The term 'unlawful interference is often misinterpreted as a 'terrorist attack. Though legal community has not given any specific definition to the term but generally it is related to a violent attack having a motive to disturb the political regime.

Silets define terrorism as:

*“terror inspiring violence, containing an international element that is committed by individuals or groups against non-combatants, civilians, states or internationally protected persons or entities to achieve political ends”.*

Though most of the unlawful interferences are politically motivated, but still interpreting this term in such a narrow sense would ignore the acts that are part of it, committed by suicidal persons or insane persons, or acts which do not necessarily involve violence.

According to article 2 of the Regulations on Safeguarding Civil Aviation Against act of Unlawful Interference., Acts of Unlawful Interference means an act attempted such as to jeopardize the safety of civil aviation and air transport, i.e.:

- (1) Unlawful seizure of aircraft in flight;

- (2) Unlawful seizure of aircraft on the ground;
- (3) Hostage-taking on board aircraft or on aerodromes;
- (4) Forcible intrusion on board an aircraft, at an airport or on the premises of an aeronautical facility;
- (5) Introduction on board an aircraft or at an airport of dangerous goods or prohibited times intended for criminal purposes; and
- (6) Communication of false information such has to jeopardize the safety of an aircraft in flight on the ground, of passengers, crew, ground personnel or the general public, at an airport or on the premises of a civil aviation facility.

Abeyratne asserts that ‘unlawful interference is a generic term of the expression ‘acts of aggression or other breaches of peace’ used in Article 1 of the United Nations Charter. Therefore it is regarded as a crime under legal principles.”. A crime consists of two elements *actus rea* commonly interpreted as the physical act forbidden by law, and *mens rea* meaning intent to commit the crime. The legal implication of these prerequisite elements is that an act of interference with civil aviation will only be unlawful if the criminal policy of the jurisdiction in which the act is effected considers such an act to be unlawful. This poses a serious problem for those who endeavor to safeguard the civil aviation.

## **STATE RESPONSIBILITY**

The notion of State responsibility arises out of the nature of the International legal system and the doctrines of state equality and sovereignty. A state is responsible for a unlawful act committed by it and it gives rise to the establishment of International State responsibility. A breach of an international obligation gives rise to a requirement of reparation. According to Shaw responsibility is as called:

second order issues ‘that it the issue of state responsibility will arise only when there is a breach of a international obligation, the rules of responsibility seek to determine the consequences of such a breach. Hence, it can be said that existence of a international legal obligation between states and a breach of such legal obligation are the prerequisites for State responsibility in International Law.’

The notion of State responsibility is also affirmed by the adoption by the International Law Commission Draft Articles (ILC) at its 53rd session.

*‘Every internationally wrongful acts of a state entails the international responsibility’ and ‘there is an internationally wrongful act of a State when conduct consisting of an action or omission;*

*(a) Is attributable to the State under International Law.*

*(b) Constitutes a breach of an international obligation of the State.*

Besides this State responsibility, the responsibility of a state for its criminally unlawful acts exists in accordance with jus cogens. The notion of jus cogens was incorporated by the ILC in its draft articles on the Law of Treaties in 1996 under Article 50 which can now be found in Article 53 of the Vienna Convention on the Law of Treaties (1969). It has also been embodied in the most recent articles on State responsibility. There are certain customary laws under International Law which cannot be revoked either by treaty or by any agreement between two states, until and unless a law contrary to its formed subsequently.

### **Objective and Subjective Responsibility**

The principle of objective responsibility imposes strict or absolute responsibility i.e. responsibility regardless of fault or intention, in contrast to the principle of subjective responsibility which emphasizes the need for intentional (dolus) or negligent (culpa) conduct on the part of the person concerned before that person can pronounced responsible. Shaw remarks that case law and academic opinion on the subject are divisible although there is a tendency towards strict (or objective) responsibility. The draft articles remain silent on this aspect and the accompanying commentary only serves to further bewilder its readers. If a State is found to be responsible for an illegal act, it must provide reparation to the injured State.

### **STATE RESPONSIBILITY FOR AVIATION SECURITY UNDER INTERNATIONAL LAW**

In international law, a State can only be held responsible after a breach of an international obligation has occurred. The contracting States have an obligation to ensure compliance with the international standards contained in Annex 17 of the Chicago Convention as imposed by Article 37 of the same convention. It follows therefore that contracting States will only be responsible under international law if they do not ensure compliance with the international standards. The issue then to be resolved is what actions are necessary on the part of the State to discharge this obligation; a literal interpretation suggests that legislating accordingly and providing adequate means of checking compliance with the national legislation would be sufficient. This is what is classified as subjective responsibility. The other possibility is that any failure of a security company to provide adequate security in compliance with the international standards would automatically entail State responsibility, even where the State has passed the requisite legislation and enforces that legislation by some type of audit system. This is objective responsibility. As stated above, opinion on this subject is divided and the ILC drafts are ambiguous.

### **Responsibility of Aviation Security Service Provider**

ASPs are contracted out to perform the duties and responsibilities assumed to airlines and airports via national and international regulations. These regulations especially the ones that are legally binding can be sued in courts to assess ASPs negligence and standard of care

owed to third party claimants since the duties and obligations incurred on airlines extend to ASPs also. Under the framework at international level each government implements its own security standards on national level. Usually on national level there are two types of responsibility system that is adopted by the State, either the government undertakes the primary responsibility of providing security duties (centralized model) or the government acts only as supervisory body while the airport authority undertakes the duties of providing security (decentralized model). The example where the government holds the primary responsibility of security duties through the relevant governmental bodies is Civil Aviation Authority (CAA) in United Kingdom.

## **IMPORTANT INTERNATIONAL CONVENTIONS ON UNLAWFUL INTERFERENCE WITH INTERNATIONAL CIVIL AVIATION**

### **The Tokyo Convention (1963)**

This convention was brought to light by judgements like was brought to light by judgements like *R v. Martin* and *USA v. Cordova*. The lack of jurisdiction was particularly problematic for the common law countries as they tended to claim territorial jurisdiction only and did not consider aircraft as part of their territory. A Sub-Committee was formed to deliberate the Convention of State Organization and a Report on that Convention was contemplated by the Legal Committee at its Rome meeting in 1962. A final text was also drafted at this meeting which was circulated once more to all Member States for consideration prior to the diplomatic conference in Tokyo. The final result was the Convention on Offences and Certain other Acts Committed on Board Aircraft, signed at Tokyo, on 14 September (Tokyo Convention), the first international convention drafted solely to tackle the problem of unlawful interference in international civil aviation. The Tokyo Convention contains several provisions on the power of the commander.

### **The Hague Convention (1970)**

The late 1960s saw a series of hijackings which induced States which previously had not ratified or acceded to the Tokyo Convention to do so. At the same time, it became clear that the provisions found in that treaty would not be adequate in the fight against terrorism and so the ICAO Assembly adopted Resolution AI6-37. The Assembly asserted therein that Article 11 of the Tokyo Convention did not provide a complete remedy. To deal with this problem a draft Convention was submitted by the Legal Committee to the ICAO Conference held at The Hague and, after much debate, was adopted in December 1970. This Convention aimed firstly to do what the Tokyo Convention had not done, namely to define the offence:

*‘Any person who on board an aircraft in flight:*

*(a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform such act, or*

*(b) is an accomplice of a person who performs or attempts to perform any such act commits an offence’.*

The Hague Convention can certainly be said to be wider in scope and effect than the Tokyo Convention. There are, however, a number of limitations to be discussed. Firstly, the Hague Convention can only be applied to those acts committed on board an aircraft ‘in flight’ as defined within the treaty. This therefore precludes acts such as sabotage or acts of seizure by remote control. A similar limitation is imposed on the prosecution of accomplices. There is also a limitation applied in Article 3(3) whereby The Hague Convention will only be applicable if the place of take-off or actual landing is situated outside the territory of the State of registration of that aircraft. In addition to the jurisdiction already established under the Tokyo convention, all contracting States are also required to create further jurisdiction under Article 4 of the Hague Convention. Similarly to the Tokyo Convention, there is no outright obligation to extradite created in the Hague Convention.

