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VOL. 18 NO. 1 (ASHOJ 2075) OCTOBER 2018

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Nepal's Accession to the Montreal Convention and its Applicable Liability Regime



The Montreal Convention is a completely new treaty which provides a complete package.



–BY DEVENDRA PRADHAN

On August 23, 2018, the House of Representatives of Nepal (the lower House in the Parliament) ratified the proposal to accede to the Convention for the Unification of Certain Rules for International Carriage by Air 1999 (“Montreal Convention”). The proposal was tabled by the Nepal Government at the House of Representatives after it received approval from the Council of Ministers on July 16, 2018. Pursuant to the provisions of the Montreal Convention, it will come into force on the sixtieth day of the deposit of the instrument of accession by the Nepal Government with the International Civil Aviation Organization (“ICAO”). By acceding to the Montreal Convention, the Government primarily aims to increase the amount of compensation to be received by passengers of international air travel.

About the Warsaw System and Its Liability Regime

The Warsaw Convention and its subsequent amendments, which apply to international carriage of passengers, baggage and cargo by aircraft, prescribe liability regime for carriers in cases of death or bodily injury of passengers and/or delay or damage of baggage and cargo in the course of international carriage by air.

The liability regime under the Warsaw Convention and all its subsequent amendments were scattered into several Conventions and Protocols which are together known as the “Warsaw System”. The Warsaw System comprises of the following Conventions and Protocols:

1. The Warsaw Convention 1929;
2. The Hague Protocol 1955;
3. The Guadalajara Convention 1961;

4. The Guatemala City Protocol 1971;
5. The 1975 Additional Protocols No. 1, 2, and 3; and
6. The 1975 Montreal Protocol No. 4.

There are some other agreements which are beyond the scope of the Warsaw System, such as, the Montreal Agreement 1966 (known as “CAB 1966”), the IATA Inter-carrier Agreement on Passenger Liability 1995 (“IIA”), the Agreement on Measures to Implement the IATA Inter-carrier Agreement (“MIA”), etc., which prescribe separate liability regimes for carriers in international carriage of passengers, baggage and cargo by air.

The Warsaw System is considered to be a complex international treaty as States are at liberty to ratify some Protocols but not others. For this reason, its applicability may vary from State to State, in accordance with the terms of the ratification of specific instruments

under the Warsaw System. Since the Warsaw System comprises of several instruments, the liability regime under it also may vary from State to State. The liability of carriers under the Warsaw Convention, Hague Protocol, Additional Protocol No. 1 and No. 2 are prescribed as follows:

Warsaw Convention	Warsaw Convention and Hague Protocol	Warsaw Convention and Additional Protocol No. 1	Warsaw Convention, Hague Protocol and Additional Protocol No. 2
• Death or bodily injury: 125,000 francs	• Death or bodily injury: 250,000 francs	• Death or bodily injury: 8,300 SDR	• Death or bodily injury: 16,600 SDR
• Personal items: 5,000 francs	• Personal items: 5,000 francs	• Personal items: 332 SDR	• Personal items: 332 SDR
• Checked baggage and cargo: 250 francs/kg	• Checked baggage and cargo: 250 francs/kg	• Checked baggage and cargo: 17 SDR/kg	• Checked baggage and cargo: 17 SDR/kg

The sum mentioned in “francs” in the Warsaw Convention and the Hague Protocol refers to “Poincaré Francs” more commonly known as “Gold Francs” consisting of sixty-five and a half milligrams of gold of millesimal fineness of nine hundred which should neither be confused with French Franc nor Swiss Franc. Currently, Poincaré Francs is not in use. According to the last conversion, 125,000 francs was equivalent to USD 10,000 and 250,000 francs was equivalent to USD 20,000.

A SDR is an artificial “basket” currency introduced by the International Monetary Fund.



Current Status of Nepal to International Aviation Liability Conventions

Nepal acceded to the Convention for the Unification of Certain Rules Relating to International Carriage by Air 1929 (“Warsaw Convention”) and the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air 1955 (“Hague Protocol”) on February 12, 1966 and became a party to those instruments on May 13, 1966.

In its proposal to the House of Representatives, the Government stated that it has become a necessity for Nepal to accede to the more passenger-friendly Montreal Convention to address the challenges and risks associated with air travel as the Warsaw Convention and the Hague Protocol have not sufficiently addressed the risks of passengers in international travel by air.

About the Montreal Convention

The Montreal Convention, which entered into force on November 4, 2003, was introduced with an aim to modernise and consolidate the Warsaw Convention and also to ensure protection of interests of passengers in international carriage by air. The Montreal Convention applies to international carriage of passengers, baggage and cargo by air of a commercial nature. It also applies to gratuitous carriage performed by carriers. The Montreal Convention applies only to international carriage where the place of departure and the place of destination are situated within the territories of two Contracting States, or within the territory of a single Contracting State, if there is an agreed stopping place within the territory of another State, even if the latter is not a party to the Montreal Convention.

