

The MH 17 incident: An analysis of Aviation Insurance Coverage

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ABSTRACT

A study was conducted during 2012 in selected villages of Chikmagalur district of Karnataka state, with a sample size of 120 farmers. The data was collected personally to know the socio economic profile, constraints perceived and suggestions offered in adoption of improved production technologies of tomato.

Key Words : Airlines, Passengers, Injury, Liability, Insurance

INTRODUCTION

Malaysia Airlines flight MH 17, flying from Amsterdam to Kuala Lumpur was blown up by rebels. The catastrophe that occurred on the fateful day of July 18 2014, over eastern Ukraine, killing all 298 people aboard, appalled the world and once again raising issues of innocent air passengers' security in a conflict zone they happened to fly over. The fact that several military aircrafts of Ukraine had been shot down in area recently by separatists, well within the knowledge of authorities, international air passage was kept open, is hard to digest. The tragedy also raises the question of insurance coverage of such incidents, before the survivors of deceased passengers and the crew of the perished aircraft as beneficiaries, for the loss of aircraft and for the damage to the third party on ground. The insurance liabilities are not easy to settle and the process turns out to be very lengthy and complex both for insurers including reinsurers and insured. Whether the aircraft was hit by a missile or crashed due to some other reason like failure of machinery, whether it was a passenger plane or mistook to be a war plane as indicated by the subsequent investigations. What is the impact of all such facts on an aviation insurance policy? The situations like aircraft hit by rebels, as the case is here, are covered by war risk insurance policy. As a result of terrorist attack of September 11, 2001 the war risk clauses were hurriedly excluded from policies or were included with high premium. This paper focuses on the nature and kinds of aviation insurance policies and their coverage and exclusions. The paper also analysis the relevant legal provisions applied in different countries and international conventions related thereto.

Aviation industry has continuously been making tremendous strides in capturing market¹

and influencing economy² since its inception. Developing from initial low capacity expensive entertainment flights to technologically advanced high capacity and low cost jumbo aircrafts, the graph of the industry has expanded both vertically, covering large range of customers from high income group of executive and business class to low income group of labourers and petty traders, as well as horizontally encompassing large range of uses.³ Insurance industry has also been keeping pace with aviation to cover the attendant risks like loss, injury or damage to the cargo, body of air craft or passenger etc. to enable airlines to meet their different liabilities.⁴

Liability Regime :

Liability for death or injury to a passenger :

Warsaw convention⁵ being the first important step towards regulating aviation liability, culminated into Warsaw System consisting of The Warsaw Convention 1929, The Hague Protocol 1955, The Guadalajara convention 1961, The Guatemala City Protocol 1971, Additional Protocols I, II, III and The Montreal Protocol (no. VI) 1975. The liability limit in Warsaw convention is determined by gold francs, the French currency which is no longer in circulation. Hence the courts of different countries adopt different ways to convert it to fix liability which leads to anomaly. The Montreal Convention 1999⁶ is expected to replace Warsaw System as is evident from the wide response it is getting from various countries.⁷ Before this situation arises The Warsaw Convention 1929 would still rule between the countries that have neither ratified the amending conventions and protocols of Warsaw System nor have become party to Montreal Convention 1999. For example country A is party to Warsaw System as well as Montreal Convention 1999 and country B is party to Warsaw Convention 1929 only. In case of accident of aircraft during flight from country A to country B, the provisions of Warsaw Convention 1929 would apply to the matters covered in it because it is the only convention to which both the countries are parties.

Montreal Convention is a step towards modernizing, consolidating and improving the Warsaw system and provides to protect the 'interests of consumers of international carriage' as well as to 'orderly development of international air transport operations.' Hence it works as a means to achieve 'an equitable balance of interests.'⁸

The scope and application of Montreal Convention 1999 is enhanced by applying it to the contracting as well as the actual carrier⁹ and by fixing their mutual liability.¹⁰ The liability system is also improved by introducing strict liability of the carrier except in case of contributory negligence in art. 20, to the extent of 113,100 Special Drawing Rights¹¹ for death or bodily injury to the passenger under article 17(1).¹² Art 21 (1) makes the carrier strictly liable for such damage up to 113,100 SDR for each passenger. The carrier can neither exclude nor limit this liability. Any contract to limit or exclude such liability is to be null and void to that extent.¹³ Above this limit the carrier is not liable if it proves non negligence on its part or the damage was resulted by the act of third party.¹⁴ This provision can be interpreted to make carrier liable for damage caused by terrorist or war activities.

