
**THE 1929 WARSAW CONVENTION ON INTERNATIONAL
CARRIAGE BY AIR; RELEVANCE AND APPLICABILITY TO
KENYA //**

BY MUEMA KITULU

G62/P/7844/04

UNIVERSITY OF NAIROBI LIBRARY
P. O. Box 30197
NAIROBI

**A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT
OF THE REQUIREMENTS OF THE MASTER OF LAWS
DEGREE OF THE UNIVERSITY OF NAIROBI**

NAIROBI

NOVEMBER

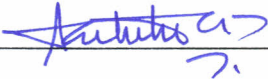
2005

This research paper is dedicated to my late father
Gideon Kitulu, a honest and God fearing man.

1924- 1983

DECLARATION

I **MUEMA KITULU** do declare that this is my original work and has not been submitted either in part or in whole and is not currently being submitted for a degree in any other University.

Signed 

This Dissertation has been submitted for examination with my approval as a University supervisor.

Signed 
DR. KITHURE KINDIKI (PhD)

Sp
up
And
bless y
Thank you

ACKNOWLEDGEMENT

The work on this dissertation would not have been finalized without the guidance and support of Dr. Kithure Kindiki who kindled in me, interest in Air and Space Law and subsequently served as my supervisor.

However it is to my wife Dr. Jacqueline W. Kitulu that I owe great gratitude for constantly encouraging me to go after my dream of pursuing a post graduate degree in Law.

Many are the weary days during the last one year when the sight of my most able constant distractions: Lee 5 and Mumo 2, would remind me that there was no room for failure in this endeavor. They are still puzzled what at my age I was doing in school. Thank you guys!

To my family and especially my dear mother Loise Kitulu who never tired of praying for me every night... I'll forever be grateful for all the encouragement the entire family gave.

To my in-laws who are still convinced I am made for bigger things, I thank you for being there and for your faith in me.

Special thanks to Joe Okudo my friend, for daring me... I hope I have lived up to the challenge.

And of course to Anna Mutinda for assisting me in typing this project. God bless you!

Thank you all.

TABLE OF CONTENTS

A)	DECLARATION.....	i
B)	ACKNOWLEDGEMENT.....	ii
C)	TABLE OF CONTENTS	iii
D)	ABBREVIATIONS.....	v
E)	TABLE OF CASES.....	vi
F)	TABLE OF STATUTES	vii
G)	TABLE OF INTERNATIONAL INSTRUMENTS	viii

CHAPTER ONE: GENERAL SCOPE OF THE STUDY

1.1	Introduction	1
1.2	Background to the problem.....	8
1.3	Statement of the problem.....	11
1.4	Objective of the study.....	15
1.5	Justification for the study.....	16
1.6	Broad argument.....	17
1.7	Hypothesis.....	19
1.8	Methodology.....	20
1.9	Conceptual Framework	20
1.10	Literature Review.....	23

CHAPTER TWO: A GENERAL OVERVIEW OF THE WARSAW CONVENTION

2.1	A general overview of the Warsaw Convention of 1929.....	31
2.2	International applicability of the Warsaw Convention of 1929.....	34
2.3	Liability under the Warsaw Convention of 1929	37
2.4	International discontent over the Warsaw Liability Limitations	38
2.5	Towards amending the Warsaw Convention of 1929	41
2.6	Amendment of the Warsaw Convention	
	a) The Hague Protocol of 1955	42

b)	The Guadalajara Protocol of 1961	44
c)	The Guatemala Protocol of 1971	44
d)	The Montreal Protocol of 1975	46
e)	The Inter-carrier Agreements	48
2.7	Goods and baggage	51
2.8	The Montreal Convention of 1999.....	56

CHAPTER THREE: RELEVANCE AND APPLICABILITY OF THE WARSAW CONVENTION IN KENYA

3.1	Applicability of International Law in Kenya.....	59
3.2	The Kenyan Carriage by Air Act of 1993.....	65
3.3	Compensation under the Carriage by Air Act of 1993	68
3.4	Enforcement of Liability and Judgements	71
3.5	Conflict in interpretation	75
3.6	Enforcement and Public Policy.....	76
3.7	The Warsaw Convention as the <i>lex specialis</i> in Air Carriage Law.....	77
3.8	Implications of domesticating the Montreal Convention of 1999	80