As of September 10, 2018, 132 countries have acceded to the Montreal Convention.

The Montreal Convention is a completely new treaty which provides a complete package. Unlike the Warsaw System, States may not have a choice to ratify some Protocols and not others. States must either accept it as a whole or reject it. The Montreal Convention has been designed primarily to replace the Warsaw System.

Liability Regime Under the Montreal Convention

The Montreal Convention adopts a higher liability regime for carriers and provides more generous compensations to passengers in cases of death or bodily injury of passengers and/or delay or damage of baggage and cargo as compared to previous international Conventions on carriage of passengers, baggage and cargo by air.

Compensation for Death or Bodily Injury:

Unlike the Warsaw Convention and its supplementary instruments, the Montreal Convention does not adopt limits of liability for carriers in cases of death or bodily injury of passengers. The Montreal Convention adopts a two-tier liability regime for compensation for death or bodily injury of passengers which is as follows:

1. Strict Liability: The Montreal Convention imposes a strict liability upon carriers in cases of death or bodily injury of passengers which at present is up to SDR 113,100 (circa USD 158,000) irrespective of the fact whether or not the carrier was negligent. Carriers may not take any kind of defense for this amount.

2. Higher Liability: As the Montreal Convention does not prescribe limits of liability for death or bodily injury, carriers may be liable for higher sums in excess of SDR 113,100. However, carriers may take defense and shall not be held liable for damages for the sum in excess of SDR 113,100 if it is able to prove that:

- a) The carrier was not negligent; or
- b) The damage occurred solely due to the act of a third party.

Compensation for Loss, Damage or Destruction of Baggage and Delay:

The Montreal Convention imposes a liability limit for carriers for the loss, damage or destruction of baggage which at present is SDR 1,131 (circa USD 1,580) per passenger for checked and unchecked baggage and SDR 19 (circa USD 26) per kg for cargos.

It also imposes a liability limit for carriers for delay in the carriage of passengers, which at present is SDR 4,694 (circa USD 6,561).

The limits of liability prescribed in the Montreal Convention are generally reviewed every five-years wherein references to the inflation rates are taken into consideration. The most recent revision to the limits of liability was done in 2009. The liability of carriers under the Montreal Convention is as follow:

Limits Effective From 2003 to 2009	Limits Effective From 2009
• Death or bodily injury: 100,000 SDR	• Death or bodily injury: 113,100 SDR
• Baggage (checked and unchecked): 1,000 SDR	• Baggage (checked and unchecked): 1,131 SDR
• Cargo: 17 SDR/kg	• Cargo: 19 SDR/kg
• Delay (passengers): 4,150 SDR	• Delay (passengers): 4,694 SDR

Any contractual provision to relieve carriers from the liability prescribed by the Montreal Convention or to fix the lower limit than those prescribed by it is deemed to be invalid.

Advance Payments

Carriers are under an obligation to make advance payments in cases of death or bodily injury of passengers to meet the immediate needs of passengers and their legal heirs if required by the national laws of the Contracting States.

Forum/Jurisdiction Available to Plaintiffs Against Carriers

In addition to the choice of four forums provided by the Warsaw Convention to plaintiffs to bring an action against carriers for damages resulting in death or bodily injury of passengers, the Montreal Convention provides an additional forum- the State in which a passenger has his or her principal and permanent residence at the time of the accident, which is known as "Fifth Jurisdiction". Under the Montreal Convention, plaintiffs have a choice to select one of the following forums to bring an action against carriers:

1. The carrier's domicile;
2. The carrier's principal place of business;
3. The place of business where the contract of carriage was made;
4. The passenger's place of destination; and
5. The State in which a passenger has his or her principal and permanent residence at the time of the accident.

For a plaintiff to invoke a State as the Fifth Jurisdiction, the following conditions must be satisfied:

1. The State must be the principal and permanent residence of the passenger at the time of the accident;
2. The State must be one which the carrier operates services to or from, either on its own aircraft or on another carrier's aircraft on the basis of a commercial agreement; and
3. The State must be one in which that carrier conducts its business.

The Fifth Jurisdiction is the outcome of seamless efforts of the United States. The United States took a strong stand that inclusion of the Fifth Jurisdiction in the Montreal Convention was necessary. However, a majority of non-U.S. airlines strongly opposed to the inclusion of the Fifth Jurisdiction due to the fear of exposure to the U.S. courts and the possibility of high damage awards by U.S. juries. Nevertheless, in reality, the Fifth Jurisdiction closes the door for non-U.S residents from forum shopping in the U.S. courts in aviation accident lawsuits as they would not be able to meet the above-mentioned three pre-conditions to invoke the Fifth Jurisdiction.