The Convention provides for advance payment in case of death of or injury to the passenger.¹⁵

Article 33 (2) of The Montreal Convention 1999 has also introduced an additional fifth

jurisdiction for the claims to be brought in case of death or injury of a passenger. The fifth jurisdiction allows a suit to be filed in the state party where the passenger had, at the time of accident, principle and permanent residence.¹⁶ The convention also allows electronic record for both passengers and cargo. As per article 55 the Convention shall prevail over the instrument of Warsaw System among the States who are parties to both The Montreal Convention 1999 and Warsaw System. The Convention of 1999 has the effect of replacing IATA agreements among State Parties to it in respect of the matters including liability covered by the Convention though these agreements are as effective as before for the states that have not ratified The Montreal Convention 1999. As the number of state parties is increasing, the provisions and liability limits are binding on them all by providing for it in their respective domestic laws.¹⁷

Liability in case of delay and destruction, loss or damage to the baggage :

The Convention of 1999 makes the carrier liable for delay¹⁸ to an amount of 4693.65 (rounded 4694) Special Drawing Rights¹⁹ for each passenger.²⁰ In case of destruction, loss, damage or delay of baggage, the liability of the carrier is limited to 1131 Special Drawing Rights²¹ for each passenger unless the passenger has made a special declaration of interest in delivery of the checked baggage and paid supplementary sum, if required, at the time of handing over the baggage to the carrier.²² The limit does not apply in case of carrier's intent and recklessness.²³ The carrier is not liable for and to the extent of inherent defect in the baggage. For unchecked baggage, the carrier is liable for damage caused by its fault only.²⁴ Under Warsaw System the liability for baggage is as low as 250 francs per kg for checked baggage and 5000 francs per passenger for unchecked baggage.²⁵

Liability for surface damage and towards third party :

Several efforts at international level have proved to be unsuccessful to achieve consensus of nations on the liability of an air carrier for surface damage and injury to a third party. Rome Convention 1952²⁶ (amended by Protocol of 1978)²⁷ was the first major step towards third party liability but it could not be fructified with meagre support of 49 countries.²⁸ Currently ICAO is taking further initiative to modernize The Rome Convention by floating two more conventions on the issue of third party liability.²⁹ The conventions create separate liability in case of unlawful interference (henceforth, in this article, to be referred as compensation for unlawful interference convention) and in case of general risk. (henceforth, in this article, to be referred as general risk convention)

The convention related to unlawful interference creates a maximum strict liability up to SDR 700 million³⁰ except in certain circumstances.³¹ The general risk convention creates liability for damage due to death and bodily injury.³² It provides for compensation for mental injury also if it is 'caused by a recognizable psychiatric illness resulting either from bodily injury or from direct exposure to the likelihood of imminent death or bodily injury.'³³ In addition to this two more liabilities are included i.e. for damage to property³⁴ and for environmental damage.³⁵ A strict liability regime is created by the convention which is exonerated in case of contributory negligence.³⁶ The liability, per event, is up to 750,000 SDR for lightest aircrafts and 700,000 SDR for heaviest aircrafts.³⁷

Many countries already provide for third party liability in their laws. In Australia the

Damage by Aircraft Act 1999 (DBA Act 1999)³⁸ provides for unlimited strict third party liability³⁹ without the need to prove negligence⁴⁰ though the same will depend on the value of liquidated assets and insurance policy of the carrier.⁴¹ Many other countries like New Zealand, Singapore provide for strict and unlimited third party liability like Australia. USA also imposes unlimited fault based liability.⁴² EU members like United Kingdom and France also provide for strict and unlimited third party liability like Australia while Germany, Italy and Romania provide for strict but limited liability except where the carrier is negligent.⁴³ The Compensation for Unlawful Interference Convention provides for a limited liability and that is one of the reasons that it is criticised as a retrograde step for the protection of its victims. 'It is likely to be very difficult to achieve agreement on a common regime.'⁴⁴

Although the conventions on third party liability are criticized on many counts, yet it needs to be supported and be given proper thought by the industry as well the governments so that international consistency may be achieved in this field.

Insurance coverage by airlines :

Insurance is a type of contingent contract, the performance of which depends on the happening of any untoward future event beyond the control of the parties, the insurer and the insured. The risk of loss suffered by the insured is spread over a number of other insured premium payers who, along with the sufferer, pay an agreed amount of money to the insurer. Thus the brunt of loss becomes tolerable to the sufferer.