CHAPTER FOUR: CONCLUDING REMARKS

4.0	Conclusion	85
	Bibliography	89

ABBREVIATIONS

1. EDP.....Electronic Data Processing
2. IATA..... International Air Transport Association
3. IMFInternational Monetary Fund
4. ICAOInternational Civil Aviation Organization
5. IIAIATA Inter-Carrier Agreement on Passenger Liability
6. MC.....Convention for the Unification of Certain Rules for
International Carriage by Air signed at Montreal on
28th May 1999 [The Montreal Convention 1999]
7. MIA IATA Inter-Carrier Agreement 1996
8. SDR Special Drawing Rights
9. US..... United States of America (A.K.A. USA)
10. UK United Kingdom
11. WC Convention for the Unification of Certain Relating
to International Carriage by Air signed at Warsaw
on 12th October 1929 [The Warsaw Convention
1929]
12. WB World Bank
13. ECU..... Euros

TABLE OF CASES

1. Consort Saoni –vs- Support da Paris; (1976)RFDA 394
2. Coccia –vs- THY; [1985] Air Law Vol X pp.297-305
3. De Marines –vs- KLM Dutch Airlines; US D/C East DIV (1977) Vol 14 pp. 18, 212.
4. EL-AL Israel Airlines –vs- Tseng; US (1999) WL 7729, 1195 CT 662.
5. Franklin Mint –vs- TWA; US, C.A 28/9/829 (Annals of Air and Space Law Vol. VII (1982) pp. 601)
6. Goddard –vs- Gray (1870) LR 6 QB139
7. Hussert –vs- Swiss Air; US Dist. Court, (1977) AVI, Vol.14 p182
8. Lonrho –vs- E CGD (1986) 4 ALL ER 673,688
9. Milone –vs- Washington Metro Area Transit Authority; F. 3d 229, 231, US D/C (Cir. 1996)
10. Maclaine Watson –vs- Department of Trade and Industry [1989] 3 ALL ER 523,531
11. Philippines –vs- Imperial Airways; (1939) US AVR 63
12. Price –vs- British Airways; US D/C NY. (1992) 23 AVI, 18,465
13. Ross –vs- PAN AM (1949) US.R.168
14. Sandhu –vs- British Airways [1997] ALL ER 193
15. Okunda –vs- Republic (1970) EA 453
16. East African Community –vs- Republic (1970) EA 457

TABLE OF STATUTES

1. The Constitution of Kenya
2. The Carriage by Air Act (No. 2 of 1993)
3. The Foreign Judgments (Reciprocal Enforcement) Act (Cap 43)
4. The Fatal Accidents Act (Cap 32)
5. The Law Reform Act (Cap 26)

TABLE OF INTERNATIONAL INSTRUMENTS

1. Convention on International Civil Aviation signed at Chicago on 7th December 1944 (The Chicago Convention 1944)
2. European Union Council Regulations; 2027/97
3. Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, signed in Guadalajara, on 18th September 1961 (Guadalajara Protocol 1961)
4. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12th October 1929, as Amended by the Protocol done at The Hague on 28th September 1955, signed at Guatemala City on 8th March 1971 (Guatemala City Protocol 1971)
5. Additional Protocol No. 1 to Amend the Convention for the Unification for Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12th October 1929, signed at Montreal on 25th September 1975 (Additional Protocol 1)
6. Additional Protocol No. 2 to Amend the Convention for the Unification for Certain Rules Relating to International Carriage by Air, signed at The Hague on 28th September 1955, signed at Montreal on 25th September 1975 (Additional Protocol 2)
7. Additional Protocol No. 3 to Amend the Convention for the Unification for Certain Rules Relating to International Carriage by Air, signed at The Hague on 28th September 1955 and at Guatemala City on 8th March 1971 signed at Montreal on 25th September 1975 (Additional Protocol 3)
8. Additional Protocol No. 4 to Amend the Convention for the Unification for Certain Rules Relating to International Carriage by Air,

signed at The Hague on 28th September 1955, signed at Montreal on 25th September 1975 (Additional Protocol 4)

