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Legal Implications of airport privatization in India

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Research Paper 4

Aerodrome Certification and Airport Privatization in India- A Critical Study

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Aerodrome Certification and Airport Privatization in India- A Critical Study

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1. Introduction

Indian aviation activities date back to 1911. Beginning with The Airship Act of 1919, Indian aviation laws have come a long way. An airport licensing provision was already available in the Indian Aircraft Rules 1937². This article examines the Indian certification system with a special reference to privatization of airport infrastructure.

2. Background

India has around 454 airports and airstrips (operational and non operational). Traditionally airports were owned and controlled by the State (Government of India (GoI)) except few private airports. A licensing system has been introduced even before India's independence from the British (pre 1947). On the international level, the ICAO Annex 14 was adopted in 1951 and the 4th amendment prescribed a time limit to introduce aerodrome safety certification by the states³. In late 90s GoI has introduced a policy of privatization for airport infrastructure. Subsequently privatization was introduced in the airport infrastructure sector. Seen from the background of these changes, the impact of airport privatization on aerodrome certification may be studied.

3. Research Questions

How does Indian certification differ from that of other countries?
Can the Indian certification system be synchronized with the ICAO frame work?
What is the impact of the privatization of airports on the aerodrome certification system?

4. Aerodrome Certification -India

4.1 Regulatory Framework

The Directorate General of Civil Aviation (DGCA) is the responsible authority for the safety of aircraft operations as well as for the overall supervision of civil aviation in India. Aerodrome licensing in India is controlled by DGCA since British India time. However, the aerodromes in "Princely states"⁴ were not under the licensing regime of DGCA in the British India era. Prior to 1971, the Civil Aviation Department under DGCA was managing Government aerodromes.

¹ The views expressed are authors personal views

² There is no provision to check whether aerodrome licensing provision was available in The Indian Aircraft Rules 1920. The Indian Aircraft Rules 1937 was successor to The Indian Aircraft Rules 1920. (ICAO working paper A37-WP/87 TE/35 dated 30/8/2010 says that aerodrome licensing was introduced in 1956, but in reality it was existing much before).

³ While the time limit for airport certification was 27th November 2003 States were required to ensure aerodrome licensing from 27th November 2003. Also, the SMS needs to be in operation from 24th November 2005. The 4th Amendment to Annex 14, Volume I – says "*As of 27 November 2003, States shall certify aerodromes used for international operations in accordance with the specifications contained in Annex 14 as well as other relevant ICAO specifications through an appropriate regulatory framework*". The amendment was adopted by the Council in March 2001 and became applicable from 1 November. By this amendment, coverage of other relevant Annexes for certifying airports, Protection of visual and non-visual navaids sites and co-ordination with other service providers and agencies for a seamless safe operating environment are ensured

⁴ The most illuminating definition of an Indian State is the one provided in the Government of India Act of 1935: *Indian State means any territory, not being part of British India, which His Majesty recognizes as being such a*

The Airports Authority of India (AAI), formed by the AAI Act 1994, as on date manages most aerodromes in the country including international airports, domestic airports and the civil enclaves over the country which are owned and managed by state governments or the private sector. In the case of private airports, AAI manages only Air Traffic Services (ATS). Runway and apron are managed by the respective operator.

India admits that there was a vacuum in the licensing system since 1987 till 1999. The working paper of ICAO puts it as follows

*“Till formation of NAA, DGCA was performing aerodrome licensing function directly. But with formation of NAA, and transfer of all aerodromes, CNS/ATM, AIS from DGCA, there was a void and no infrastructure was available in DGCA to oversee these functions. The aerodrome standards directorate was established in DGCA and commenced functioning in the year 1999 onwards. However, the activities remained minimal due to the manpower constraints and lack of regulatory framework for aerodrome licensing”.*⁵

4.2 Legal Framework

The basic statute which governs aerodromes and airports in India is the Aircraft Act 1934⁶. The Aircraft Rules 1937 were framed as per the provisions of the Aircraft Act 1934. Part XI of these Rules deals with aerodromes. The other set of rules which governs matters connected with aerodromes is the Civil Aviation Requirements (CAR) which was promulgated as per Rule 133A of the Aircraft Rules 1937. CAR gives detailed rules and current regulations which should be followed by aviation activities.

4.3 Certification Vs Licensing

Although the international regime requires aerodromes to be ‘certified’ in accordance with Annex 14 and Doc 9774, in India, the aerodrome ‘licensing’ system prevailed even before ICAO came in to existence. Since 1937, licensing was required for private aerodromes. Although India is a founding member of ICAO and an ICAO Council member, the licensing system is still continued instead of certification. By certification adherence to Annex 14 is ensured, but in case of a license, India is ensuring that aerodromes are within the administrative control of the state - in addition to ensuring standards as per the Annex 14. A license can be defined as

*‘The permission granted by competent authority to exercise a certain privilege that, without such authorization, would constitute an illegal act, a trespass or tort. The certificate or the document itself that confers permission to engage in otherwise proscribed conduct’.*⁷