In aviation insurance, the insurance rules are based on general principles of insurance as in any other type of insurance.⁴⁵ The loss suffered by an airline is compensated from pool of insurance premiums, collected from airlines in general. Aviation insurance, though compared with motor accident insurance and marine insurance, is an independent and well developed branch of insurance today. It has become a specialized and separate field because of its unique characteristics like flights crossing national boundaries of different jurisdiction and legal systems with different interpretations of terms, most advanced and rapidly changing technologies relating to manufacture, security, speed, sound, fuel etc. of aircrafts, use of air crafts for war, criminal and terrorists activities etc. All these features make the risk assessment, a tough task for the insurance underwriters.⁴⁶ This is further toughened by the fact that premium paid by a limited number of insureds is very less as compared to the loss covered. From 1998-2000 hull, passenger and third party claims exceeded premiums by some US\$2.75b in airline sector alone.⁴⁷ In the decade to 2001 there were only four years where market premium exceeded incurred claims and for that ten years as a whole claims exceeded premiums by US\$13,069m.⁴⁸

Aviation Insurance market covers a wide variety of customers, from aircraft manufacturers, passengers, third party to service providers resulting in even more types of policies covering risks like hull all risks, passenger and third party legal liability, airport owners liability, product liability and many more. These customers get insurance from their primary insurers by paying premium to them.⁴⁹ They, in turn, contract with other insurers, by paying premium, to insure their liabilities under the policies sold by them. These second insurers are called reinsurers, and the insurance, reinsurance. The paper is confined to passenger and third party liabilities and insurance for them including war risk cover.

Passenger liability insurance :

Art 50 of Montreal Convention 1999 makes it mandatory for the state parties to require their carriers to get proper insurance to meet their liabilities under the Convention. The carrier may also be required to have proper insurance by the state in to which they are operating.⁵⁰ The absolute and fixed liability regime created by Montreal Convention requires the airlines to have availability of adequate funds to compensate for the injuries and meet various liabilities there under.

In Australia the Civil Aviation (Carrier's Liability) Act 1959⁵¹ provides for mandatory insurance coverage for passenger liability in case of death or injury. This mandatory requirement is applicable to all carriers flying to, from or within Australia to meet the requirements of Art. 50 of Montreal Convention 1999. Now if an accident occurs causing death or injury to the passengers the insurer is liable even if the carrier failed to take safety measures provided by law.⁵² This provision is similar to part 205 of Federal Aviation Regulations of USA.⁵³ In Australia the carriers have to make a declaration before Australia Civil Aviation Safety Authority, of having proper insurance rather than getting a certificate of insurance compliance from the same. If any operator fails to make declaration its authorization to carry passenger would automatically fail and carrying passengers without authority entails administrative penalties and criminal actions.

In India Director General of Civil Aviation issues air operators' certification procedure as per rules provided in Aircraft Rules 1937,⁵⁴ Civil Aviation Requirements (CAR)⁵⁵ and ICAO requirements. India is a party to Montreal Convention 1999, hence require the operator to have proper insurance as per article 50 of the convention.

As per European Council Regulation 785/2004 UK and other European countries makes it mandatory for the airlines to obtain minimum insurance of SDR 250,000 per passenger.⁵⁶ US requires insurance of US \$ 300,000 per passenger.

Third party liability insurance :

Although there is no specific provision for third party liability insurance yet the practice adopted by world's major airlines reveal the fact that to maintain a place in the market and to compete with the rivals, the airlines go for third party insurance. A comprehensive insurance is the requirement of the commercial arrangements as leasehold agreements relating to aircrafts require hull insurance and principles adopted in corporate governance prohibits the carriers to leave the passenger-stakeholders and third party in lurch without proper insurance. A practice of having a single policy covering all three liabilities enables the carrier to claim the whole amount of policy at the time of particular accident to meet all three liabilities. In India, though third party insurance is not mandatory, it is provided by the insurance companies to match and compete with international market. In Australia Damage by Aircraft Act 1999 which provides for strict and unlimited third party liability, does not provide for insurance against such risk.

As per European Council Regulation 785/2004 the third party insurance is compulsory and its limit would increase with the maximum take off mass/weight of the aircraft.⁵⁷ The regulation provides for a minimum of SDR 700 million (approx US \$ 1.6 billion) for the heaviest aircraft.⁵⁸ In US this limit is US \$ 2 million per occurrence. Singapore, United Arab

Emirates and some other countries also require third party insurance in one form or other.

War risk insurance :

War risk insurance covers the damage or destruction to the body of the aircraft (hull) or surface damage and injury to or death of a passenger or third party caused by war, terrorist activities, weapons of mass destruction, or using aircraft itself as a weapon of mass destruction (new perils).⁵⁹

As the loss caused by war or terrorist activities etc. is not measurable beforehand so that it can be diversified among insureds and can be shared with large number of insurers in case of reinsurance, insurance industry has always been reluctant to provide airlines with war risk insurance under the standard War, Hijacking and Other Perils Exclusion Clause AVN48B.⁶⁰ However, the airlines have the option to purchase insurance against these perils on the payment of additional premium and include it as a 'write back' clause AVN52.⁶¹ Many times such cover is available, in market, to the airlines subject to termination at short notice or automatic termination.⁶²