9. Vienna Convention on the Law of Treaties
10. Warsaw Convention (1929) Convention for the Unification of Certain Relating to International Carriage by Air signed at Warsaw on 12th October 1929 [The Warsaw Convention 1929]
11. Warsaw Convention (1929) Convention for the Unification of Certain Relating to International Carriage by Air signed at Warsaw on 12th October 1929 as amended at the Hague Protocol (The Hague Protocol 1955)
12. Convention for the Unification of Certain Rules for International Carriage by Air signed at Montreal on 28th May 1999 [The Montreal Convention 1999]

1.1 INTRODUCTION

This study is intended to examine the applicability of the Warsaw Convention (1929) to the conduct of civil aviation within developing countries but with specific reference to the Republic of Kenya. Of particular concern is the domestic normative regime that regulates carrier liability with respect to injury, wounding or death of passengers who are engaged in international travel or the loss, delay, damage or destruction of baggage and goods within international transportation contracts.

There is urgent need to educate air travelers about the general conditions applicable to international carriage by air. This will ensure that many members of the public are aware of their rights under the Warsaw Convention with specific reference to the Warsaw Convention's role in regulating the conditions under which a passenger who is injured, wounded or killed during international air travel can be compensated.

The Warsaw Convention of 1929 was therefore an attempt at unifying different air carriage laws especially on the issue of air carriers' liability for damage arising out of loss, delay to goods and baggage as well as their liability for accidents that may lead to injury, wounding or death of passengers while on board aircrafts. This was necessitated by the divergent laws of different countries involved in international carriage of passengers and goods.¹

The Warsaw Convention was therefore intended to address itself specifically to international carriage of baggage, cargo and passengers. In that regard it became a universal criteria and benchmark for determining

¹ The Warsaw Convention of 1929 had by 30th June 2000 been ratified by 149 State parties. It entered into force on the 13th day of February 1933.

compensation for damages arising out of accidents, loss of goods and baggage or delay to goods and passengers.

The Warsaw Convention was developed at the infancy of air travel, indeed just two years after the first successful trans-Atlantic solo flight. It is noteworthy at the time the Warsaw Convention was agreed, most airlines, where any existed, with the exception of the United States of America, were Government owned. It was therefore in the interest of those Governments to create an instrument that would provide protection for the nascent industry as well as for their own individual interests. This was effectively done by limiting liability of the carriers in the event of an accident. It is also noteworthy that at that time air transport business was not considered safe and insurance cover for air transport was not readily available.²

The Warsaw Convention of 1929 has been amended severally. These amendments have been necessitated by technological advancement in air travel covering the introduction of pressurized cabins, through electronic ticketing, automated baggage handling and currently to the digital electronic information age. Other factors include transnational economic activities and aviation policies particularly Americas disenchantment with any system of law that did not agree with their accident victim compensation principles within their domestic law. All these developments have necessitated fundamental changes in the focus of the Convention.

Globalization of the international economy, regional integration and the advent of regional and national currencies with stability to rival gold and the French Franc, the rapid growth of insurance industry, the tremendous

²Michael Milde;- Liability in International Carriage by air; the New Montreal Convention: UNIF L.Rev 1999-4 837).

improvement in safety in air travel, has made the usefulness of the liability limitation clauses in the Warsaw Convention questionable.

Since 1929 there has been several amendments to the convention namely:-

- i) The Hague Protocol 1955
- ii) Guadalajara Protocol - 1961³
- iii) Guatemala Protocol - 1971⁴
- iv) Montreal Protocols 1-4 - 1975⁵
- v) And finally, Montreal Convention-1999

The rapid expansion of the aviation industry has therefore necessitated corresponding evolution of the international law regarding air carriers' obligations to their passengers, consignors and consignees and vice versa. Since its inception, the Warsaw Convention has received wide acceptance with many countries ratifying it as stated before.