State, whether described as a State, an estate, a jagir or otherwise. The term "Princely States" is a convenient but inexact denomination used to include all Indian territorial units not directly ruled by the representatives of the king-emperor. Within a year of independence, however, the new national government of India recorded a final figure of 584 states, including those that had acceded to Pakistan. For more details kindly refer: <http://princelystatesofindia.com>

⁵ Para1.4, ICAO working paper number A 37-WP/87 TE/35 Dt 30/8/10, Titled ‘ Licensing of aerodromes in India’

⁶ Originally this Act was titled ‘The Indian Aircraft Act 1934’, and was applicable throughout the then British India. In 1960 the name title was changed to ‘The Aircraft Act 1934’

⁷ <http://legal-dictionary.thefreedictionary.com/license>

Hence by introducing licensing instead of certification, the use of any unlicensed aerodrome becomes illegal unlike a non-certified aerodrome. On the other hand the state can apply its control to regulate the construction of aerodromes since permission is required as per licensing rules to even start construction of an aerodrome. While certification is applicable in case of an existing aerodrome or when an aerodrome is ready, the licensing process starts even before site clearance. Also, as a license is a permission granted to a particular person the same cannot be transferred. This is also true in case of an aerodrome license. But in case of certification, the issue of transfer does not arise. No specific reason has been stated by India for retaining the licensing system, but it just continues with the old British system.

4.4 Classification of Aerodromes

Prior to 1975, aerodromes were classified as *government aerodromes, private aerodromes, and public aerodromes* only. A government aerodrome was defined as ‘... *an aerodrome which is maintained by or on behalf of government and includes an airport to which the International Airports Authority Act 1971 applies or is made applicable*’⁸. Government aerodromes were not required to be licensed as in case of private aerodromes. There is a third category of aerodrome called ‘Civil Enclave’. This term was defined only in NAA Act 1985 for the first time⁹. It is defined as

*Civil enclave - an airport belonging to any armed force of the Union, for use by persons availing of any air transport services from such airport or for the handling of baggage or cargo by such service, and includes land comprising of any building and structure on such area*¹⁰.

In case of Civil Enclave, the aerodrome including the runway belongs to the armed forces and only the terminal building and allied facilities are with the operator (AAI). Hence, in case of a Civil Enclave, naturally, licensing is not applicable. However as per the latest amendment, a Civil Enclave may not be used for civil aviation operations, if it does not have a license. In India, there are 22 Civil Enclaves, which cater to civil operations in far-flung areas like Guwahati in Assam, Jammu, Srinagar and Leh in Jammu and Kashmir, Goa, Pune etc. Out of these, Goa and Srinagar also handles international flights. Civil operations from these military aerodromes are undertaken due to the lack of civil aerodromes in such places.

4.5 Changes in the Regulations - 2004 Amendment to Aircraft Rules 1937

In 1997 GoI has issued a draft policy on airports and as per that private participation in the airport sector was encouraged. Accordingly, in Bangalore a new Greenfield airport was planned to be set up in the private sector. The Amendment of Aircraft Rules was a condition precedent in the Concession Agreement between GoI and the Bangalore International Airport Limited (BIAL).¹¹ Subsequently, GoI has decided to transfer Mumbai and Delhi airports from AAI to private consortia with AAI having a minority stake. This necessitated the amendment to the Aircraft Act 1937. Another main reason for the Amendment to the Aircraft Rules in 2004 was the 4th amendment of Annex 14 as per GoI.¹² As per this amendment, aerodrome licensing was made mandatory for all airports irrespective of their ownership. Also

⁸ Aircraft Rules 1937, 3,(27)

⁹ The same is available in AAI Act 1995.

¹⁰ NAA Act 1985, Section 2.(d), and AAI Act 1994, Section 2(i)

¹¹ Concession agreement between GoI and BIAL, Art.4.1.(ii), www.civilaviation.nic.in

the concept of ‘Government Aerodrome’ has been removed from Part XI of Aircraft Rules 1937, although the definition itself was retained. Hence private airports were placed at par with AAI airports as far as aerodrome license was concerned. In addition to these amendments, CAR and advisory circulars detailing requirements and guidance were developed based on SARPs as contained in ICAO Annex 14. According to this amendment the submission of an aerodrome manual and the establishment of a safety management system (SMS) were made mandatory for the applicant for an aerodrome license.

However, the airports from which scheduled flights were operated before the amendment were allowed to continue their operation unchanged until such aerodrome had obtained a license from DGCA by the date to be notified by the central government.¹³ Subsequent to the amendment in 2004, GoI has banned scheduled operations from/to any airport without a license with effect from 31 December 2005 for international flights and with effect from 31 March 2006 for domestic flights.¹⁴ GoI has notified from time to time the extension of this date. By the latest of such notification in the official gazette, all airports should have obtained a license before 30th June 2011.¹⁵ However, as per the DGCA website, there are 15 licensed aerodromes in the ‘private use’ category and 50 aerodromes in the ‘public use’ category.¹⁶ This deadline has been extended again by another notification till 31st December 2011, which may be also extended in all probability considering the remaining unlicensed aerodromes.