After the incident of September 11 2001, aviation insurance market experienced a remarkable dip in war risk insurance causing extra burden on the governments to provide the carriers with indemnity cover. Keeping this fact in mind the Convention on Unlawful Interference proposes an International Civil Aviation Compensation Fund (the International Fund)⁶³ to be created to meet the liability up to a maximum amount of 3 billion per event.⁶⁴ The international Fund is to give support to carriers in such situation on the payment of certain amount as fee so as to minimise their dependents on insurance players. The convention provides for compensation to be paid through International Fund which would be readily available to the victims though this fund depends on the availability as maximum total collection in this fund can not exceed SDR 9 million over two consecutive years.⁶⁵

As mentioned above, after the incidence of September 11, 2001, aviation insurance market experienced a record low as the loss occurred was unforeseeable and far more exceeded the loss caused by other incidents like accident or natural calamity specially in respect of third party and surface damage. Regional insurance schemes like 'Eurotime' emerged in the market to meet future untoward events. ICAO (International Civil Aviation Organization) also initiated 'Globaltime' scheme for the same purpose.⁶⁶ In 2001 only ICAO established a Special Group on Aviation War Risk Insurance to provide mechanics to meet untoward situations like 9/11.⁶⁷ For further insurance strategies The Aviation Committee of the Lloyds' Market Association and the Aviation Technical Committee of the International Underwriting Association set up the Aviation Insurance Clauses Group in 2005.⁶⁸ In 2006 the Group, by introducing new exclusion clause AVN48C and 'write back' clause AVN52H' allowed the insurer to exclude coverage against 'new perils' even on the payment of extra premium.⁶⁹ To thaw the situation aviation and insurance industry came forward for the proposal of limited insurance under certain circumstances, in respect of 'new perils', by putting forward an alternative war risk clause AVN48D and 'write back clause AVN52K. Now the current position is that a 'write back clause AVN52E is used allowing the insurer and insured to reinstate agreed exclusions. Clause AVN48B is also used by insurers presently.

In USA, after 9/11, Federal Aviation War Risk Programme of the government eased

the coverage for the airlines which otherwise had disappeared from the commercial market.⁷⁰ The condition was rather tighter for third party insurance though other war risk cover like passenger and hull was available at a very high premium.⁷¹ The amended US Code 49 provides insurance and reinsurance to American and foreign aircraft operators⁷² if the same is not available on reasonable terms from the insurance carrier.⁷³ It also provides for reimbursement for the increased premium as an aftermath of 9/11.⁷⁴ Third party liability for acts of terrorism etc. from 22 Sep. 2001 to Sep.30, 2014 is not to exceed \$ 100,000,000 as the aircraft is considered to be the victim of the terrorist act. Above this amount the responsibility is posed on the government.⁷⁵ Now as the market conditions normalize, the airlines have started approaching the private insurers. Apart from this initiative Terrorism Risk Insurance Act 2002 which provide for reinsurance to insurers from general fund of the government without payment of any premium for the same.

In European Union, Regulation 785/2004 was introduced as a result of 9/11 under which air carriers and air craft operators⁷⁶ have to meet minimum insurance requirements in respect of passengers, baggage, cargo and third party liability including that arising out of acts of war, terrorism, hijacking, acts of sabotage, unlawful seizure of aircraft and civil commotion⁷⁷ as a condition precedent to obtaining operating license.⁷⁸ Non compliance with the insurance requirements may result in imposition of sanctions like withdrawal of operating license of air carriers of European Community⁷⁹ and refusal of the right to land on the territory of (European Union/Community) member state for non community air carriers.⁸⁰ As the Regulation 785/2004 was an outcome of the market situation resulted by 9/11, it specifically provided to meet 'exceptional cases of insurance market failure by taking appropriate measures'⁸¹ to enable air carriers to get proper insurance required thereunder. The Regulation does not specify what these measures are but they may include assistance from the government, formation of mutual funds etc.⁸²

Situation after MH17 :

Aviation industry, already running on a thin profit margins, gets badly affected by the incidents like that of MH17. The event reminded the previous incidents of the like nature as those relating to the disappearance of MH370 a few months back with about 250 persons on board, and attack on aircrafts in Pakistan and Libya. Grieving families could be eligible for millions of dollars in compensation for the disaster and may take years to resolve the issue.⁸³ Immediately after the incident ICAO released a 'Joint statement on Risk to Civil Aviation Arising from Conflict Zones' along with International Air Transport Association (IATA), Airports Council International (ACI) and Civil Air Navigation Services Organization (CANSO) expressing strong condemnation of the use of weapons against civil aviation. ICAO is further convening a High- Level Safety Conference with all its 191 members in February 2015.⁸⁴