### **The Montreal Convention (1971)**

It was undoubtedly the Leila Khaled incident along with two instances of mid-air explosion in West Germany and Switzerland caused by sabotage which alerted ICAO to the limitation of the scope of the Convention. Realizing the shortcomings of the Hague Convention which had not yet been adopted, and recognizing that amendments to encompass acts of sabotage would delay the adoption of the Hague Convention, ICAO initiated work on a separate treaty on sabotage. This treaty was signed in Montreal on 23 September 1971. The Montreal Convention was therefore drafted to cover attacks on and sabotage of aircraft either in flight or in service. This new term ‘in flight’ is defined as follows:

*‘Aircraft is considered to be in service from the beginning of the pre flight preparation of the aircraft by ground personnel or by the crew from a specific period until twenty-four hours after the landing. The period of the service, shall, in any event, extend for the entire period during which the aircraft is in flight’.*

It covers a wide variety of acts including the placing of an explosive device on an aircraft or any act of violence against a person on board an aircraft in flight, where that act is likely to endanger the safety of the aircraft. In addition, it includes accomplices who commit or attempt to commit such offences. This proved to be one of the most controversial provisions in the Montreal Convention because many States felt that the regulation of sabotage of air navigation facilities was a matter purely for domestic jurisdiction and did not belong in an international treaty.

### **The ICAO’s Strategic Plan**

Apart from legislative activities, ICAO conducts other activities which impact on the aviation industry. The Strategic Action Plan (SAP) was adopted by the ICAO Council on 7 February



1997 to represent ‘the first comprehensive re-evaluation of ICAO’s mission since the signing of the Chicago Convention’. The goal of ICAO is:

*‘to become the recognized world-wide auditor of safety and security standards for international civil aviation.’*

In order to attain this status, ICAO would be empowered to carry out technical inspections in any State in order to ensure the uniform implementation of the safety and security standards. In this context of safety and security standards, the author would also like to add that such action by ICAO is vital in preventing the development of a two-tier safety and security regulation. The concepts found in the Strategic Action Plan, in particular the audit system will play an essential role in the enhancement of aviation security worldwide.

### **Thirty-Third Session of ICAO Assembly (2001)**

The 33rd Session of the ICAO Assembly was convened shortly after the events of (11 September 2001). Resolution A33-1 of this session declares that misuse of civil aircraft as weapons of destruction and other terrorist acts involving civil aviation are ‘contrary to the letter and spirit of the Convention on International Civil Aviation, in particular its preamble and Articles 4 and 44 and that such acts and other terrorist acts involving civil aviation or civil aviation facilities constitute grave offences in violation of international law.

The obligations imposed on the contracting States in Resolution A33-1 may appear to merely reiterate the duties which were already imposed upon States. Whether the correlation between Article 4 of the Chicago Convention and ‘those who misuse civil aircraft as weapons of destruction’ is deliberate, cannot yet be discerned. Article 4 is unquestionably a State’s duty:

*‘Each contracting State agrees not to use civil aviation for any purpose inconsistent with the aims of this Convention.’*

The appendices attached to Resolution A33-2 constitute ‘the consolidated statement of continuing ICAO policies related to the safeguarding of international civil aviation’. They supersede all the previous policies of the ICAO in this area. States are urged to take action in a number of different areas such as adhering to the international conventions. States are also urged to comply with the standards in Annex 17 and other relevant Annexes. In addition to this, the Assembly recommends that aviation security provisions be included in bilateral agreements on air services and that ICAO co-operates to the fullest extent possible with interested international organisation.

It can be concluded from the ILC’s draft articles that the State responsibility in international law arises when a breach of an international obligation occurs. It may therefore seem curious that the obligation contained within the principal treatises on unlawful interference in

international civil aviation do not address the problem of terrorism directly. Rather the obligations contained therein are directed primarily at the response of other states to such acts of unlawful interference. The author submits that the fundamental dilemma of international air law in this field is the lack of obligations upon a State to refrain from air law in this field is the lack of obligation upon a State to refrain from committing such Acts.

It is also submitted that the imposing such a heavy liability on the airlines, governments are invading their own responsibilities under general international law, European human rights law and specifically the Chicago Convention. Terrorist attacks are attacks on the whole, they are attack on society, State while the airlines and their passengers are their unfortunate victims. All acts are not unlawful interferences. A suicidal passengers who bursts out into the cockpit and attempts to crash the aircraft has also committed an act of unlawful interference but it is not an act directed at the State. Therefore, such considerations should be taken in account when calculation as to payment of compensation is done.

### **LIABILITY OF AIRLINE/GOVERNMENT FOR AVIATION ACCIDENTS AND ACTS OF TERRORISM**

In the jet age, air travel has quietly overshadowed other modes of transport. Luxury liners, which were the pride of yester years, have been replaced by Boeings, Airbus and Concorde. Increase in air traffic has also resulted in the incidence of air disaster, although percentage wise, it is minimal and less alarming. Nevertheless, in view of the costs in terms of death toll and loss of aircraft, it is necessary to study the problems involved in air disasters and make suggestions, which further help reduce air disasters. The disasters are caused due to a number of factors, which include operators' lapses, the negligence of airport and air traffic controlling authorities, unlawful interference with aircraft, environmental hazards and original mechanical defects by manufacturers.

#### **Liability for Aviation Accidents**

Aviation safety and liability are inter-related, for, tougher safety measures enhance the confidence in air travel and reduce accidents involving liability to damages. [the notion of air travel risks has made the law prefer absolute liability to fault liability]. The operator of an aircraft and agencies providing navigational aids are responsible for aircraft safety. They are also liable to damages if they failed to maintain minimum standards of air safety. Of the different aspects of aviation liability -they include the carrier's liability, the operator's liability, the liability to third persons in collisions on the surface, and the liability of air traffic controllers and manufacturers - the main focus shall be on the passenger's liability under the Warsaw system.

The private international law rules applicable to accident compensation in commercial aviation govern the contractual relationship between carriers and passengers. Generally, the

basic interests involved in liability are (a) the interests of passengers or of their dependents to receive full financial compensation, (b) the carrier's interest to be protected against being forced into bankruptcy by the claims arising out of a catastrophic event, and (c) the public interest in maintaining and developing an economically sound and viable air transport industry. In other words, the objective of any compensation formula, whether national or international, is to provide (1) adequate, certain and prompt compensation to all accident victims, and (2) a fair distribution of the compensation costs among all the parties concerned, including operators and carriers, manufacturers, insurance underwriters, and government organizations.

With the blossoming of commercial air transport in the 1920s, governments and transport industry alike began to inquire into the ramifications of an aviation accident. The French government, in response to this concern, convened the first international conference on private air law, in 1925, primarily to consider the creation of a uniform system of aviation law. The second international conference on private air law was held in Warsaw from October 4 to 12, 1929. Its main purpose was to unify the rules on the international transport of persons and property by air, fix the damages for loss or injuries sustained and create a presumption of liability against the carrier on the happening of an injury to or death of a passenger, or damage to or loss of property.

The Warsaw Convention of 1929, formally known as the Convention for the "unification of certain rules relating to international carriage by air", was signed in Warsaw on 12 October 1929 and came into force on 13 February 1933. This convention established the international liability of air carriers and the monetary limits of damage, delay or loss. The legal regime governing the liability of air carriers in the carriage of passengers, baggage and cargo comprised a number of international instruments, collectively known as the Warsaw system. The Warsaw system consists of the original Warsaw Convention of 1929, a series of protocols amending the Warsaw Convention provisions, as well as one supplementary convention to the Warsaw Convention, commonly known as the Guadalajara supplementary convention of 1961. In its practical application, the Warsaw Convention has been amended de facto by a private agreement of air carriers operating to, from or via the territory of the US. Some components of the Warsaw system are in force for a considerable number of countries; the other instruments have not yet been enforced, although they were adopted by a diplomatic conference many years ago.

The Warsaw Convention of 1929 is a basic document on an air carrier's liability, although it has been amended by other subsequent treaties too. According to Article 17, an air carrier is liable to death or injury sustained in an accident on board the aircraft unless, under Article 20, the carrier establishes that he has taken all necessary measures to avoid the damage, or that it is impossible for him to do so. A condition precedent to the carrier's responsibility to the passengers is that the damage must take place on board the aircraft, or in the course of any of the operations of embarking or disembarking ([Article 17(1)].