5. Government Aerodrome Licensing

As stated *supra* government aerodromes were not required to obtain a license until the 2004 amendment and the AAI airports were classified as government aerodromes. This can be seen to be in line with the definition of ‘license’ under common law. As the license is granted by the government, a government organisation does not have to take a license. In the case of the US and the UK, government aerodromes are exempted from aerodrome certification and licensing respectively. In the case of the UK, BAA was privatized in 1987 and the government aerodromes did not have to be licensed. Although India follows the UK system, the majority of the Indian aerodromes are still owned by AAI, a corporate entity fully owned and controlled by the state. Hence it is of no purpose to make licensing mandatory for government aerodromes like AAI aerodromes. However if India would follow aerodrome certification, then also AAI aerodromes could probably be certified from the safety point of view.

6. Types of Aerodrome Licenses

As per the Aircraft Rules 1937 (Rule 78) there are only two categories of Aerodrome licenses,¹⁷ i) for public use and ii) for private use. However sub section 4¹⁸ says “ *No person shall operate or cause to be operated any flight from a temporary aerodrome or an aerodrome which has*

¹³ Aircraft Rules 1937, Rule 78.1

¹⁴ Gazette of India (extraordinary), Part II, section 3, sub-section (i), No 108, dt 14th March 2005

¹⁵ Gazette of India no 1473 Part ii section 3, Subsection (H), dt July 19, 2010 says “ *In pursuance of proviso to rule 78 of the Aircraft Act*

1937 and in suppression of notification No.S.O. 525(E) dated 25th February 2010 published in the official Gazette of India, part II,

Section 3, Sub-section (H) dated 3rd March 2010, the Central Government hereby directs that no person shall operate scheduled air

transport services to/from an aerodrome with effect from 30th June 2011, unless it has been licensed by the Director General of Civil

Aviation”.

¹⁶ <http://dgca.nic.in/aerodrome/aerodrome/aero-list-ind.htm>

¹⁷ Aircraft Rules 1937, Rule 78,

¹⁸ Aircraft Rules 1937, Rule 78(4)

*not been licensed or approved, as the case may be, under these rules unless it meets the minimum safety requirements laid down by the Director-General.*¹⁹ Also civil aviation requirements (CAR) says²⁰

The aerodromes shall be licensed in one of the following categories, namely: -

- i. For **Public Use**; the aerodrome, which, when available for operation of aircraft, shall be so available to all persons on equal terms and conditions*
- ii. For **Private Use**; that is to say, for use by the licensee and by individuals specifically authorised by the licensee*

7. Aerodrome Certification and Privatization

Although the aerodrome licensing system has been in force in India since 1937, it can be seen that till late 2000 and till the 4th amendment of Annex 14 Volume 1, India has not applied the certification system effectively. But organisational changes in airport ownership and regulatory establishments have contributed to the problems discussed above. Privatization or the private ownership of airports had a considerable effect on the aerodrome certification system in India off late. In the following, effects of privatization on the aerodrome certification will be analysed.

7.1 Privatization and Closure of HAL Airport

On 16th May 2008, GoI has published a gazette notification closing Bangalore HAL Airport for commercial civil aviation operations.²¹ As per this notification, all scheduled commercial flights from/to HAL airport were stopped with effect from 24th May 2008. However, non-scheduled operations continued to operate from HAL airport. According to GoI, the HAL airport was closed for commercial operations as it did not obtain a valid license within the prescribed time limit (31st March 2006)²² even after repeated reminders.

HAL owns and operates another aerodrome in the city of Nasik. Regular scheduled air traffic has started from that airport in the year 2009, which is called Ojhar airport. Although GoI has asked HAL to take license for both Bangalore and Ojhar airports before the deadline, HAL has reiterated its stand, that as it comes under the Ministry of Defence (though it is a limited company), it comes under defence airports category and therefore it does not require a license from DGCA, which is a “civil” aviation authority.²³ Operations in Bangalore HAL airport continued till 24th May 2008, more than two years after the 31st March 2006 deadline. However in 2010 DGCA/GoI has again asked the HAL management to obtain a license for its airports

¹⁹ Aircraft Rules 1937, Rule 83(1),

²⁰ Civil Aviation Requirements, Section 4 – Aerodrome Standards & Air Traffic Services, Series 'F' Part I, 16th October 2006, www.dgca.nic.in/cars/D4F-F1

²¹ S.O.1170(E) – In exercise of powers conferred by Section 5A of the Aircraft Act, 1934, read with Rules 11 and 78 of the Aircraft Rules, 1937 and all other applicable statutes and other enabling powers in that regard and in deference of the contractual commitments including Clause 5.5 of the Concession Agreement signed between Government of India and Bangalore International Airport Limited (BIAL) on 05th July, 2004, the Central Government hereby notifies that consequent on commissioning of the Bangalore International Airport at Devanahalli, w.e.f. 0001 hours of 23rd May, 2008, the HAL Airport at Bangalore will no longer be available for commercial civil aviation operations except at times of national emergency. The International Air Transport Association code “BLR” for the HAL Airport is hereby transferred to the Bangalore International Airport at Devanahalli with effect from the above date and time.