The incident of MH17 also raises concerns about flying over restricted areas. Although the flight, as per preliminary report by Dutch Safety Board,⁸⁵ was above the restricted height, the question common to all flights is that, should not precautions be taken and common sense be applied to avoid such conflict areas for the sake of human lives.⁸⁶ Moreover, information about route clearance must be uniform and the agencies responsible to disseminate the information must be connected to impart uniform information to avoid confusions. It is

for this reason that ICAO convened a *special task Force on Risk to civil Aviation Arising from Conflict Zones* (TF RCZ) which has met twice till 09.09.14 and to meet again in December 2014 for next round of talks.⁸⁷

The immediate effect of incidents like 9/11 is experienced in the form of unprecedented hike in the premiums and levying of extra charges. As the situation comes to normal and the market melts down the premiums are also seen to be decreased to a considerable extent so far as the hull and passenger liability is concerned. The scene is not similar for third party liability as it remains rather thinly changed because of its unpredictable nature. The was speculated to get a jump requiring aviation companies to pay higher premiums as a result of MH17 but the trend, afterwards, witnesses a fairly smooth market proving the speculation incorrect. As a result of this incident the insurers may become more aware about the route and require the airlines to give full details of the same so as to avoid coverage over some specific risk areas.

Conclusion :

The trend of the market towards third party liability insurance and War risk insurance is in a fluctuating condition. Though the governments are trying to cover the gap by providing various schemes but the insurance market as such, is still hesitating because of the nature of the risk. Moreover, the airlines are required, by some countries to have compulsory insurance in this respect but what would they do if they are refused by insurers and reinsurers in turn. There should be some mandate for insurers and reinsurers also to cover these risk to a certain limit. This can be done with government -industry collaboration. Moreover the interests of smaller and developing markets, both of aviation and insurance, must be kept in mind before reaching any agreement in this regard.

Many countries provide for third party liability including war risk and insurance for the same and even in those states that do not have specific provision for the same, the insurance companies provide coverage for the same because of international market pressures but when it comes to make a uniform policy applicable to all nations, they fall apart for one reason or the other. There is lack of uniformity among states in this area. There is urgent need to come together on the issue to have a harmonised solution. The Conventions on third party liability, introduced by ICAO provide for maximum limit of liability and no minimum limit is set. This aspect is also necessary to be considered.

Drones used for various purposes and suggested use of drones by US for commercial purposes further complicates the risk factor for underwriters. NTSB⁸⁸ recently decided that drones/unmanned aircrafts are covered in the definition of aircraft and FAA (Federal Aviation Administration) regulations equally apply to them.⁸⁹ The amended definition of 'aircraft' in Chicago Convention includes unmanned aircrafts within its ambit.

REFERENCES

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operating about 26,000 aircrafts if all airlines operating jet or turbo prop powered aircrafts of 15 seats or more are included. Turbine Airliner Fleet Survey (spring 2004) Air claims Ltd. as cited in Paul Hayes etc. 'Recent Development in the Aviation Industry', page 2, Para 4, available at http://www.trforum.org/forum/downloads/2006_1A_StockPrice_paper.pdf visited 10.Nov. 2014.

2. Research conducted by Air transport Action Group in 2012 indicates that aviation contributes 230 billion pounds directly to EU GDP. As mentioned in *Mid-term Evaluation of regulation 785/2004 on insurance requirements of air carriers and air craft operators*. Final Report, July 2012. ec.europa.eu/transport/modes/air/.../2012-07-insurance-requirements.pdf last visited Oct. 25 2014
3. International Air Transport Association (IATA), in its 20 year passenger growth forecast revealed the number of passengers to reach 7.3 billion by 2034. It represent an average annual growth of 4.1% that will result in more than a doubling of the 3.3 billion passengers expected to travel this year. IATA (2014) 'New IATA Passenger Forecast Reveals Fast Growing market of the Future' press Release no. 57, Oct.16. <http://www.iata.org/pressroom/pr/Pages/2014-10-16-01.aspx> visited Nov.10 2014.
4. [In India] the gross direct premium underwritten in FY 2013-14 by the private players amounted to 85.86 crore. Whereas the premium underwritten by public sector in regard to aviation insurance was 352.16 crore with a growth of 3.34% over the last year. <http://customerclick.in/2014/07/07/how-a-missing-flight-impacted-the-aviation-insurance-industry/> visited 21.11.2014
5. Convention for the Unification of Certain Rules Relating to International Carriage by Air 1929.
6. Convention for the Unification of Certain Rules for International Carriage by Air 1999.
7. Currently, 108 states have become parties to it. Mozambique being the latest to join on 27.01.2014. http://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf visited 12.11.2014
8. It is clear from the Preamble of The Convention for the Unification of Certain Rules for International Carriage by Air 1999.
9. Chapter V, Convention for the Unification of Certain Rules for International Carriage by Air 1999.
10. Art. 41, Convention for the Unification of Certain Rules for International Carriage by Air 1999.
11. The limit is revised from original 100,000 SDR w.e.f. 30.12.2009. ICAO ,Ref.: LE 3/38.1-09/87 4 November 2009 <http://folk.uio.no/erikro/WWW/cog/087e.pdf> visited 20.11.14.