The Warsaw Convention only applies in the following circumstances:-

- (1) where the transport is international,
- (2) where the transportation of goods, baggage and passengers is for a reward and
- (3) where the carriage performed by the carrier, is gratuitous.⁶

³ Intended to unify rules relating to International Carriage by air performed by persons other than the contracting carrier. Since it dealt with a different issue, it became a Supplementary Convention. (See Thomas Wharleel;- The Warsaw Convention: The Montreal Convention, Air and Space Law Journal Vol. XXV No. 1 of 2000 page 12 - 25).

⁴ It was meant as an amendment to the Warsaw Convention but it was never ratified by the intended member states and it therefore never came into force. It was intended to shift liability principle from fault to risk so that even if the carrier was not at fault he would still be held liable. It also sought to increase liability limit to 100,000US\$. (Thomas Wharleel *ibid*).

⁵ Comprise of four separate protocols adopted by a diplomatic conference. Protocol 1. Allows payment made within the liability limits originally set by Warsaw Convention calculable in terms of Special drawing rights (SDR's) as defined by IMF. Protocol 2 Replaces the limits set out in the Hague protocol with limits expressed in SDR's. Protocol 3 Also deals similarly with limits specified in the Guatemala Protocol, Protocol 4 changes for the 1st time, since the Hague Protocol, the liability rules relating to goods and also introduces SDR as the unit for compensation. (Thomas Wharleel *ibid*).

⁶ Article 1 Warsaw Convention.

The Warsaw Convention like all other treaties is open to all states wishing to ratify it. However a US court has held that the Warsaw Convention covered even non member states.⁷

In an attempt to solder the cracks that were being created by the very many amendments to the Warsaw Convention above mentioned, a fresh move at unifying all divergent rules agreements, protocols and conventions and conflicting court decisions was made in May 1999 at Montreal. This became the Montreal Convention of 1999. It set out to unify the Warsaw Convention, the 4 protocols as well as the supplementary conventions.

In doing so, while adopting largely the original Warsaw Convention provisions, the Montreal Convention proceeded to increase the limits of carrier liability. This has been done to balance the interest of the air carriers and those of the passengers. Indeed the mood of the carriers as epitomized in the IATA inter-carrier agreement of 1944 were incorporated to recognize the carriers wish to waive liability limitation which was stifling air carrier business.

The effect of these changes are a more flexible legal regime that gives air carriers room to increase liability limitations vide independent contracts with their passengers. Under the Montreal Convention, 1999, the air carriers could also waive the limited liability clause and in return passengers would accept compensation of up to 100,000 Special Drawing Rights (SDR)

The following hypothetical case illustrates the legal labyrinth that claimants would have to go through to collect compensation in a multi-state litigation involving application of the Warsaw system:

⁷ Philippines –vs- Imperial Airways (1939) USAVR 63.

Supposing a plane carrying a group of Germans, an Australian, an American and a French crew went down. Firstly the crew would not be covered because the Warsaw Convention applies only to international carriage of persons, baggage or cargo performed by the air carrier for reward or where the carriage is gratuitous. Naturally the aircraft crew would not fall within this category.

Supposing also that this was a scheduled flight between France and the US but that the aircraft was under charter to a German operator. The place of departure therefore being an airport in France and the point of destination, at a port in the U.S., between France and US the applicable convention would be the Warsaw system because the US has not ratified the Guadalajara Protocol or any amending protocol.

Under Article 28 of the Warsaw Convention the jurisdictions from which the passengers would seek help would be:-

- i) The territory of one of the High contracting parties.
- ii) Any court where the carrier is ordinarily resident.
- iii) Where the carrier has his principal place of business.
- iv) Or where the air carrier maintains an agency through which the ticket was purchased.

US Courts with their jury system would normally grant larger awards if the tickets were purchased at their home countries, then the claimants could lodge their claims in their national courts.