²² This was submitted by the attorney general representing GoI in the High court of Karnataka on 18th March 2010

²³ HAL letter to DGCA No. ASC/DGM(AO)/129/335/2006 dated 15th February 2006

as they are used for civilian flights. Similarly, old Hyderabad airport (Begumpet airport-VOHY) was closed for civil aviation operations by another notification upon commissioning of a new private Greenfield airport at Shamshabad.

7.2 Airport License for New Private Airports

On 24th May 2008 the new airport in Bangalore (BIAL), was commissioned. As per the existing rules, BIAL need to take a license for operating scheduled flights from the new airport. It may be of interest to note that one of the basic reasons for introducing privatization was to have airports of international standard. The new airport was supposed to be commissioned in the month of March 2008. Accordingly DGCA carried out a pre-licensing inspection from 7th to 11th January 2008. In the report DGCA pointed out 59 deficiencies or shortcomings to be rectified.²⁴ These deficiencies related to the runway, taxiways, apron, marking, obstacles, signs and signals, fire services as well as to the aerodrome manual. Due to these issues, the opening of the new airport was postponed. In the month of April 2008, again the DGCA team had visited BIAL to verify the action taken to rectify the issues pointed out by the team in their earlier (January) report.²⁵ As per the report, the team had noted that in as many as 22 issues, action needed to be taken to rectify the issues pointed out in the earlier report. In effect, many safety issues were left to be rectified even at that stage. However, DGCA issued a provisional license valid for 6 months on 15th May 2008.²⁶ Subsequently on 15th November 2008 the provisional license was regularised.

Two major safety issues related to the glide angle and the runway/taxiway shoulders space. AAI, who is the CNS/ATM service provider had originally planned the glide angle considering the terrain affecting radiation and space modulation which determines the resultant glide angle. However, subsequently the terrain was disturbed by the dumping of soil and levelling the same. The result of this change in terrain was a higher glide angle (but within the permissible limits as per SARP). After commissioning the airport, this higher glide angle has become a matter of concern. It was reported that the glide slope has been corrected by relocating the glide path antenna system and the equipments to another location as it is impossible to achieve a comfortable lower glide angle (from 3.4 to 3.0 degrees) because of the change in the terrain.²⁷ DGCA license has never considered this aspect, possibly because the glide angle was within the permissible limits. Similarly, the shoulder space at the turning point from the runway to the taxi way was inadequate.

None of the concerns expressed by the DGCA team were mentioned in the license issued as conditions. This means that the DGCA has ignored even its own safety audit report. As per the Rule 83(1) of the Aircraft Rules 1937, *Conditions governing the grant of license: An aerodrome license shall be granted or renewed subject to such conditions as the Director General considers necessary to ensure compliance of The convention and the safety of aircraft operation.*

Two fundamental concepts must be considered with respect to the above (1.) Licensing is a method to ensure compliance with the Chicago Convention and its Annex (2.) Conditional license is issued to ensure safety of aircraft operations. However in the given case of BIAL, the license was provisional but the conditions were not mentioned although it was clear from the

²⁴ The report of the DGCA dated 11th January 2008

²⁵ The second inspection was on 24th and 25th of April 2008

²⁶ License NoAL/Public/022 Dated 15th May 2008

²⁷ “Bangalore International Airport repairs threaten passengers” www.dnaindia.com dated 2 November 2009

inspection report of DGCA that safety issues were pending while the license was issued. The license did not state the reason for being temporary either. In case of Hyderabad Begumpet airport, owned by AAI, DGCA had issued a conditional license and clear instructions were recorded in the license unlike in the BIAL case.²⁸ Hence it is clear that this specific situation is applicable in case of old government aerodromes. However in the case of new aerodromes, this condition cannot be continued as the operator must obtain clearances from DGCA and from site clearance stage itself. Hence, one cannot find any specific reason for the fact that BIAL was granted a temporary license under the amended licensing rules.

7.3 Aerodrome Licensing and Types of Aerodrome-after Privatization

As per the above provisions of relevant Rules and CAR, it can be seen that an aerodrome can be either for ‘public use’ or ‘private use’ only. There is no provision for a third category like, “*for public use but not for commercial civil aviation operations*”. Moreover, Rule 83 clearly states that DGCA can subject the license to conditions in order to ensure compliance with the Chicago Convention and for the safety of aircraft operations. Hence, it is clear that DGCA cannot subject an aerodrome license to commercial conditions as in the current case. As per the notification, HAL airport/ Begumpet airport in Hyderabad city would become an airport “for public use but not for commercial civil aviation operations.” This violates the provisions of the relevant rules and CAR. Significantly, there is no airport in India (except HAL and Begumpet airports) which is licensed for “public use” and at the same time closed for “commercial civil aviation operations.”²⁹ If commercial civil aviation is not permitted from an airport licensed for “public use,” the only operations permitted would be those of private aircraft, which means the airport would turn out to be one which is licensed for “private use.” For this reason it makes little sense for a publicly owned airport to have a license in the category of “public use” and at the same time be closed to all commercial civil aviation.