Art 17 (1) says "The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that 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. This article corresponds to Art 17 of Warsaw Convention.

12. In Warsaw Convention 1929 such liability is limited to 125,000 francs per passenger.
13. Art 26 says "Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void but the nullity of any of such provision does not involve the nullity of the whole contract which shall remain subject to the provisions of this Convention. This Article corresponds to art. 23 of Warsaw Convention.
14. Art. 21 (2) says," The carrier shall not be liable for damages arising under paragraph 1 of article 17 to the extent that they exceed for each passenger 1 00 000 special Drawing Rights if the carrier proves that:
 - (a) Such damage was not due to the negligence or other wrongful act or omission of the carrier

or its servants or agents; or

(b) Such damage was solely due to the negligence or other wrongful act or omission of a third party.

15. Article 28 says, "In the case of aircraft accidents resulting in death or injury of passengers, the carrier shall, if required by its national laws, make advance payments without delay to a natural person or persons who are entitled to claim compensation in order to meet the immediate economic needs of such persons. Such advance payment shall not constitute a recognition of liability and may be offset against any amount subsequently paid as damages by the carrier.
16. Article 33 (2) says, "In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this article, or in the territory of a State Party in which, at the time of accident, the passenger has his or her principle 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.
17. In India Carriage by Air Act 1972 has been amended accordingly in 2009 to include the enhanced limits provided in the convention. Many countries like EU, USA, Australia etc. provides for even higher liability limits. Section 31(1A) of Civil Aviation (Carrier's Liability) Act 1959 provides the limit of 260,000 SDR for each passenger.(as amended by Aviation Legislation Amendment (Liability and Insurance) Act 2012)<http://www.comlaw.gov.au/Details/C2013C00130> visited 18.11.14
18. Article 19
19. The limit is revised from original 4,150 SDR w.e.f. 30.12.2009. ICAO ,Ref.: LE 3/38.1-09/87 4 November 2009 <http://folk.uio.no/erikro/WWW/cog/087e.pdf> visited 20.11.14.
20. Article 22 (1)
21. The limit is revised from original 1000 SDR w.e.f. 30.12.2009. ICAO ,Ref.: LE 3/38.1-09/87 4 November 2009 <http://folk.uio.no/erikro/WWW/cog/087e.pdf> visited 20.11.14.
22. Article 22 (2)
23. Article 22 (5)
24. Article 17 (2)
25. Article 22, Warsaw Convention 1929. The later instruments of Warsaw System improved the liability limits for passengers and baggage but different countries ratified different instruments which resulted in a complex network of liability.
26. Convention on Damage Caused by Foreign Aircraft to Third Parties 1952
27. Previous efforts like Rome Convention 1933 relating to damage caused to third party and Brussels Protocol 1938 failed drastically.
28. Lebanon is the latest to join on 27.02.2007. Initially Australia, Canada and Nigeria were party to the Rome Convention but later they denounced the same in 2000, 1976 and 2002 respectively. http://www.icao.int/secretariat/legal/List%20of%20Parties/Rome1952_EN.pdf. After passing Damage by Aircraft Act 1999 Australia's reason for denouncing the convention was its inadequate liability. Damage by Aircraft Bill 1999 , Explanatory Memorandum , Outline, Para 2-3 <http://>

www.austlii.edu.au/au/legis/cth/bill_em/dbab1999149/memo1.html visited 21.11.2014