Under Article 21, if the carrier proves that the damage has been caused by or contributed to by the negligence of the injured person, Court may, in accordance with the provisions of its own law, exonerate the carrier wholly, or partly, from liability.

The central underpinning of the Warsaw Convention is Article 22, which places a maximum ceiling on the damages recoverable from an air carrier when a passenger has been injured, or killed, in an international air travel. The internationally established rule is that subscribing air carriers are liable to damage sustained by a passenger during the course of international transport up to an amount not exceeding 1,25,000 pomcare francs (at that time equal to about \$8,300).

The wilful misconduct exception to the liability limitation, under Article 25 of the Warsaw Convention, has been a cause of concern and extensive debate since its promulgation. According to the original draft of the treaty written in French, the carrier cannot invoke liability limitation provisions if the damage has been caused by dol or by such default on the carrier's part as considered equivalent to dol (or "wilful misconduct" for French). However, even this translation does not seem to conform to the original intent of the treaty draftsmen, who selected the word dol. Even so, the conflict emerging over the years in those Warsaw Convention cases, where "wilful misconduct" is alleged against a carrier, has not focused so much on the question of translation as it did on the case-by-case factual issues of what constitutes a "wilful misconduct". Special contracts, ticket conditions or other provisions designed to reduce or limit this liability were declared void by Article 23. Under Article 24 all sanctions arising out of the convention, were subject to the terms of the convention.

The Hague Protocol, 1955, has changed those provisions of the Warsaw Convention which were found incompatible with the changed situation of international air transport, or were unclear or subject to different interpretations. It doubles the original Warsaw limits of liability by amending Article 22, to increase the gold franc limit from 1,25,000 to 2,50,000 (approximately \$ 16,000 in 1955). This was accompanied by a revision of Article 25. Under the original text, a claimant could recover unlimited damages if he established that the accident was the result of "wilful misconduct". (Dol in the original French text is an admittedly loose term, which has been subject to widely differing interpretations]. The Hague Protocol changed this to a more precise standard, permitting unlimited recovery if the plaintiff could establish that "the damage resulted from an act or omission of the earner, his servants or agents done with intents to cause damage or recklessly and with knowledge that damage would probably result". It also simplified documentation, provided for more adequate "notice" to passengers and permitted the attorney's fees and other costs of litigation to be awarded separately from the limit if permitted by the law of the forum.

The so-called Montreal Agreement of 1966, which is not an intergovernmental agreement but only an arrangement on liability among air carriers operating passenger transport, to, from or with an agreed stopping place in the United States, -"was adopted on 13 May 1966. This was

necessitated by the withdrawal of the denunciation of the Warsaw Convention by the US which was to take effect on 16 May 1966. By this agreement, the parties have de facto amended the application of the Warsaw Convention as changed by the Hague Protocol, 1955, by providing for a limit of liability for each passenger in the case of death, or bodily injury, of US\$ 75,000, inclusive of legal fees and costs and \$ 58,000 exclusive of legal fees and costs.

The rapidly changing nature of international air transport necessitated the Guatemala City Protocol in 1971, which effected a far-reaching revision of the Warsaw Convention, 1929, as amended by the Hague Protocol, 1955, particularly the provisions on the concept of liability and the limitation of the air carrier's liability. The Guatemala City protocol mainly provides for a regime of absolute liability of the air carrier; an unbreakable limit of the carrier's liability at the maximum amount of 1,50,000 pomcare francs (US \$ 1 00,000) per person; a domestic system to supplement, subject to specified conditions, the compensation payable to claimants under the convention in respect of the death or personal injury of passengers; a settlement inducement clause, conferences for the purpose of reviewing the passenger limit; and an additional jurisdiction for suits pertaining to passengers and baggage.

The 1975 'diplomatic conference on air law' drafted and adopted four protocols to the Warsaw Convention. The protocols did not raise the limit of liability, but changed the expression from pomcare francs to Special Drawing Rights (SDRs) as defined by the International Monetary Fund (IMF). Additional Protocol No. 1 establishes the liability limit at 8,300 SDR, or 1,25,000 monetary units (MU) per passenger. Additional protocol No. 2 limits the liability at 16,600 SDR, or 2,50,000 MU, per passenger. Additional Protocol No. 3 establishes 100,000 SDR, or 1,500,000 MU, per passenger in the case of injury or death. Additional Protocol No. 4 revises various provisions relating to air cargo regulations.

To protect third parties on the ground, the Rome Convention of 1933 and the additional Insurance Protocol of Brussels, 1938, were drafted to establish the absolute but limited liability of an aircraft operator with respect to damage caused to third parties on the surface of the earth. These agreements did not receive sufficient adherence. Today they have been replaced by the Rome Convention of 1952, amended by the Montreal Protocol of 1978. The difference between the Warsaw system and the Rome Convention is that while the Warsaw Convention relates to the liability of the carrier with a contractual relationship to the passenger, the Rome Convention sets the liability of carrier to persons with whom they have no contractual relationship. The operator of an aircraft is liable to damage claims, on the proof by the injured person that the damage has resulted and is attributable to the aircraft. These are in force, but with a rather limited adherence.

Current airline liability limits for international air passengers range from about US \$ 10,000 under the Warsaw Convention, 1929, to a maximum of US \$ 1,50,000 depending on the circumstances, such as where the ticket is bought. For the past two decades, governments

have been seeking agreement through the ICAO to increase the protection of passengers travelling by air internationally, but are unable to agree on amending the applicable law. To review the current situation and formulate recommendations for a maximum harmonization of this area, the IATA convened a world-wide Airline Liability Conference between 19-23 June 1995. The conference examined the possibility of developing a uniform world-wide system, to be put into effect by conditions of carriage and applicable tariffs pursuant to a new inter-carrier Agreement, which would replace the Montreal Agreement of 1966 covering only service to, from and through the United States. The main conclusions reached by the conference are the following:

- (a) that the Warsaw Convention system must be preserved; however, the existing passenger liability limits for international carriage by air are universally low in many jurisdictions and should be improved as a matter of urgency;
- (b) that the governments should, through the ICAO and in consultation with airlines, act urgently to update the Warsaw Convention System, including liability issues; and
- (c) that the governments should act expeditiously to bring into force Montreal Protocol No. 4, dealing with cargo and postal items independently of the Montreal Additional Protocol No. 3.

Furthermore, the conference established two working groups to address and report on (a) the cost impact on the airlines of an enhanced liability package, and (b) appropriate and effective means to secure complete compensation for passengers, if required.

The working groups met jointly in London and Washington in July and August 1995 respectively and, after examining possible options, concluded that a new inter-carrier agreement should provide inter alia for a single universal system without specified limits, full recoverable compensatory damages to be awarded in accordance with the law of domicile of the passengers, and constitute an umbrella accord which would give the carriers a maximum flexibility to adjust their conditions of carriage, taking into account applicable government regulations.

The Draft Convention for the Unification of Certain Rules for International Carriage by Air, 1997, is aimed at the modernization and consolidation of the Warsaw system of air carriers' liability.

The most significant feature of the draft convention is the removal of outdated limits of air carrier liability, in cases involving personal injuries or accidental death of passengers. Under the proposed instrument, the passenger or the person entitled to claim on the passenger's behalf will be able to obtain full economic restitution with respect to proven damages sustained. For damages of up to 100,000 SDRs (about US\$ 1,40,000), the liability of the air carrier is based on the principle of strict (no-fault) liability. Above this financial threshold in the so-called second tier, a regime of fault-based liability, which has no numerical limits, will

apply. In both tiers of liability, to obtain full compensatory damages, the claimant would only have to prove negligence on the part of the carrier, his servants or agents.

The above mentioned system of liability, therefore, substantially modifies the legal position of the claimant and respondents to concern about providing adequate protection to the air transport user. Unlike under the current rules, full compensation is no longer predicated upon the requirements for the claimant to prove "willful misconduct" of the air carrier. On the other hand, the interests of the air carrier are also taken into account, since the defence of contributory negligence remains available to the carrier in both tiers of liability. Finally, the draft instrument clarifies that only resitutory compensation may be awarded, a fact which alleviates the airlines' fear of being faced with claims for so-called punitive damages.