As per the CAR provision quoted *supra*, all airports categorized for “public use” when available for operations of aircraft, “shall be so available to all persons on equal terms and conditions.”³⁰ Hence, an aerodrome like HAL airport or Begumpet airport, which is available for public use, cannot be closed only for commercial civil aviation operations by using licensing provisions. If it were closed for some aircraft then it would be in violation of Article 15 of Chicago Convention.

Licenses only refer to the safety aspects of the airport, period of validity and special conditions, such as load restrictions. As per Rule 78, “[a]n aerodrome may be licensed for all types of aircraft or for certain specified types or classes of aircraft and the license may specify the conditions on which the aerodrome may be used.”³¹ It can be seen that the term used is “type or class of aircraft,” and not “class of operations.” An aerodrome license is primarily associated with the safety of aircraft operations and not with the commercial nature of the aerodromes use

²⁸ The reason for issuing conditional license while as per Annex 14 airports needs to be certified as per the Annex only, is as follows as per the official version “*Like the prevailing trend worldwide, all the aerodromes in India had been developed over a period of time and there was no strict regulatory control over the aerodromes as they were maintained by governments directly and such bodies were performing dual functions of the regulator and service provider. Most of the airports in the country have been in existence since the pre-independence era and have been developed subsequently to meet the requirement of the traffic as well as aircraft operations. These airports have been upgraded in terms of the runway and associated facilities on the need basis. This was biggest challenge for licensing of the aerodromes as the compliance of SARPs was not to the desirable standards for such airports*” CAO working paper A37-WP/87 TE 35 Dt 30/8/10 para 2.7

²⁹ As per the clarification issued by DGCA.

³⁰ civil Aviation Requirements, *supra* note 7.

³¹ Aircraft Rules 1937, *supra* note 6, Rule 78.

by aircraft. None of the airport licenses issued by DGCA say ‘*commercial civil aviation operations*’ are permitted from a specific airport or otherwise.

In the case of Hyderabad, the old airport owned by AAI had a valid aerodrome license. In this case also GoI had issued a notification under Rule 78(of The aircraft Rules 1937), along the similar lines of Bangalore. However in this case the notification bans all ‘*civil aviation operations*’ and ‘*the license stands modified accordingly*’. DGCA subsequently inserted a condition in the license of old Hyderabad which reads as “*Aircraft operations to be restricted in accordance with conditions notified vide S.O.470(E) 10th March 2008*”

7.4 Concession Agreements and Aerodrome Licensing

Until privatization, as per the licensing rules, non-government aerodromes were required to obtain a license in case of scheduled operations. But privatization has started a new trend. In case of Bangalore and Hyderabad airports GoI has entered into agreements with the private companies called concession agreements. These agreements contain certain provisions about the issue of licensing to the new airports and the said agreements resulted in GoI using the licensing related rules and powers for the specific performance of these agreements.

It can be seen that as per the licensing rules it is not compulsory for GoI to issue a license for an aerodrome or to do it within a certain period. If in normal course DGCA is satisfied that the aerodrome satisfies the laid down conditions and parameters, the license will be issued. This means that it is the prerogative of DGCA to decide whether a license will be issued or not. In a normal case any person who intends to construct an aerodrome must obtain a No Objection Certificate (NoC) from the Ministry of Defence and the Ministry of Environment & Forests as well as from local municipal authorities. These clearances are mandatory for DGCA to give site clearance for a new aerodrome.

This being the case, due to the privatization of airports or the establishment of new private airports a new trend was started regarding the issue of aerodrome licensing. Concession agreements were signed between GoI and the private operators before the construction of the airport has started. Certain clauses of these concession agreements are of interest while analysing the impact of privatization on aerodrome certification. The Concession Agreements (CAs) have the following conditions

7.6.1 Grant of Licence

*GOI shall use its good offices and assist BIAL for DGCA’s grant of an airport licence to BIAL initially valid for a period of two years to enable it to commence commercial operation no later than forty-five (45) days from the date of its application to DGCA, provided that BIAL shall have completed construction of the Airport in accordance with the terms of this Agreement and shall have complied with (i) the requirements of Rule 86 and Section A of Schedule V of the Aircraft Rules 1937, (ii) any special directions or guidelines issued by DGCA pursuant to Rule 133A of the Aircraft Rules 1937 and (iii) any other standard requirement of DGCA in connection with the issuance of an airport licence for a Major Airport.*³²

7.6.2 Continuing Licence

Subsequent to the issue of airport licence under Article 7.6.1 above, GOI shall use its good offices and assist BIAL for DGCA’s renewal of said airport licence issued to BIAL

³² Clause 7.6 of the concession agreement between GoI and BIAL.

for a further period of two years prior to the expiry of the airport licence issued for the immediately preceding two year period, no later than forty-five (45) days from the date of BIAL's application to DGCA, provided that BIAL continues to comply in all material respects with (i) Applicable Law and the Aircraft Rules 1937, (ii) any special directions or guidelines issued by DGCA pursuant to Rule 133A of the Aircraft Rules 1937, (iii) the provisions of this Agreement and (iv) any other standard requirement of DGCA in connection with the issuance of an airport licence for a Major Airport (including the payment of all past dues owed to DGCA in connection with such licence) and provided that there are no outstanding breaches by BIAL under the current licence.