Carriers may not alter the choice of forums provided by the Montreal Convention through the contract of carriage. Any clause in the contract of carriage contrary to the jurisdiction provided by it shall be null and void.



Limitation Period

As in the Warsaw Convention, the Montreal Convention also prescribes a limitation period of two years to bring an action against carriers. In the event a plaintiff fails to bring an action against a carrier within a period of two years from the date of (i) arrival of aircraft at the destination; (ii) the date which the aircraft was scheduled to arrive; or (iii)

the date on which the carriage stopped, the right of such plaintiff to seek damages shall extinguish and the carrier shall not be under an obligation to provide compensation to such plaintiff.

Domestication of the Montreal Convention After its Accession by Nepal

There are two major approaches on how bilateral and multilateral treaties may become enforceable domestically: (i) Dualist Approach; and (ii) Monist Approach. Under the Dualist Approach, a treaty to which a State becomes a party is not a self-executing document, and therefore it does not automatically become enforceable domestically. In order for a treaty to be enforceable domestically, an appropriate national legislation must be enacted incorporating the provisions of the treaty into the legislation. This process is called "domestication of treaty". The Dualist Approach is primarily adopted by common law countries and States in those jurisdictions enact a separate legislation i.e., Carriage by Air Act or Civil Aviation Act incorporating provisions of international aviation treaties to give effect to such treaties domestically. On the contrary, under the Monist Approach, a treaty is a self-executing document which shall be enforceable without a need for domestication. In case of conflict between the treaty and national laws, provisions of the treaty shall supersede over national laws.

In the context of Nepal, the Nepal Treaty Act 2047 (1990) provides that a treaty to which the Nepal Government is a party, upon ratification by the Parliament or House of Representatives, shall carry the force of law in that particular matter and shall prevail over the existing domestic laws in case of any conflict. Nepal has adopted the Monist Approach in enforcing treaties and thus does not require additional parliamentary action to make the Montreal Convention enforceable in Nepal.

Non-applicability of the Montreal Convention to Domestic Flights

As per the terms of the ratification by Nepal, the Montreal Convention shall apply only to commercial international carriage of passengers, baggage and

cargo by air and not to domestic flights. Currently, the liability regime prescribed by the Warsaw Convention and the Hague Protocol are made applicable to domestic flights through the Air Operator Certificate Requirements 2012, a regulatory Manual of the Civil Aviation Authority of Nepal. Unless regulated by a separate legislation, the liability regime adopted by the Warsaw Convention and the Hague Protocol shall continue to be in effect for domestic flights.

In light of the ratification of the Montreal Convention and adoption of a more generous liability regime applicable to international carriage of passengers, baggage and cargo by air, it is pertinent that the liability regime for domestic carriage of passengers, baggage and cargo by air be revised as well. Nepal can adopt the liability limits for domestic flights keeping in consideration the liability limits adopted by neighboring countries and more specifically taking into consideration the per capita income, economic and social standard of people, etc. in order to make the liability limits more compatible nationally as well as geographically. In addition, domestic laws which set liability limits for death or bodily injury for other types of accidents, i.e., road accidents, rail accidents, capsizing of boats or ships, workers' accidents, etc., may

also be taken into consideration while adopting liability limits for domestic carriage by air. Currently, the liability limits for carriers in road accidents has been set to the amount of NPR 100,000 by the Vehicle and Transportation Management Rules 2054 and to the amount of NPR 700,000 by the Labor Act 2074 (2017) for accidents of workers. In the event the liability limits are to be set unusually higher for domestic air transport compared to other types of accidents, then the Nepal Government must also raise the liability limits for other types of similar accidents as well in the interest of equity.



Conclusion

The initiative of the Nepal Government to accede to the Montreal Convention is a positive move. The current liability regime adopted by Nepal under the

Warsaw Convention and the Hague Protocol is significantly lower as compared to the Montreal Convention. Accession to the Montreal Convention will certainly enhance the credibility of Nepal in the international aviation sector.

There have been repeated and continuous arguments in favor of the ratification of the Montreal Convention for the past several years in Nepal due to the insufficiency of the current applicable level of compensation adopted by Nepal under the Warsaw Convention and the Hague Protocol, i.e., 250,000 "Poincaré Francs" or "Gold Francs" (circa USD 20,000).

Certain provisions of the Montreal Convention rely on domestic laws, such as, advance payment, conversion of SDR into national currency, etc. In the context of Nepal, there is no provision in domestic laws to deal with those issues. Though the enactment of a separate national legislation would not be necessary to incorporate the provisions of the Montreal Convention, proper directives need to be enforced for the purpose of clarity and in order to avoid lapses.

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