29. 'Convention on Compensation for Damage to Third Parties Resulting from Acts of Unlawful Interference Involving Aircraft' (ICAO doc.9920) http://www.icao.int/Meetings/wrdss2012/Documents/9920_mu.pdf and 'Convention on Compensation for Damage caused by Aircraft to Third Parties' (ICAO doc. 9919) http://www.icao.int/Meetings/wrdss2012/Documents/9919_mu.pdf These two drafts were adopted in Montreal, Canada on 2 May 2009. See also http://www.icao.int/secretariat/PostalHistory/the_rome_convention_and_its_modernization.htm visited 21.11.14
30. Art. 4,
31. Article 20 provides for exoneration. It says, 'If the operator or the International Fund proves that the damage was caused or contributed to, by an act or omission of the claimant or the person from whom he or she derives his or her rights, done with intent or recklessly and with knowledge that damage would probably result, the operator or the International Fund shall be wholly or partly exonerated from its liability to that claimant to the extent that such act or omission caused or contributed to that damage.' 'Art 3 (2) says, 'There shall be no right to compensation under this Convention if the damage is not a direct consequence of the event giving rise thereto.' Damage caused by nuclear incident also does not create liability for compensation under art. 3 (6).
32. Article 3(3).
33. Article 3(3).
34. Article 3(4).
35. Article 3(5). Environmental damage shall be compensable, in so far as such compensation is provided for under the law of the State Party in the territory of which the damage occurred.
36. Article 10.
37. Article 4.
38. Amended by Aviation Legislation Amendment (Liability and Insurance) Act 2012 <http://www.comlaw.gov.au/Details/C2013C00130> visited 18.11.14
39. Section 10 DBA Act 1999 Amended by Aviation Legislation Amendment (Liability and Insurance) Act 2012 <http://www.comlaw.gov.au/Details/C2013C00130> visited 18.11.14
40. Section 11 *ibid*.
41. Section 10(1A) of DBA Act 1999 provides for liability in case of mental injury also.
42. *Mid-term Evaluation of regulation 785/2004 on insurance requirements of air carriers and air craft operators*. Final Report, July 2012. Page 30, Para 3.70, ec.europa.eu/transport/modes/air/.../2012-07-insurance-requirements.pdf last visited Oct. 25 2014
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44. *Mid-term Evaluation of regulation 785/2004 on insurance requirements of air carriers and air craft operators*. Final Report, July 2012. Para 3.34, page 23, ec.europa.eu/transport/modes/air/.../2012-07-insurance-requirements.pdf last visited Oct. 25 2014 This evaluation study is based

on the market analysis interviews of brokers, insurers, reinsurers, government officials, civil aviation authorities airlines and other stakeholders in EU.

45. These basic principles are: insurable interest, utmost good faith and indemnity which further includes subrogation and contribution.
46. In India, New India Assurance Company Ltd is the first company to set up aviation insurance department in 1946. <http://newindia.co.in/Content.aspx?pageid=1>
47. This is apart from the insurance provided to manufacturers, airport operators, service providers etc.
48. 'A Guide to Aviation Insurance' pp 1-2 available at <http://www.oecd.org/daf/fin/insurance/4.DavidGasson-background.pdf> visited 11.11.2014
49. 'The potential exposure to each airline is so huge for an insurer to underwrite the entire risk. Hence a number of insurers will each underwrite a small percentage of that exposure thus keeping the exposure for anyone insurer at acceptable limit.' 'A Guide to Aviation Insurance' page 1, available at <http://www.oecd.org/daf/fin/insurance/4.DavidGasson-background.pdf> visited 11.11.2014
50. Art 50 – Insurance – 'States Parties shall require their carriers to maintain adequate insurance covering their liability under this convention. A carrier may be required by the state, into which it operates, to furnish evidence that it maintains adequate insurance covering its liability under this Convention.
51. As amended by Aviation Legislation Amendment (Liability and Insurance) Act2012 <http://www.comlaw.gov.au/Details/C2013C00130> visited 18.11.14
52. In Australia Civil Aviation Safety Authority (CASA) is responsible to check the safety requirements of air carriers with the help of Civil Aviation Act 1988. CASA is further strengthened by the Aviation Legislation Amendment (International Airline Licences and carriers' Liability Insurance) Act 2008 to require the airlines properly insured.
53. 14CFR205, Title 14,Chapter II, Part 205, 205.6 (b)(1) https://www.faa.gov/about/office_org/headquarters.../CFR205.doc
54. As amended time to time. <http://dgca.nic.in/rules/car-ind.htm>
55. dgca.nic.in/cars.html
56. Article 6 (1), EU Regulation 785/2004, eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:138 visited 1.11.14.
57. Maximum take off weight (MTOW) or maximum take off mass (MTOM) of an aircraft is the maximum weight at which the pilot of the aircraft is allowed to attempt to take off due to structural or other limits. MTOW is the heaviest weight at which the aircraft has been shown to meet all airworthiness requirements applicable to it. It includes total fuel, cargo passengers and empty operating weight. http://en.wikipedia.org/wiki/Maximum_takeoff_weight visited 18.11.14
58. Article 7 (1) EU Regulation 785/2004, eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:138 visited 1.11.14.
59. War risk insurance policies have traditionally contained a seven day notice clause which allows insurers to review and reassess the risk and if necessary to amend or cancel coverage in the event of a radical and adverse change in condition or circumstances. 'Aviation War Risk Insurance:

Background and options for Congress' Congressional Research Service Report, Sep. 05, 2014. www.crs.gov.