7.7 Commissioning

GoI shall use its good offices to persuade that AAI and DGCA shall, at BIAL's cost and in a timely manner, carry out all tests and procedures as are necessary to be undertaken for the grant of the licence referred to in Article 7.6 above and/or for the safe operation of the Airport.

These clauses clearly impose obligations on GoI and GoI would be bound to issue a license to BIAL/HIAL by DGCA although DGCA is an authority distinct from GoI. The original wording of these clauses are as follows: *'DGCA shall grant an airport license to BIAL initially valid for a period of two years to enable it to commence commercial operations no later than 45 days from the date of the application to DGCA provided that BIAL shall have completed construction of the airport in terms of this agreement'*.³³ However the Ministry of Law Justice has objected to such a clause and said that *"(1). DGCA is not a party to the agreement, so no obligation can be created against DGCA. (2). GoI can only use its good office for grant of airport license because it cannot direct / dictate statutory authority to act in a particular manner"*.³⁴ From this, it is clear that DGCA is a distinct entity from GoI but still the said clause indirectly compels DGCA to issue a license. This clause looks like a mere promise, that DGCA would issue a license under the sole condition that BIAL would follow all laid down rules and regulations/conditions. But in reality DGCA has issued a license although there were many safety issues pending. As a reply to a query about the license issued to BIAL, DGCA had stated that license to BIAL was issued as per the concession agreement.

As stated *supra* DGCA has pointed out many deficiencies in its inspection of the new airport. However as the date of opening was nearing, in the second inspection DGCA has confirmed that all the issues pointed out in its earlier inspection were not rectified. Rather on many issues it said that *being done/ would be done etc.* This is interesting because of two reasons. Firstly as stated *supra*, all new airports like BIAL (unlike old aerodromes) had to obtain clearance in each stage starting from site clearance stage. Hence it cannot be said that there were constraints which were unknown earlier. Also as privatization was brought in, like in case of BIAL, specifically for bringing in international standards to India,³⁵ for which foreign airport developers/operators were made a part of the consortium which build the new private airports, the question of not knowing international standards as prescribed in Annex 14, Volume 1 cannot arise. Secondly in case of other airports DGCA has issued licenses only after correction of the deficiencies which had been pointed out earlier.

DGCA is expected to issue a license to ensure compliance with the Chicago Convention. Hence in the given case, it is the clauses in the concession agreement that has forced DGCA, the

³³ Point No2, of Ministry of civil aviation document file no AV 20014/002/2000-AAI

³⁴ *ibid*

³⁵ Naresh Chandra Committee report, and Policy on airport infrastructure GoI

regulator, to issue a license to the private airports. Moreover GoI and DGCA are bound to continue the license given, though not as per the safety standards. In case, DCGA refuses to extend the license, the operator can proceed against GoI for specific performance of the concession agreement clause. The Aircraft Rules 1937 do not prescribe any time limit for the issue of a license, although the Civil Aviation Requirement (CAR) amended subsequently suggest a minimum of 90 days time for processing,³⁶ (but no maximum limit and there is no obligation on the part of DGCA to grant a license). Hence the contractual obligation of GoI (but in all practical sense of DGCA) is not in line with domestic legal provisions. As to the contractual obligations, they are neither in line with the spirit of international conventions nor with the ICAO Annex or with international practice as far as regulatory functions are concerned.

The effect of privatization does not end with Bangalore which is the first Greenfield Airport in which case GoI has entered into a Concession agreement. This concession agreement has become the model concession agreement. In subsequent cases also the same concession agreement with the same clauses has been executed by GoI. Hence it has become a benchmark for future private aerodromes. In this situation, DGCA would be prescribing detailed rules for aerodrome licensing in the light of international obligations, but in case of private aerodromes, including new private airports, DGCA would be forced to issue licenses as per the terms of a commercial contract but not as a regulator. It is yet to be seen how this obligation of GoI, and in turn that of DGCA, can enhance aviation safety as expected by the international obligations/Annexs.

7.5 Private Contract but Regulator's Obligations

The GoI has signed the Concession Agreement not in 'governmental capacity' but in private and commercial capacity of Government. The concession agreement says

*GoI unconditionally and irrevocably agrees that the execution, delivery and performance by it of this Agreement and those agreements and other documents comprising the Security to which it is a party constitute private and commercial acts rather than public or governmental acts.*³⁷

It is not clear how India agreed to incorporate conditions/obligations regarding the issue and renewal of a license, when the agreement itself was not executed in governmental capacity, or in other words, it is an *acta jure gestionis*). But the issue of a license is a governmental act or *acta jure imperii*. Hence the execution of the agreement is an *acta jure gestionis* but the performance of the contractual commitments are *acta jure imperii*.