It was generally agreed that the major stumbling block in all the efforts to modernize the Warsaw system had been a low level of passenger liability limit. Moreover, such limits had eroded due to inflation and a substantially high standard of living. The liability limits were a controversial issue, and a compromise is imperative. However, such compromise should be progressive, fair and equitable to all parties and acceptable to the largest number of states.

### **Aviation Liability for acts of Terrorism**

"Terrorism" is not a new phenomena in the world. Its cognizance as a potential danger to society the world over has been taken in various international conventions and conferences since 1934. The League of Nations Council has then laid down in 'Convention for the Repression of International Terrorism' that "a duty rested on every state not to encourage or tolerate on its territory any terrorist activity with a political purpose and to do all in its power to prevent and repress terrorist acts of political character and for this purpose to lend its assistance to Governments which request it."

Article 4 of the Draft Declaration on Rights and Duties of States prepared by the International Law Commission in 1947 sought to cast a duty on a state to prevent within its borders all political terrorist activities directed against another state. Similar duty, though wider and in general terms, was reiterated in the Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States' in accordance with the United Nations Charter, by the General Assembly in 1970. This duty was reaffirmed in the Convention to Prevent and Punish Acts of Terrorism by the General Assembly of the Organization of American States and also by Helsinki Declaration adopted on 1<sup>st</sup> August, 1975.

All these conventions, declarations and reaffirmations of the duty cast upon a state to prevent terrorism within its own boundaries had found their birth in the desire of various countries the world over to seek respect for their territorial integrity and sovereignty of the nations and also to prevent, as far as possible the outbreak of yet another World War. While the Second World War could not be averted, terrorism has grown unabatedly thereafter, more

particularly, in view of the upsurge in religious fanaticism and nationalism. It is likely once again to acquire significant proportions in future in view of the fast political changes taking place in the communist world where 75 years of suppression of liberties of the people with iron hand is getting dismantled, without proper leadership, system, organization, administration and constant conflicts between the rival parties and groups in various countries the world over.

Terrorism is now widespread and there is hardly any country today which has escaped its wrath. Its object is to overawe, create a sense of fear, insecurity and loss of confidence in the minds of people at large, in the governments established by law on the one hand, and to harass such governments and prevent their smooth functioning on the other hand. The unfortunate aspect is the growth of state terrorism as a substitute of an undeclared war. As a result, some of the terrorist organizations, particularly those which have support of one or the other state keep themselves abreast with advancements in the armor technologies and tend to use these in the terrorist activities. As such, there should be no cause for surprise if terrorist organizations come to use various advanced armor technologies in aviation fields as well. In aviation industry the present facets of terrorism are ‘hijacking’, ‘bombing’ and destruction of aircrafts. Sometimes the acts of terrorism on aircraft are considered as normal hazards of air travel.

Whenever an aircraft gets involved in terrorist activity, there are several states which get affected. These states can be:

- (a) Where the aircraft is registered;
- (b) From where the aircraft has last taken off for flight;
- (c) Where the aircraft is scheduled to land and its destination;
- (d) From where the terrorist activity takes place;
- (e) Those to which the passengers and cargo being carried by the aircraft belong;
- (f) Where the underwriters of the aircraft reside and carry on the business;
- (g) Those against which such activity is directed.

Every act of terrorism has therefore some international ramifications. In spite of the question being of vital importance, the question as to who should be burdened with the civil liability has not been dealt with by any of the conventions and/or declarations.

The international community took cognizance of terrorism in aviation industry as early as in the 1960s. This cognizance culminated into a Convention held on 14 September 1963 at Tokyo known as Convention on Suppression of Unlawful Seizure of Aircrafts. This was followed by another convention held on 16 December 1970 at Hague, known as Convention on Offences and other Acts Committed on Board Aircraft. The third convention was held on 23 September 1971 at Montreal known as “Convention for Suppression of Unlawful Acts Against the Safety of Civil Aviation and for Matters Connected therewith”.



The Warsaw Convention as well as the amended convention, i.e. the Montreal Convention, 1999, stipulates conditions under which a carrier becomes liable for loss and damage that may be suffered by passengers and for baggage and cargo; provisions of both these conventions are identical and the relevant rules read:

17. The carrier is liable for the damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft in the course of any of the operations of embarking or disembarking.

18(1). The carrier is liable for damage sustained in the event of destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air.

19. The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods.

Though the phraseology of the above rules casts an absolute liability and are unlimited in scope, all these rules are conditioned by rule 20. The said rule reads as under:

- (1) The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.
- (2) In the carriage of goods and luggage the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

It should be appreciated that at the time when the Warsaw Convention and amended convention were drafted the aviation industry was in infancy. The objects of these conventions were:

- (a) to establish uniformity in the aviation industry with regard to procedure for dealing with claims arising out of international transportation and substantive liability applicable thereto and matters connected therewith;
- (b) to provide the limits on potential liability of air carriers in the event of an accident.

These conventions had not envisaged claims arising out of terrorist activities. At the relevant time, such activities were more or less unheard of. None of the signatories to these conventions had visualized these activities and extent thereof. Consequently use of the word “accident” in Article 17 of the conventions did not cover and was not intended to cover the loss and damage arising out of terrorist activities. In any case, this article has to be read in

conjunction with articles 18 to 25 of the conventions. It may true that if article 17 is read word 4 'accident' is interpreted so as to include terrorist activity, an airline can be absolute but this is not so. This article is certainly by article 20 of the conventions. What article 20 envisages is take all necessary measures to avoid the damage or that it or them to take such measures. When an airline takes necessary damage arising out of an accident it would necessarily include of necessary measures to avoid accident itself as well.

Rule 20 stipulates exclusion of a carrier if, (a) it (the carrier) proves, (b) it (the carrier) took all necessary measures to avoid the damage or, (c) that it was impossible for it (the carrier) to take such measures, or (d) measures to avoid the damage.

The excluding rule 20 may appear to be simple but it "necessary measures" and "impossible to take such measures" of precise definition. These are vague and bound to vary subjectively situation to situation. As such they are bound to be interpreted invariably with hind wisdom and sympathy for the victim.

The taking of all necessary measures so as to prevent the damage caused by acts of terrorism becomes mandatory because no airline possibility of acts of terrorism taking place on its flights while airborne - it is becoming a normal hazard of travel by air. These phrases can be dilated to an extent that these can be rendered non est.

The phrase "necessary measures" would imply those measures which a normal prudent person would take to prevent himself from getting involved in an act of terrorism. However, it would be impossible to define such measures with precision.

What steps can an airline take to prevent an act of terrorism? No airline in any country is armed with legal powers to physically check each and every passenger, his baggage and the cargo it carries and even if it does, it is bound to be considered a hassle or deficiency in the service by passengers, shippers and consignees and thereby come in conflict with its business and commercial interests. As such, it is certainly not possible for any airline by itself to take extensive steps to prevent acts of terrorism on board the flight, not only because of the cost factor, but also for want of legal authority to do so, besides the fear of loss of business.

However, where an airline in conjunction with the statutory authorities of a state concerned with the clearance of an aircraft and passengers before its take-off, have followed the procedure and taken the prescribed steps to physically check all passengers, crew, baggage and cargo it carries, so as to prevent acts of terrorism on the aircraft while it is airborne, the airline should be construed to have taken the "necessary measures" as contemplated by Rule 20 of the Warsaw Convention and amended convention and, therefore, get benefit to this rule, i.e. exclusion of its liability under rules 17, 18 and 19 of the conventions.

Every state owes a duty to protect life, limb and property not only of its own subjects, but also of aliens who come within its boundaries. This duty is corollary to the recognition of its

sovereignty. If a few armed terrorists can defy the might of the state from where piracy is committed, the state and its authorities forfeit their sovereignty, which priceless possession with which civilization stands and falls. This duty has been recast by various conventions. Consequently, such state should be held liable for civil consequences which flow out of its negligence, failure and/or commission to discharge its duties.

It follows, therefore, that it is ultimately the state, from where an aircraft last takes off prior to occurrence of acts of terrorism on its board while it is airborne, which owes the duty to prevent such terrorist acts. This is in conformity with the spirit behind the 1934 Convention and Tokyo Convention. Therefore, it further follows that it should be such state which should be wholly responsible and liable for civil consequences of acts of terrorism on board the flight and not the airline because in the event of a terrorist activity taking place on an aircraft, a presumption can legitimately be drawn that there had been negligence, omission and/or failure on part of such state in discharging its duty to prevent the commission of acts of terrorism on the aircraft.