Under Article 28 of the Warsaw Convention, the passengers relatives could bring an action in several different locations. Since the German tour operator was the carrier with whom the passengers entered into contract

of carriage, the convention would allow an action to be brought in a German Court. Under Article 22 the maximum liability per passenger would be 125,000 Francs Poincaré which under German law is 12,666 Euros (approx. A\$20,200). To recover more, the relatives of the passenger would need to prove that the German tour operator, through its subcontractor, Air France, had committed willful misconduct.

As the USA was the destination, the passengers relatives could also bring an action in a US Court. Similarly, liability would be limited to 125,000 francs Poincaré, which under US practice would be US\$10,000 (Approx. A\$19,200). However, carriers that operate to the US are required to set a higher limit in their contracts of US\$75,000 (approx. A\$144,200) or US\$58,000 (approx. A\$111,500) in legal systems which have separated awards for legal costs.

Nevertheless, carriers that have entered into the 1995-96 IATA Inter-carrier Agreements, such as Air France, have agreed to a higher limit of 100,000 SDRs (approx. A\$ 242,000). Additionally carriers agree not to argue any defences under Article 20 of the Warsaw Convention. The German tour operator would not, however, be a party to these agreements. So, unless the tour operator had similarly waived the liability limit in its contracts with the passengers, these agreements would not benefit the victims families in this instance. As in Germany, the relatives of the passengers would need to prove willful misconduct to recover greater damages.

US Courts, faced with the original low limits of liability, have tended to be more willing to explore the bounds of willful misconduct, so the relatives or legal representatives may be encouraged to pursue an action in a US Court. Also US Courts allow juries to hear civil cases and it is generally accepted that juries are more willing to award higher damages.

Finally, the passengers relatives could bring an action in the country in which the passengers purchased their tickets. If we assume the passengers purchased their tickets in the country of their nationality, their relatives could bring an action in Austria or Denmark, although this would depend on whether the German tour operator had a presence in those countries. If this were the case, the relatives would have the convenience of bringing an action in their home courts.

France, Germany, Denmark and Austria, as members of the European Union, are subject to EC Regulations No. 2027/1997. This regulation applies to all European air carriers, including airlines operating charter flights. This regulation imposes unlimited liability on air carriers and requires them not to argue any defences up to an amount of 100,000 SDR (approx. A\$242,000). It also requires the air carrier to make an advance payment to the passengers relatives of 15,000 SDR (approx. A\$36,300). Air France would be liable to the families of the passengers under this regulation, despite the silence of the Warsaw Convention on the liability of a charter airline.⁸

If there had been a Kenyan on the flight, that persons rights would depend on where he or she bought his or her ticket. If the package was purchased in Kenya through an agent, that persons relatives would probably not be able to bring an action in Kenya since the German group does not do business here. Instead they would have to sue in German or US Courts. However, if the Concorde had been on a scheduled flight and if the ticket was purchased in Kenya as part of a round the world fare then relatives could bring an action under the Carriage by Air Act of 1993. Kenya is a party to the Warsaw Convention as amended by the Hague Protocol, so this regime would apply. The Kenyan court decision would interpret the liability limit applied to the market price of gold formula. Under this method

⁸ Reform of Carrier Liability; The Montreal Convention discussion paper. www.montrealconvention.org.

the maximum amount payable would be approximately Ksh.13,704,460.00, unless the relatives could prove the carrier was reckless. In comparison, a carrier applying the Montreal Convention would face a limit of 260,000 SDRs (approx Ksh. 35,631,596.00).

In summary, it can be seen that with the various amending Protocols and other instruments, there is considerable diversity in the applicable law. It should be noted that this example is relatively straight-forward. A more common scenario would involve a large wide bodied jet carrying hundreds of passengers traveling under tickets issued by a number of code share partners, with a multitude of places of departure and destinations. New inventions are likely to result in planes that can carry 600 or more passengers!

In comparison, if the new Montreal Convention were in force and governed carriage, the relatives of the passengers would face a uniform system. They would not need to consider differing liability limits as parties would have the same two tier system of 100,000 SDRs (Approximately Ksh. 13,704,460.00) without fault and unlimited fault liability beyond that. They could sue both the tour operator, as charterer, and Air France, as the actual carrier. They could choose to bring their action in the passengers home state, and if they wanted to argue the carrier was negligent, they could bring that action in the forum where it was easiest to present the evidence.