7.6 Aerodrome Certification and Monopoly

As said *supra*, India follows the aerodrome license system instead of aerodrome certification. India has taken the stand that aerodrome licensing is equivalent to certification. The case in which aerodrome licensing rules were used to close an existing aerodrome would demonstrate the actual difference between aerodrome certification and licensing. The concession agreement between BIAL and GoI has the following clause.

Existing Airport

(i) BIAL shall, six (6) months prior to the anticipated Airport Opening Date, notify GoI of the date it expects Airport Opening to occur.

³⁶ CAR Section 4, Series "F" Part 1.4.4

³⁷ Concession agreement between BIAL and GoI; clause 18.13

(ii) *From and with effect from the date on which Airport Opening occurs GoI will ensure that the Existing Airport shall not be open or available for use for commercial civil aviation operations and shall no longer be classified as a civil enclave under the AAI Act 1994.*

(iii) *From and with effect from the date on which Airport Opening occurs GoI will issue and publish an appropriate notification stating that the Existing Airport is no longer open or available for commercial civil aviation operations (which shall, for these purposes, not include use for Airport activity at times of national emergency or (at any time) by aircraft owned or operated by or for the Indian Air Force or other Armed Forces of India or for transportation of dignitaries by special government hired VIP aircraft or otherwise for their use or activities) and that it is no longer classified as a civil enclave under the AAI Act and also for ensuring that the international code (BLR) of the Existing Airport is transferred to the Airport.*

In 2008, to close down the old HAL airport, Rule 78 of Aircraft Rules 1937 was used³⁸ which mandates a license as a necessary condition for operating scheduled flights. This shows how GoI/DGCA has used the provisions governing licensing to close the old HAL airport. The stand of GoI is that as HAL has not obtained a valid license, the airport is closed, as it is against the Rule 78 of The Aircraft Rules 1937 and not because of the concession agreement or because of the new airport. But the notification clearly says it is in ‘deference’ to the concession agreement. Also as per the official gazette of GoI HAL was classified as a ‘privately owned licensed’ aerodrome until 2008.

These actions of DGCA are not as per the regulatory provisions because:

- a) While DGCA is the licensing authority the notification is by GoI (Ministry of Civil Aviation)
- b) As the license given is to ensure safety standards, even the licensing authority, DGCA, cannot disallow civil aviation operation/commercial civil aviation as per rule 78. DGCA may have the power to cancel a license due to safety related issues but not due to issues related to commercial agreements,
- c) As commercial civil aviation has been banned, the Hyderabad Begumpet airport has become an aerodrome licensed exclusively for ‘private use’, which is a contradiction to the license itself.
- d) Once licensed for “*public use*” the aerodrome, which, when available for operation of aircraft, shall be so available to all persons on equal terms and conditions.³⁹ Hence restricting commercial civil aviation from using a aerodrome licensed for ‘public use’ is against this provision.

³⁸ The rule 78 is as follows

Licensing of Aerodromes – (1) No aerodrome shall be used as a regular place of landing and departure by a scheduled air transport service or for a series of landings and departures by any aircraft carrying passengers or cargo for hire or reward unless --

- (a) it has been licensed for the purpose, and save in accordance with the conditions prescribed in such licence; or
- (b) it has been approved by the Director-General, subject to such conditions as he may deem fit to impose, for the purpose of operation of flights in the event of national or international crisis, natural calamities, emergencies or otherwise requiring such flights to carry material goods for relief purposes, or for giving joyrides for hire or reward:

³⁹ CIVIL AVIATION REQUIREMENTS SECTION 4 – AERODROME STANDARDS & AIR TRAFFIC SERVICES, SERIES 'F' PART

I, Dated 16th October, 2006, Clause 1.i

7.7 Restriction of Other Airports and Licensing

The concession agreement further states the following regarding future aerodromes within a 150 km radius.

5.2.1 International

No new or existing airport shall be permitted by GoI to be developed as, or improved or upgraded into, an International Airport within an aerial distance of 150 kilometres of the Airport before the twenty-fifth anniversary of the Airport Opening Date.

5.2.2 Domestic

No new or existing airport (except for Mysore and Hassan airports) shall be permitted by GoI to be developed as, or improved or upgraded into, a Domestic Airport within an aerial distance of 150 kilometres of the Airport before the twenty-fifth anniversary of the Airport Opening Date.

By this clause, DGCA is barred from granting approval for an aerodrome or it can issue a license for an aerodrome within 150 kilometres of these airports. This means that DGCA's power to license an aerodrome is limited to a 150 kms radius area around these airports. Or in other words, DGCA's licensing power is subject to two private agreements. As per ICAO Annex, States are expected to certify airports from the safety point of view, whereas in India the certification powers are used for commercial purposes by the regulatory authorities, which is not the intention of international initiatives.

In 2008, just after opening of new Greenfield airports in Bangalore and Hyderabad, the state of Karnataka planned to open Bidar air force base for civilian operation by constructing a terminal building. The Defence Ministry had given clearance to the operations from this air force base and the state government has written to the Union (Federal) Government to grant permission. But the Union Government has not given permission as this airport falls within 120 kms of New Hyderabad airport as it may violate the 150 kms monopoly clause in the concession agreement of new Hyderabad airport (HIAL).⁴⁰ The state government, who is interested in the operation, has requested AAI to take NoC of HIAL for operating Bidar airport.⁴¹ It can be seen that post privatization, approval (NoC) of the private airports is needed even for DGCA to allow operations from an airport in India due to the 150 kms restriction clause in the concession agreements. The licensing power of DGCA itself is subjected to the concession agreement. But if the aerodrome certification method had been practiced instead of licensing, this situation would not have happened.

To appreciate the implication of this issue, one should try to answer the following question: In case that India would follow the aerodrome certification instead of the aerodrome licensing, would India then be able to incorporate/discharge such obligations in the concession agreement? Considering the certification system in other states, the answer is negative. This points to the advantages of the licensing system over the certification system, about which GoI is fully aware.

⁴⁰ <http://www.hindu.com/2009/04/20/stories/2009042053540700.htm>

⁴¹ <http://www.deccanchronicle.com/channels/cities/bengaluru/bidar-airport-awaits-clearance-769>

7.8 Transfer of License

In case of three AAI airports, viz, New Delhi, Mumbai and Nagpur which were transferred to private companies (where AAI has minority shares) as part of privatization initiatives the following has to be considered. In case that India had followed aerodrome certification the certification of these aerodromes would have continued without any problem as the certification relates to the aerodrome facilities and is not connected with the ownership of the aerodrome. However, in case of licensing, an aerodrome licence is issued to a person and not to the aerodrome. Hence, the same is not transferable. Once the ownership is changed, the airport remains unlicensed until the new owner obtains a new licence. The old licence would cease to have validity. In the case of the above mentioned airports their licenses lost validity due to the change of ownership but the airports continued operation - without license. This issue was challenged before the Nagpur bench of Bombay High Court. However GoI has overcome this difficulty by extending the time limit to obtain a license for all airports which were permitted scheduled operations before the licensing rule had come to effect (5th Nov 2004) as per the rule 78. The relevant provision regarding the transfer of ownership reads as follows:

*Minimum notification of three months is required for change of owner or operator of the aerodrome. During the change the outgoing licensee shall be responsible for the operation of the aerodrome until the grant of aerodrome licence to the new applicant.*⁴²

From this, it can be seen that a minimum time of three months is required for the process of issuing a new license. When privatization of airports becomes reality, the issue of transfer of ownership is bound to happen. Considering the time required for the issue of a license to the new owner/operator, DGCA wants the old owner /operator to be responsible for the operation of the airport. Hence a license is not transferable but the responsibility connected with the license continues to be with the ex-licensee even after the expiry of the license. This notion is against the basic concept of license as a license is a permission granted to a particular person.

8. Conclusion

The licensing system existed and was used by India even before the creation of ICAO and even long before the introduction of Annex 14. However, the privatization of airports in India had affected the aerodrome certification /licensing system and rules. There is a fundamental difference between *certification* and *licensing*. Hence India's stand that '*licensing is the same as certification*' is not correct. India uses licensing regulations to ensure specific performance of the conditions in the privatization agreements.

Although ICAO has developed aerodrome certification to ensure safety of civil aviation, in India the same provisions are used for achieving economic policies. The regulatory authority has used its licensing power to create a monopoly in the airport infrastructure sector and to curtail the use of two aerodromes, which were considered to be safe by the same authority for civil aviation operations until the opening of new private Greenfield Airports.

So, the authority of the State with respect to licensing has been subjected to private and commercial agreements. Thereby, instead of compliance of rules by the private airport operator, the licensing authority has to comply with the terms of private contracts.

⁴² Civil Aviation requirements(CAR), Section 4, Series 'F', section 7.3

9. Suggestions

1. India should change over to 'aerodrome certification' at the earliest instead of licensing, in the light of the introduction of aerodromes privatization.
2. India should free aerodrome certification regulations from policy matters of political nature and treat it purely as an aviation safety issue.
3. India should ensure that the aerodrome certification regime is strictly beyond the scope of any private and commercial agreements and allow the certification authorities to consider safety of civil aviation as the only criterion for certification. Current concession agreements may be amended to this effect.
4. India should allow/certify new airports only in case that they are safe. Conditional certification may be allowed only in case of existing aerodromes.
5. India should not use its licensing/certification powers to create unlawful type of aerodromes (like '*for public use but not for commercial aviation*').
6. Certain minimum category certification may be made mandatory for any public transport. In case of remote and essential air service areas a time bound programme may be created to ensure safety.
7. No restriction of distance etc. with respect to neighbouring airports may be part of the concession agreements or contracts, which virtually limits the powers of aerodrome regulatory authorities.
8. The Aircraft Rules 1937 may be amended accordingly, in the light of the above suggestions.