However, such state should have the first and absolute right to have hijackers extradited and prosecuted. Further, where the state into which the aircraft was forced to fly by the hijackers refuses, neglects and/or avoids for any reason whatsoever, regardless of the motive behind the act of terrorism to extradite the hijackers within a short and reasonably prescribed period to the country from where the aircraft had taken off, it should be held liable to pay compensation and reimburse the loss/damage suffered by the airline and its passengers. It must be remembered that apart from there existing a duty on every state to prevent acts of terrorism on an aircraft which takes off from the territory, it has civil liability since it charges landing, parking and other fees from the airline. If every state is fastened with civil liability arising out of acts of terrorism as aforesaid, it is likely to discharge its legal obligations under various conventions vigorously and rigorously. Terrorism in aviation can thus be contained to a very great extent, if not eliminated.

### **CONSUMER PROTECTION AND LIABILITY IN AVIATION**

Along with the continuing liberalization of air transport regulation, the protection, and improvement of airline passenger rights has gained greater importance. A significant number of States, in recent years, have adopted regulatory measures concerning for instance access to air travel for passengers with reduced mobility, price transparency and obligation of the carrier toward passengers in case of flight disruption (flight cancellation, flight delay or denied boarding due to overbooking). At the industry level, many airlines have adopted voluntary commitments (i.e. non-legally binding self-regulation) to clarify or improve their policies or practices with regard to certain customer services (such as fare offers, ticket refunds, denied boarding, flight delays and cancellations, baggage handling, response to complaints, and special passenger needs), often in response to public pressure and to avoid

regulatory measures. ICAO (International Civil Aviation Organization) has also done considerable work in the field of consumer protection.

## **ICAO'S WORK IN THE FIELD OF CONSUMER PROTECTION**

First of all, the *Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention)* adopted by a diplomatic meeting of ICAO member states on 28 May 1999 contains some provisions granting rights to the passengers.

- The convention provides that the carrier is liable for damage sustained in case of death or bodily injury of a passenger if the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking (article 17.1).
- The carrier shall also be liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage if the event which caused the damage took place during any period within which the checked baggage was in the charge of the carrier (article 17.2).
- Finally, the convention also mentions that the carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo, except if the carrier can prove that he took all the measures to avoid the damage (article 19).

Moreover, ICAO also developed guidance material in such areas as conditions of carriage, fare guarantee, baggage, tariff disclosure, denied boarding and code sharing. This guidance can, among others, be found in the *Policy and Guidance Material on the Economic Regulation of International Air Transport*.

In 2003, ICAO was already aware of the issue of consumer protection. Indeed, the Fifth Worldwide Air Transport Conference (Montréal, 24–28 March 2003) concluded that States should minimize differences in the content and application of regulations, with a view to avoiding legal uncertainty that could arise from the extra-territorial application of national laws. As recommended by the Conference, and in order to assist States, the Secretariat developed a summary of airline and governmental responses to some of the more prominent consumer protection issues. The key principles of consumer protection concluded at the conference are as follows:

- a) Non-discrimination in access to air transport: this should include preventing air carriers from discriminating during ticketing by nationality, residence or disability. For persons with disabilities the provision of access and assistance has to be granted without any additional charges. Such persons should not be refused carriage on

board an aircraft except on reasons of safety, which air carriers would have to justify;

- b) Transparency: this should include the right for the passengers to have accurate, timely and accessible information in particular to:
  - 1) be able to obtain information on what is included within the price of their ticket. Passengers should have access to all relevant information (e.g. on price and charges applicable) in order to make a reasoned decision before buying an air ticket. Such information will enable them to fairly compare ticket prices and provides a level competitive playing field for industry. This approach would also ensure that air carriers detail the conditions and restrictions on any fare offered and that tickets are sold inclusive of all taxes, fees and charges, together with any "optional" charges – such as the carriage of luggage. This would prevent air carriers from advertising "tax-free" prices where charges that passengers have to pay are only added during the process of payment;
  - 2) be advised before departure on which air carrier they will be flying;
  - 3) receive appropriate information before the purchase of their flight ticket and at appropriate stages of travel, particularly when disruption occurs; and
  - 4) renounce travelling and obtain a full refund when the trip is not undertaken as planned due to the actions of the air carrier.
- c) Immediate and proportionate compensation and assistance: This includes compensation to be offered to the passengers under special circumstances, such as denial of boarding, short-notice cancellation of flights and under certain conditions long delays. It also includes the right for passengers to have assistance at departure or at connecting points in the form of, for example:
  - 1) right to care, especially meals, refreshments, telephone calls, hotel accommodation and transport between the airport and place of accommodation; and
  - 2) right to rerouting or reimbursement and rebooking.

In accordance with the eleventh meeting of the ICAO Air Transport Regulation Panel (ATRP/11), held in June 2012, ICAO has carried out a study on the effectiveness of consumer protection regulations.

On the occasion of the Sixth Worldwide Air Transport Conference (Montréal, 18 to 22 March 2013), ICAO acknowledged the fact that more and more states were adopting

regulations in the field of air passengers rights and that a coordinated approach was needed. Pursuant to the recommendation of this conference, and as endorsed by the Council and the Assembly (A38), ICAO has developed, after consultation with States, the Core Principles on Consumer Protection. These are designed as guidance for States and concerned industry stakeholders in dealing with consumer protection matters.

During its 39th session, the Assembly once again invited the Member States to adopt unified systems for the protection of traveler rights.

To complement its guiding actions, ICAO keeps up to date a data base identifying and summarizing the different rules adopted by its member states in the field of consumer protection and particularly in the field of air passengers rights. Therefore, this database enables passengers to access information about their rights in case of flight disruption depending on the country where they fly. It also allows Member States and concerned industry stakeholders to be aware about the different rules implemented in the world in the field of consumer protection. This non-exhaustive database was developed with a view to provide easy and quick access to relevant information. Whenever possible, hyperlinks have been inserted as references. In certain cases, the material is only available in a language other than English.

## **ICAO'S CORE PRINCIPLES ON CONSUMER PROTECTION**

The Core Principles on Consumer Protection, are divided in three parts depending whether they should be implemented before, during or after the travel. ICAO encourages all Member States and concerned industry stakeholders to give regard to and apply the ICAO Core Principles in policy-making, and in regulatory and operational practices. Recognizing the dynamic nature of the air transport industry, the Core Principles will be a "living document", which would be refined and improved from time to time in the process of their implementation, based on the experiences gained and feedback received. The adoption of these Core Principles is a significant step towards regulatory and operational convergence and compatibility in this area.

### **Preamble**

Recognizing that passengers can benefit from a competitive air transport sector, which offers more choice in fare-service trade-offs and which may encourage carriers to improve their offerings, passengers, including those with disabilities, can also benefit from consumer protection regimes.

Government authorities should have the flexibility to develop consumer protection regimes which strike an appropriate balance between protection of consumers and industry competitiveness and which take into account States' different social, political, and economic characteristics, without prejudice to the safety and security of aviation.

National and regional customer protection regimes should:

- Reflect the principle of proportionality;
- Allow for the consideration of the impact of massive disruptions;
- Be consistent with the international treaty regimes on air carrier liability (Warsaw Convention 1929; Montréal Convention 1999).

### **Raising awareness on air passengers rights**

Efforts should be made to increase awareness of passengers to help them make informed choices. Air passengers should benefit from:

- Accessible information on their rights;
- Clear guidance on legal or other protection applicable in their specific situation, including assistance expected, for example, in case of service disruption;
- Consumer education about passengers' consumer rights and the available avenues for recourse in cases of disputes.

### **Before Travel**

Passengers should have access to clear and transparent information on the air transport product sought, including:

1. Total price, including the applicable air fare, taxes, charges, surcharges and fees;
2. General conditions applying to the fare; and
3. Identity of the airline actually operating the flight and advice on any change occurring after the purchase as soon as possible.