1.2 BACKGROUND OF THE PROBLEM

Kenya has ratified the Warsaw Convention as amended by the Hague Protocol in 1955. Indeed, Kenya has domesticated the Convention by the promulgation of The Carriage by Air Act (Act No. 2 of 1993) which, in its long title, defines itself as:

An act of parliament to give effect to the convention concerning international carriage by air, known as "The Warsaw Convention as amended by the Hague Protocol 1955" to enable the rules contained in that convention to be applied with or without modification, in other cases and in particular, to non-international carriage by air, and for connected purposes.

The Act adopts and reproduces the entire Warsaw Convention 1929 as amended by the Hague Protocol under the first schedule to the said Act.

The theory of limited liability under the Warsaw Convention is essentially a trade off between the passenger and the air carrier, under which arrangement, in exchange for a permanent presumption of liability on the part of the air carrier, the passenger's maximum compensation for injury, death, loss, damage or delay of baggage was fixed and even local courts before whom such claim is brought can not grant compensation beyond those set limits. This system was seen as likely to cut down length of litigation, reduce claims against the airline industry and enable victims or claimants to benefit from compensation much faster.

As a consequence, Kenya has continued to apply law that is virtually obsolete in other jurisdictions. However more significant is the fact that air claimants who may have the misfortune of attempting to recover compensation within local courts, for injury or for the death of a passenger involved in an international air travel or for the damage, loss, delay, or destruction of cargo and baggage, would end up with compensation far below that they would have benefited from other jurisdictions that have embraced further amendments or the Montreal Convention of 1999 and or proceeded to adopt the provisions as their domestic law.

Of significance to this study therefore, is section 6 of The Carriage by Air Act of 1993 which applies the liability limitation set out under Article 22 of the Warsaw Convention as amended by the Hague Protocol, to claims brought before domestic Courts.

The liability limitation set up by the Hague Protocol has been subsequently amended vide the four additional Montreal protocols popularly known as Montreal Additional Protocol one up to four and by the Montreal Convention of 1999. These Additional Protocols and conventions made significant changes to the Warsaw Convention of 1929 such as:-

1. The introducing of e-ticket and other electronic modes of transactions.
2. The introduction of the concept of vicarious liability so that agents may bind their principal through their own declarations made in the statements on the airway bill i.e with respect to damages the carrier may suffer due to their incorrectness, errors and so on.
3. Liability of carrier is split as between baggage and goods each attracting separate compensation scheme.
4. They adopted new defences for the carrier in liability claims and the carrier can therefore escape liability:-
 - a. On account of inherent defect, poor quality or vice in the goods, or defective packaging where done by consignor.
 - b. Due to an act of war or armed conflict.

- c. Due to and act of public authority in connection with entry, exit or transit of cargo.
5. They also repealed the defence of negligent piloting and replaced it with test of whether all necessary steps were taken to avoid, the accident.
 6. On liability, the Warsaw Convention pegged quantum of compensation on gold and the French Franc. However, the additional protocol introduced and expanded further the concept of Special Drawing Rights (SDR) as defined by the International Monetary Fund (IMF). This concept first appeared in the 1st Additional protocol.
 7. The 4th protocol also allows non-member states of IMF to set their own limitations to liability within their domestic jurisdictions and use domestic law in sanctioning currency conversions during enforcement of awards.
 8. Wilful conduct is defined under Warsaw Convention and expanded under the 4th Additional Protocol Article IX to include a provision for compensation where its proven an act was done with intent to cause damage or was done with the knowledge that damage may occur.

1.3 **STATEMENT OF THE PROBLEM**

While many countries in the world ratified the Warsaw Convention of 1929 and the subsequent amendments and adopted them as their domestic law, Kenya continues to lag behind in approving any of those

amendments. However finally on 28 May 1999 Kenya signed the Montreal Convention of 1999, and proceeded to ratify it on 7 January 2002. Kenya then set the 4th November 2003 as the date of entry into force of the treaty.