60. At the time of MH 17 incident in July 2014 Malaysian Airlines policy MH Insure did not have the cover for acts of war and terrorism. 'Malaysia Airlines MH 17Crash: Basic travel insurance policies do not cover terrorism' The Straits Times, July 25 2014
61. Airlines' lease and loans contracts requires them to war risk insurance especially for hull. So the airlines can not do away with such type of insurance.
62. *Mid-term Evaluation of regulation 785/2004 on insurance requirements of air carriers and air craft operators*. Final Report, July 2012. Para 4.6, page 33, ec.europa.eu/transport/modes/air/.../2012-07-insurance-requirements.pdf last visited Oct. 25 2014
63. Article 8
64. Article 18(2)
65. Article 14(3).
66. Agenda item 35, 'Assistance in the field of Aviation War Risk Insurance', http://www.icao.int/Meetings/AMC/MA/Assembly%2035th%20Session/wp017_en.pdf
67. http://www.icao.int/Meetings/AMC/MA/Assembly%2035th%20Session/wp017_en.pdf
68. <http://www.aicg.co.uk/> visited 23.11.14
69. On September 17, 2001, all aviation insurers issued a seven day notice of cancellation of air transport industry's third party war risk insurance. This action was unprecedented and threatened the shut down of the entire industry. International Air Transport Association (2001), ' www.iata.org/pressroom/documents/impact-9-11-aviation.pdf visited 09.10.2014.
70. 49 US Code Ss. 44301-10. (The amended statute). <http://www.gpo.gov/fdsys/pkg/PLAW108publ176/html/PLAW-108publ176.htm> also available at <http://www.law.cornell.edu/uscode/text/49>
71. 'Aviation War Risk Insurance: Background and Options for Congress' Congressional Research Service Report, September 5, 2014, available at www.crs.gov see also Ss 1201-1204 of the Homeland Security Act 2002 USA http://www.dhs.gov/xlibrary/assets/hr_5005_enr.pdf visited 11.11.2014
72. As per s. 44310 of US Code 49 the insurance and reinsurance provided under the code is not effective after 30 Sep 2014.
73. S. 44302 (a) of US Code 49
74. S. 44302 (b) (1) of US Code 49
75. S. 44303 (b) of US Code 49
76. As per article 2 (1) EU Regulation 785/2004 is applicable to all air carriers and air craft operators flying within, into, out of or over the territory of a member state.
77. Article 4 (1), EU Regulation 785/2004. Passenger and third party insurance by air carriers, though without specifying minimum amount and conditions thereof, was required in EU Regulation on licensing of air carriers. (article 7 of Council regulation (EEC) no. 2407/92 of 23 July 1992). On 13 Dec. 2000 European Civil Aviation Conference adopted a resolution ECAC/25-1 on minimum insurance coverage for passenger and third party liability which was further modified in 2002. eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:138

78. Article 4 (h) of EU Regulation 1008/2008. <http://eurlex.europa.eu/legalcontent/EN/TXT/?uri=CELEX:32008R1008> visited 01.11.2014
79. Art. 8 (5), EU Regulation 785/2004.
80. Art. 8 (6), EU Regulation 785/2004.
81. Art.5 (5) EU Regulation 785/2004.
82. *Mid-term Evaluation of regulation 785/2004 on insurance requirements of air carriers and air craft operators*. Final Report, July 2012. Para 3.14. ec.europa.eu/transport/modes/air/.../2012-07-insurance-requirements.pdf last visited Oct. 25 2014
83. As per Floyd Wisner, a top aviation lawyer, the carrier's liability over MH17 <https://www.linkedin.com/pulse/article/20140804181716-50625862-mh17-potential-1bn-lawsuit-under-the-1999-montreal-convention> visited November 05,2014
84. www.icao.int > ICAO > Newsroom
85. 'Preliminary report: Crash Involving Malaysia Airlines Boeing 777-200 Flight MH17', Page 13, Para 2.4.3. available at www.safetyboard.nl visited 25.11.14.
86. Though the argument does not stand fairly from legal point of view, especially in the light of Preliminary Report, yet it is strong as agencies like FAA had issued warning about that risk zones.
87. 'Uniting Aviation' news release, www.icao.int visited 27.11.14
88. NTSB (National Transport Safety board is an independent federal agency charged by congress with investigating every civil aviation accident in US and accidents related to other means of transport. <http://www.nts.gov/about/index.html> visited 20.11.14
89. Michael P. Huerta, administrator FAA v. Raphael Pirker, NTSB order no. EA-5730 served 18. 11. 2014 <http://www.nts.gov/legal/pirker/5730.pdf> visited 20.11.14