### **During Travel**

- Passengers should be kept regularly informed throughout their journey on any special circumstances affecting their flight, particularly in the event of service disruption.
- Passengers should receive due attention in cases of service disruption including rerouting, refund, care and/or other compensation (where provided).
- Persons with disabilities should, without derogating from aviation safety, have access to air transport in a non-discriminatory manner and to appropriate assistance.
- Mechanisms should be planned in advance by all concerned stakeholders to ensure that passengers receive adequate attention and assistance in cases of massive disruptions.
- Massive disruptions include situations resulting from circumstances:
  - a) Outside the operator's control;

- b) Of a magnitude such that they result in multiple cancellations and/or delays;
- c) Leading to a considerable number of passengers stranded at the airport.

Examples of such circumstances, which result in large numbers of passengers being stranded away from their home, include: (i) meteorological or natural phenomena of a large scale (hurricanes, volcanic eruptions, earthquakes, floods), (ii) political instability, (iii) similar events.

#### **After Travel**

- Efficient complaint handling procedures should be available.
- Passengers should be clearly informed about such procedures.

### **CRITIQUE OF THE INDIAN AVIATION LIABILITY LAWS**

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 2020.

When civil and general aviation initially developed, a legal regime was required to govern the liability of the air carriers, not only for the purposes of providing protection to the passengers or carriers but also for the purposes of fixation of cases and the conditions subject to which the carrier would be liable. This resulted in the enactment of the Carriage by Air Act 1972 (hereinafter called as 'Act') which in the form of its schedule contained the three most significant international instruments which regulated the liability of the air carrier at the international sphere including the Montreal Convention of 1999 which was incorporated in this domestic legal framework by way of the third schedule.

The Act brought the much needed relief and provided a concrete regime to govern the liability of the air carrier. But over the period of time these provisions of the first and the second schedule of the Act have proved to be insufficient to provide adequate relief. Though the third schedule which was incorporated in the Act in 2009 brought about many significant changes, nevertheless, its general provisions and broad framework carries the potential of being misused, primarily by the air carriers in order to escape their liability under the Act.



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 India it to be the third largest aviation market by 2020<sup>243</sup>. 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 economy<sup>244</sup>.

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 industry<sup>245</sup>.

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 effect<sup>246</sup>. Scheduled airlines in India contribute to over 50% of the gross income of the Civil Aviation sector in India<sup>247</sup>. 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 lakhs<sup>248</sup>. 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.

### **POSITION PRIOR TO CARRIAGE BY AIR ACT**

In the international sphere, civil aviation and a liability regime to govern this sector in the developed right after the World War I, in the form of the Warsaw Convention 1929<sup>249</sup>. In order to keep pace with the technological and legal developments, the international legal

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<sup>243</sup> IATA, *Special Report on Putting the pieces Together*, October 2012, available at <http://www.iata.org/publications/airlines-international/october-2012/Pages/india.aspx>

<sup>244</sup> Ministry 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](http://civilaviation.gov.in/cs/groups/public/documents/document/moca_001680.pdf)

<sup>245</sup> *Ibid.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> Passengers Carried By Scheduled Domestic Airlines, DGCA Statistics available at <http://dgca.nic.in/reports/pass-ind.htm>

<sup>249</sup> *Supra* Note 2.

liability regime also changed and one of the most significant changes was brought about by the Hague Protocol which amended the Warsaw Convention<sup>250</sup>. Thereafter many protocols and agreements adopted to change or revise the Warsaw Convention<sup>251</sup>. Unfortunately not every amended version of Warsaw Convention was fully ratified by all or most of the states. As a result it led to a fragmented regime with regards to the air carrier's liability. Then came the path breaking Montreal Convention 1999<sup>252</sup> which not only aimed to unify all the rules and regulations existing in the international level in the form of amended versions of the Warsaw Conventions but also to provide better protection to the consumers. However due to lack of significant number of ratifications, it has failed to achieve its former objective. Therefore presently at the international level there is a fragmented regime to govern the air carrier's liability.

India has a proud history of having developed general and gradually civil aviation at a very early stage i.e. right at the time the civil aviation was developing in the international level. Aviation began in 1911 when the first air mail flight took off from Allahabad and in fact this was the first air mail flight in the world<sup>253</sup>. To take benefit of India's strategic intermediate location between West and the East, the British government gifted approximately hundred aircrafts to various princes in India in a strategic move to promote aviation in India and thereafter reap the benefits of the developed civil aviation in its future operations and activities. By 1920, regular mail services had been established between Karachi and Bombay and from 1932, the golden era of aviation started with the emergence of many private airlines like Tata Airlines, Indian National Airway Limited, etc. Therefore Indian aviation developed much earlier than the rest of the world. Unlike international sphere, the concern of having a concrete liability of the air carriers was addressed after almost a gap of thirty years i.e. in 1970 when India ratified the Warsaw convention<sup>254</sup>. But till then the accidents used to take place and in fact its frequency was higher in comparison to what witness in the modern times primarily because due technological development. Prior to 1972, the liability of the air carriers with respect to international carriage was governed by the Carrier's Act 1934. However as far the domestic carriage was concerned, there was no concrete law and therefore the cases regarding death or injury to passengers in an aircraft accident or damage or loss or destruction to luggage or cargo was primarily decided on the basis of the common law principles. The judiciary had constantly felt handicapped to deal with the issues of air carrier's liability because of absence of a concrete legal regime governing the same and therefore was compelled to apply the common law principles. In *Air Carrying Corporation v. Shibendranath Bhattacharya*<sup>255</sup> the court observed that to analyse the existing state of law on

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<sup>250</sup>*Supra* Note3.

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<sup>252</sup>*Supra* Note4.

<sup>253</sup>V.S Mani and V Balakista Reddy, *The History and Development of Air Law in India: A Survey*, in AIR LAW AND POLICY IN INDIA, 11-33, (1997)

<sup>254</sup>*Ibid.*

<sup>255</sup>*Air Carrying Corporation v. Shibendranath Bhattacharya*, AIR 1964 Cal 396

air carrier's liability in absence of a legislation governing the same, the court traced the history of influence of common law principles on the Indian legal system and concluded that in absence of a legislation, the common law principles can be applied to determine the liability of the air carriers in India. It also opined that the present case could be regarded as a fit case for legislative intervention and not judicial reverence. In *Indian Airlines Corporation v. Madhuri Chowdhary*<sup>256</sup>, the court analysed whether the Indian Contract Act 1872 or the Fatal Accidents Act or the tort law principles should be made applicable but ultimately observed that none of these three principles could be made applicable and the court applied common law principles to determine the validity of the exemption clause.

This situation nevertheless changed when India ratified the Warsaw Convention<sup>257</sup> in 1970 and the Warsaw Convention amended by the Hague Protocol in 1973<sup>258</sup> and therefore in pursuance of its international obligations, it enacted the Carriage by Air Act 1972 and incorporated the provisions of the conventions in the First and the Second Schedule. With this there was a concrete regime of the air carrier's liability. This regime was substantially amended with the incorporation of the Montreal Convention 1999<sup>259</sup> in the form of the third schedule.

## **OVERVIEW OF THE AIR CARRIER'S LIABILITY REGIME UNDER THE CARRIAGE BY AIR ACT 1972**

India in pursuance of its international commitments under the Warsaw Convention 1929<sup>260</sup> and the amended Warsaw Convention of 1955<sup>261</sup> 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 2009<sup>262</sup>, 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.

### **Preamble**

As per the preamble of the legislation, the legislation was enacted to give effect to the international commitments of India under the Warsaw Convention<sup>263</sup>, amended Warsaw Convention<sup>264</sup> and subsequently the Montreal Convention<sup>265</sup>. Hence the sole objective of the

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<sup>256</sup>*Indian Airlines Corporation v. Madhuri Chowdhary*, AIR 1965 Cal 252

<sup>257</sup>*Supra* Note 2

<sup>258</sup>*Supra* Note 3

<sup>259</sup>*Supra* Note 4

<sup>260</sup>*Supra* Note 2

<sup>261</sup>*Supra* Note 3

<sup>262</sup>*Supra* Note 4

<sup>263</sup>*Supra* Note 2

<sup>264</sup>*Supra* Note 3

<sup>265</sup>*Supra* Note 4

enactment was to fulfil India's international obligations existing under the above mentioned conventions.

### **Operative Provisions**

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 carriage<sup>266</sup>.

### **Exclusion of Laws for Liability in case of death**

The Carriage by Air Act 1972 expressly excludes the application of the 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 passenger<sup>267</sup>. 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.

### **Application to Domestic Carriage**

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 first<sup>268</sup> and the second schedule<sup>269</sup> 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.

### **Documentation Requirements with respect to Passenger Tickets and Cargo Receipts**

The first schedule lays down certain documentation requirements with respect to contents of the passenger tickets<sup>270</sup> which were reduced considerably in the second schedule<sup>271</sup>. However with the advent of the third schedule, drastic changes were brought about in the third

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<sup>266</sup> Carriage by Air Act 1972, Section 3, 4 and 4A

<sup>267</sup> *Ibid.*, Section 5

<sup>268</sup> Notification of the Official Gazette No. 186 E, dated March 30, 1973

<sup>269</sup> Notification of the Official Gazette No. 186 E as amended by SO 1885, dated July 5, 1980

<sup>270</sup> Carriage by Air Act 1972, First Schedule, Rule 3

<sup>271</sup> Carriage by Air Act 1972, Second Schedule, Rule 3

schedule where the documentation requirement were merely confined to the two things i.e. an indication with regards to the places of departure and destination<sup>272</sup> 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 places<sup>273</sup>. Due to 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 considered<sup>274</sup>. Similarly the passenger shall also be handed over a baggage identification tag for each piece of checked in baggage<sup>275</sup>. 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.

### **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.

### **Liability for Damage, Loss or Destruction to Baggage and Cargo and Compensation**

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 cargo<sup>276</sup> and makes a separate provision for checked in and unchecked baggage<sup>277</sup>. It for the first time recognised the liability of the carrier for unchecked baggage.

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<sup>272</sup>Carriage by Air Act 1972, Third Schedule Rule 3 (a)

<sup>273</sup>Carriage by Air Act 1972, Third Schedule, Rule 3 (b)

<sup>274</sup>Carriage by Air Act 1972, Third Schedule, Rule 3 (2)

<sup>275</sup>Carriage by Air Act 1972, Third Schedule, Rule 3 (3)

<sup>276</sup>Carriage by Air Act 1972, Third Schedule, Rule 18

<sup>277</sup>*Ibid.*, Third Schedule, Rule 17(2)

## **Defences with the Carrier**

The three schedules had 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 or its servants or agents or such damage was solely due to negligence or other wrongful act or omission of the third party<sup>278</sup>.

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 cargo<sup>279</sup>.

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 baggage<sup>280</sup>

## **Limits on Liability**

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, 000<sup>281</sup> francs which was increased upto 250, 000 francs<sup>282</sup> in the second schedule. This was

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<sup>278</sup> *Ibid.*, Rule 21(1)

<sup>279</sup> *Id.*, Rule 18(2)

<sup>280</sup> *Id.*, Rule 17 (2)

<sup>281</sup> Carriage by Air Act 1972, First Schedule, Rule 22

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 liability<sup>283</sup>. But for claims arising beyond 100, 000 SDR, the carrier may have certain defences<sup>284</sup>. 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 sum<sup>285</sup>.

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 sum<sup>286</sup>.

### **Advance Payment**

This is a novel concept introduced under the Montreal Convention<sup>287</sup>. As per the provision of advance payment, 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 persons<sup>288</sup>. 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.

### **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

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<sup>282</sup> Carriage by Air Act 1972, Second Schedule, Rule 22

<sup>283</sup> Carriage by Air Act 1972, Third Schedule, Rule 21(1)

<sup>284</sup> *Ibid.* Rule 21 (2)

<sup>285</sup> *Id.*, Rule 22 (2)

<sup>286</sup> *Id.*, Rule 22 (3)

<sup>287</sup> *Supra* Note 4

<sup>288</sup> *Supra* Note 45, Rule 28

destination<sup>289</sup>. 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 agreement<sup>290</sup>.

### **Limitation**

The three schedules contain the same provision as far as the provision regarding limitation is concerned. As per Rule 35 of the third schedule, the right of damages shall be extinguished if an action is not brought within a period of two years from the date of arrival at the destination or from the date on which the aircraft ought to have arrived or from the date on which the carriage stopped<sup>291</sup>.

### **Arbitration**

Under the first schedule, a consignor can enter into arbitration proceeding where the arbitration is to take place in one of the jurisdictions specified under Rule 28, i.e. the four jurisdictions. No change has been brought about by the second schedule. In the third schedule, the consignor is entitled to enter into arbitration agreement under any of the five jurisdictions specified under Rule 33<sup>292</sup>.

### **IMPROVEMENTS MADE BY THIRD SCHEDULE**

When India ratified the Montreal Convention of 1999<sup>293</sup> in 2009 and incorporated the provisions of the same under the third schedule, it brought about many significant and much required changes in the field of the governance of the liability of air carrier in India. These changes can be primarily attributable to the incorporation of the principle of risk liability.

Few of these changes have been discussed in the project.

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<sup>289</sup>Carriage by Air Act 1972, first and the second schedule, Rule 28

<sup>290</sup>Carriage by Air Act 1972, Third Schedule, Rule 33 (1)

<sup>291</sup> Carriage by Air Act 1972, Third Schedule, Rule 35

<sup>292</sup>*Ibid.*, Third Schedule, Rule 34

<sup>293</sup>*Supra* Note 4



### **Online Documentation**

Technological Development had begun a long time ago. Many countries including India had adopted environmental friendly and hence started using online documentation procedures. With the advent of third schedule, the same principle was seen to have been incorporated into the third schedule. The documentation requirements for both passenger tickets<sup>294</sup> as well as cargo receipts<sup>295</sup> havenot only been reduced drastically, but as far as the delivery of the tickets or cargo receipts are concerned, it clearly recognises any other mode which is suitable to preserve and deliver the required information. Hence it not only recognises online storage and delivery of information in the form of passenger tickets and airway bill, but it also recognises any other form which may be arising in the future for the purposes of storing and delivering the information. Hence it is an open ended provision which has been drafted keeping in mind the fast pace of technological development which may lead to new forms of storing and delivering information in the form of passenger tickets or airway bill in the future.

### **No Limit on the Liability for Death and Personnel Injury**

Governed by the principle of risk liability, one of the major and most widely discussed changes brought about by the third schedule is the provision for unlimited liability. In the previous two schedules, the limit on the carrier's liability was fixed upto the extent of 125, 000 gold francs<sup>296</sup> and 250, 000 gold francs<sup>297</sup> respectively. However after the incorporation of the third schedule, these limits have been taken off<sup>298</sup>. Though the interpretation of the provision has been clouded with a lot of controversies after the Mangalore air crash case, but nevertheless, it is uniformly accepted that there no longer exists any limit as to the maximum limit of compensation which the claimants can claim for death of a passenger or bodily injury which occurred during any accident which may be caused either on board or during embarking and disembarking. Whether the claimants are entitled to claim to an unlimited extent irrespective of the nature of damage or whether they are entitled to claim only to the extent of the loss suffered is a subject matter of controversy which is yet to be decided by the apex judiciary of the country.

### **Advance Payment**

One of the novel concepts introduced by the third schedule was the provision for advance payment incorporated primarily to meet the immediate economic needs to the dependents of the passenger who died or needs of the injured passengers<sup>299</sup>. The only condition for the

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<sup>294</sup>Carriage by Air Act 1972, Third Schedule, Rule 3 (2)

<sup>295</sup>*Ibid.*, Rule 5

<sup>296</sup>Carriage by Air Act 1972, First Schedule,Rule 22 (1)

<sup>297</sup>Carriage by Air Act 1972, Second Schedule,Rule 22 (1)

<sup>298</sup>Carriage by Air Act 1972, Third Schedule,Rule 21

<sup>299</sup>*Ibid.*, Rule 28

applicability of this provision is that the death or the personnel injury should have been happened in an aircraft accident. It is one of its kind concepts as it takes into consideration the fact that the people will have immediate economic needs in cases of aircraft accidents and therefore it provides for advance payment to meet those needs. The advantage of this provision can be noticed in the Mangalore air crash case<sup>300</sup>, where the National Aviation Company of India Limited immediately offered and paid advance compensation of Rs 10, 00, 000/- to the claimants of each of the deceased adult passenger and Rs.5, 00, 000/- to the claimants of each child died in the air crash<sup>301</sup>. There have been numerous air crashes in the past but such an amount was never offered. In fact the cases where in the amount of compensation was often disputed used to get years to be decided<sup>302</sup> and in the interim period the economic needs of the claimants were not taken care of. Due to the inordinate delay in determination of cases in our country, victims often have to incur enormous physical pain and financial expenditure in getting a final settlement. In fact many at times, the carrier have tried to lure the claimants into a small settlement amount under the pretext of threatening them to be left penniless during the long standing litigation process of our country<sup>303</sup>. Hence to curb the misuse and to provide a relief to the claimants, the provision of advance payment was incorporated.