However, until the Convention is adopted as local legislation, the only applicable law is the Carriage by Air Act that incorporates the Hague Convention 1955. Unfortunately the Government is yet to draw and pass a bill to repeal and replace the Carriage by Air Act of 1993 and introduce a fresh one that applies the Montreal Convention provisions to which Kenya is now obligated. Passing such law would boost the civil aviation industry and passengers traveling in locally registered carriers would stand to benefit from a higher compensation scheme. The Warsaw Convention has been an impediment to the advancement of the industry. Indeed the United States of America has severally threatened to withdraw from the Warsaw Convention when it felt that its liability limitation provisions were against its public policy, and/or were likely to stifle growth of its airline industry. It's a pity that the Kenyan Government does not approach this debate with similar vigor.

A low threshold of compensation limitations is therefore seen by some as morally wrong and contrary to public policy. The Government lethargy in ratifying amendments to the 1955 protocol has for a long time denied Kenyan travelers passengers engaged in international air travel the right to higher compensation in the event of an accident or for loss, damage or delay in their cargo.

Conflicting judicial decisions on definitions of terminologies has led to fragmentation of Warsaw Convention.⁹ Although these contradictions

⁹ Rene H. Mankiewicz; The 1971 protocol of Guatemala City to further amend the 1929 Warsaw Convention; *Journal of Air Law and Commerce* (1972) Pg 521.

have been addressed in the subsequent amendments to the convention, Kenya's failure to quickly ratify these subsequent amendments, for a long time exposed would be claimants to the risk of local courts giving out dated interpretation and therefore lead to more contradictions. This is more so in view of changes in definitions such as between "accidents" as defined under Article 17 of the Warsaw Convention as amended at the Hague 1955 and "events" as now defined under Article 17 of the Montreal Convention of 1999.

Article 55 stipulates that the 1999 convention does not oust the Warsaw Convention of 1929. This of course creates problem of uniformity in that the existence of two parallel conventions could lead to contradictions and confusion in their applicability especially where the claimants state is party to one and the air carriers state of registration is party to the other. By failing to embrace this new development, Kenya is therefore at a disadvantage in that where there is a conflict between the Warsaw Convention of 1929 and any subsequent amendment, based on the facts that the parties states are signatory to different conventions, the Warsaw Convention of 1929 would take precedence.

First, there is therefore a problem facing Kenyan Courts as to which to apply: the Warsaw Convention as amended by the Hague Protocol of 1955 and domesticated under the Carriage by Air Act of 1993 or to apply the provisions of the Montreal Convention of 1999 to which Kenya is now bound. Under Article 55 of the Montreal Convention of 1999, the objective of the Convention was to replace the entire Warsaw system. This means therefore that once Kenya ratified the Montreal Convention, it became obligated to put in place legal mechanism to replace the Hague Protocol amending the Warsaw Convention of 1929 with the Montreal Convention 1999.

The Montreal Convention is not meant to usurp the sovereignty of member states. However, Kenya cannot be party to the two Conventions as that would amount to a conflict in law. Therefore, Kenya has an obligation under international law to repeal the existing law and domesticate the Montreal Convention.

One might argue that the decision whether or not to ratify any treaty is first and foremost dictated by public policy and the interest of the state but to apply the public policy principle in order to safeguard domestic law would be against the very spirit of the Montreal Convention that Kenya is now signatory to.

Secondly, there is also the question of recognition and enforcement of foreign judgement in Kenya. Neither the Warsaw Convention of 1929 nor its Hague amendment bears any provision for the enforcement of foreign judgements in the territories of its member states. In spite of the Warsaw Convention being the *lex specialis* of the law on international carriage by air this has been left to the whims of domestic law.

Even assuming the applicable law is still the Warsaw Convention as amended by the Hague Protocol, the failure by the present Carriage by Air Act of 1993, to include a provision for recognition and enforcement of foreign judgements would allow for manipulation of any foreign awards by courts who would refuse to recognize and enforce any awards based on the enhanced limitation clauses contained in the further amendments to the Hague Convention of 1955 on account of being in conflict with domestic law in Kenya. