

AVIATION CLAIMS IN INDIA: SOME THOUGHTS REGARDING THE NEW MONTREAL CONVENTION

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1. Introduction

I represented families in the Kenya Airways disaster where Indian nationals perished.¹ I am currently representing families in the recent India Air Express catastrophe that occurred May 22 of this year.² Out of 166 people onboard the Air India Express flight, 158 persons were killed. All but one were Indian nationals. India recently ratified the Montreal Convention 1999 (MC99).³ In India Air Express, Indian Government officials and media have made some erroneous statements regarding how the MC99 is applied. I will therefore clarify some minor topics of interest in this paper.

2. India's ratifications of aviation conventions and compensation levels

India entered the 1929 Warsaw Convention⁴ in 1947 and the 1929 Warsaw Convention as amended by the Hague⁵ in 1973.⁶ June 30, 2009 MC99 entered into force in India.

Back in the early 20th century, aviation was deemed a dangerous activity. The Warsaw Convention was intended to protect the carriers from exposure by capping liability to 125,000 Poincare gold francs (approx. 8,300 USD at the time).⁷ The Hague amendment raised the cap to 250,000 Poincare gold francs (approx. 16,600 USD at the time). and Montreal additional Protocol No 2 1975 changed expression of the 250,000 gold francs, as well as all other amounts in these Conventions, into Special Drawing Rights (SDR).⁸ (As of November 5, an SDR is equal to 1.58494 USD or 69,62 Rupees.)

In MC99, the focus changed toward both consumers and consumer protection. No longer deemed a dangerous activity, flying by air is now a part of modern life. The old limitations were therefore replaced by a two-tier compensation system where the carrier is strictly liable up to the first 100,000 SDR. Above that level, liability attaches for unlimited damages with a reversed burden of proof. The 100,000 SDR was revised up to 113,100 SDRs (approx. 179,000 USD or 79 lakh rupees) on December 30, 2009, according to MC99, Article 24.⁹

3. The MC99 two tier system

The two-tier system means that the carrier is strictly liable for the first 113,100 SDRs of damage and cannot exclude or limit this liability, see MC99, Article 21 (1), except to the extent the carrier proves that the damage was caused

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or contributed to by the negligence or other wrongful act or omission of the passenger, see MC99, Article 20. For damages in excess of 113,100 SDRs, the carrier is not liable if the carrier proves that the damage was not caused by the negligence or other wrongful act or omission by the carrier or that the damage was solely due to the negligence or other wrongful act or omission of a third party, according to MC99, Article 21 (2).

4. MC99 and local law, are all passengers entitled to 113,100 SDRs?

The MC99 has unified certain rules relating to international carriage by air but is silent when it comes to the calculation of damages. Questions of damage law, conflicts of law, and procedural law will be governed by the law of the court seized of the case. An Indian court would therefore apply Indian law.

So are all passengers entitled to 113,100 SDR? The answer to this is no. It needs to be emphasized that the 113.100 SDRs are a limit, not a lump sum payable under any circumstances. The claimant has to prove the extent of the actual damage suffered. Thus, a young professional leaving a widow and orphans will recover more than an elderly pauper.¹⁰

5. Can all Indians always invoke MC99?

The answer is no. MC99 has been ratified by 98 parties.¹¹ The Warsaw Convention has been ratified by 152 parties and the Warsaw Convention as amended by the Hague by 137 parties. This means that the Warsaw Convention will keep playing an important role in international carrier liability for years to come. The application of MC99 is determined by MC99, Article 1 (2) where it is stated that the expression "international carriage" means that the place of departure and the place of destination are in states parties to the convention, or carriage within the territory of a state party to the convention with an agreed stopping place in another state, even if that state is not party to the convention. So if an Indian passenger is travelling to a country which is not party to MC99, for example Ghana, he can enjoy the benefits of MC99 if he travels India - Ghana - India but not if he travels Ghana - India - Ghana. In the latter case, the Warsaw Convention as amended by the Hague will be applied since India and Ghana are both parties to that convention. Again regarding Air India Express, both Dubai and India are parties to MC99 hence it is applicable.

6. The five foras of MC99

According to MC99, Article 33, an action for damages must be brought where the carrier is domiciled, or where the carrier has its principle place of business, or where the ticket has been bought through the carrier's place of business, or at the place of final destination. An action could also be brought where the passenger at the time of the accident has his or her principal and permanent residence and where the carrier operates either its own aircraft or through code sharing. For example, certain passengers in the Air India Express disaster, which was an international flight from Dubai to Mangalore, India, can

choose between bringing action either in Dubai, the place of final destination, where the ticket was bought, or where the passenger had his or her principal and permanent residence. All passengers can always bring action in India, the domicile of Air India Express.

Endnotes

1. Kenya Airways Flight 507, Douala, Cameroon, May 5, 2007.
2. Air India Express, Flight IX812, Mangalore, India, May 22, 2010.
3. Convention for the unification of certain rules for International Carriage by Air done at Montreal on 28 May, 1999.
4. Convention for the unification of certain rules Relating to International Carriage by Air signed at Warsaw on 12 October, 1929.
5. Convention for the unification of certain rules Relating to International Carriage by Air signed at Warsaw on 12 October, 1929 and the protocol modifying the said convention signed at the Hague on 28 September, 1955.
6. By a note dated 29 January 1970, India declared that it considered itself bound by the Convention (before India became independent, acceptance of the Convention was effected by the United Kingdom on 20 November, 1934).
7. International Air Carrier Liability: The Montreal Convention of 1999, Paul S. Dempsey, Michael Milde, 2005, p 15.
8. <http://www.imf.org/external/np/exr/facts/sdr.HTM>.
9. http://www2.icao.int/en/leb/List%20of%20Parties/mtl99_en.pdf/.
10. 8 *supra*, p. 182.
11. 10 *supra*.