### **Revision of the Limits of the Liability**

This provision is an attempt to guard the third schedule against particular problems from which the first and the second schedule suffered. Under the latter schedules, the limit of the liability was fixed i.e. a person cannot claim compensation beyond a particular limit irrespective of the damages suffered. However these limits were rigid and there was no means to revise it and revision of such limits was needed especially in the light of the inflation and different developments in the standards of the living in the member states. Coupled with the frequent rise in inflation, these liability limits gradually proved to be very low. Hence the third schedule proved to be innovative and cured one of the major shortcomings of the first and the second schedule by providing for revision of the limit of the liability in every five year and also provides for a detailed procedure for revising the limits<sup>304</sup>. The third schedule foresaw that the present limits of liability could become inadequate with the passage of time, due to economic factors like changes in standard of living and inflation. To ensure that these limits remained relevant, the Convention installed an innovative mechanism for their periodic review and increases.

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<sup>300</sup>National Aviation Company Of India Limited v. S.Abdul Salam, WA.No. 1197 of 2011

<sup>301</sup>*Ibid.* Para 2

<sup>302</sup>See e.g.: Airports Authority of India v. UshabenShirishbhai Shah, (2010)1GLR321, it took 21 years for final determination of cases.

<sup>303</sup>See e.g.: Anita Bhatia v. Kenyan Airlines, (Original Petition No. 130 of 2001) a settlement amount was alleged to offer under the pretext that the claimants would otherwise have to suffer a lot in case they go for a long standing battle in the court against the carrier.

<sup>304</sup>Carriage by Air Act 1972, Third Schedule, Rule 24

### **Fifth Jurisdiction**

As discussed above, the four jurisdictions mentioned in the first and the second schedule are strictly speaking inequitable, because none of them allows action in respect of passenger injury or death to be brought in the jurisdiction where the passenger had his or her domicile or permanent residence. The first and second schedule as incorporated the Warsaw Convention and the Warsaw Convention as amended by The Hague Protocol and therefore it incorporated the underlying hidden intention i.e. providing protection to the carriers. However when India incorporated these conventions in the first and the second schedule, the carrier need not be protected. Instead a better protection was required for the consumers of the air services especially in the matters of the determination of the amount of compensation which includes entitling them to bring an action in a jurisdiction which is convenient for the consumers. With the intention of providing a protection to the consumers, the Montreal Convention as incorporated in the third schedule, made provision for a fifth jurisdiction. According to this, in the cases of passenger death or personnel injury, a claim or action for damages can also be brought in the territory of a state 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 agreement<sup>305</sup>. The fifth jurisdiction is particularly important and useful for the claimants as they can file a suit in a court which is easier both physically and financially for them to approach, otherwise it would have added to the financial burden of the claimants to seek a relief in a jurisdiction which is a not favourable to them in terms of access and approach.

### **Compulsory Insurance**

Another crucial and significant provision which the third schedule contains is with respect to Insurance. On many previous occasions, many carriers have conducted international carriage without undertaking adequate insurance cover. In such circumstances, its capacity to compensate the claimants would become very unpredictable<sup>306</sup>. An adequate insurance cover acts as a guarantee ensuring the capacity of the carrier to meet its liability.

The third schedule mandates the state to ensure that the carrier operating in its territory has taken an adequate insurance for the purposes of covering their liability<sup>307</sup>. The insurance cover maintained by the carrier must cover its liability to pay compensation for all the damages incurred during the performance of the contract of carriage. Maintenance of an

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<sup>305</sup> *Ibid.*, Rule 33

<sup>306</sup> K Shanker, Aviation Insurance Regulations, Emerging Legal Issues, available at <> (Last Visited August 23, 2013)

<sup>307</sup> *Supra* Note 45, Rule 50

insurance cover is beneficial for the carriers as they can withstand the financial burden of paying large amounts of compensation in case of any accidents especially those involving an air crash or air collision where the nature of damage is very severe and the financial implications of which is very huge and extensive. Maintenance of such cover is also beneficial to the passengers too.

### **Chartered Flights**

The three schedules in the very beginning explain the scope of the application of the Carriage by Air Act. The first and the second schedule, covers within the scope of its ambit, even those carriages which are gratuitously undertaken by the air transport enterprises<sup>308</sup>. However under the third schedule, those carriages are included within its ambit which are undertaken although gratuitously but by an air transport undertaking<sup>309</sup>. Hence the replacement of the word enterprise with undertaking has often been argued to have expanded the ambit of the provision and has included within its scope chartered flight.

### **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 extend 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 carriage<sup>310</sup>. However there has been no such 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

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<sup>308</sup> Carriage by Air Act 1972, First and Second Schedule, Rule 1(1)

<sup>309</sup> Carriage by Air Act 1972, Third Schedule, Rule 1(1)

<sup>310</sup> Carriage by Air Act 1972, Section 8

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 case<sup>311</sup>, the Single Bench of the Madras High Court has opined that the domestic carriage by India is governed by the third schedule<sup>312</sup>.

### **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 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.

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<sup>311</sup>Supra Note 62

<sup>312</sup>*Ibid.*, paragraph 7

### **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 liability<sup>313</sup>. But for claims of damages beyond 100, 000 SDR, carrier has certain defences<sup>314</sup>. In *National Aviation Company of India Limited v. S. Abdul Salam*<sup>315</sup> 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 of death or personnel injury which a passenger suffers in any accident which takes place on

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<sup>313</sup>*Supra* Note 40

<sup>314</sup>*Ibid.*

<sup>315</sup>*Supra* Note 62

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 persons<sup>316</sup>. Indeed it is a novel concept passed with the intention to providing the dependents

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<sup>316</sup>*Supra* Note 61

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 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'<sup>317</sup>. Many argue that

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<sup>317</sup>Pablo 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 IdorenyinEdet Amana, *The Montreal Convention of 1999: Problems And Prospects*, Unpublished LLM Dissertation, Institute of Air and Space Law, McGill University, March 2002, available at <> (Last Visited September 2, 2013), See also, ElmarGuemala, MONTREAL CONVENTION, page



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 disembarking<sup>318</sup>. 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 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 damage<sup>319</sup>. 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 delay<sup>320</sup>. 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 concerned<sup>321</sup>. 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 applicable<sup>322</sup>. 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

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<sup>318</sup>ElmarGuemala,

<sup>319</sup>Carriage by Air Act 1972, First and Second Schedule, Rule 20 (1)

<sup>320</sup>Carriage by Air Act 1972, Third Schedule, Rule 19

<sup>321</sup>*Supra* Note 81, Rule 4 to 8

<sup>322</sup>*Ibid.* Rule 9

subject to the limit prescribed in the schedule<sup>323</sup> i.e. to the extent of 17 SDRs per kilogram<sup>324</sup>. 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.

### **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 destination<sup>325</sup>. 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*<sup>326</sup> the Supreme Court relying upon an precedent<sup>327</sup> 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

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<sup>323</sup> *Supra* Note 82, Rule 9

<sup>324</sup> *Ibid.*, Rule 22(3)

<sup>325</sup> *Supra* Note 81, Rule 28

<sup>326</sup> *Interglobe Aviation Limited v. N Satchidanand*, Civil Appeal No. 4925 of 2011

<sup>327</sup> *A.B.C Lambart (P) Limited v. A.P. Agencies* 1989 2 SCC 163

proper jurisdiction to decide the dispute arising out of contract, then such clause must be declared void as being against public policy<sup>328</sup>. 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 arose<sup>329</sup>. 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 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 cargo<sup>330</sup>. 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,

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<sup>328</sup>*Ibid.*, paragraph 14

<sup>329</sup>*Ibid.*

<sup>330</sup>*Supra* Note 82, Rule 34

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.

## **CONCLUSION**

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 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.

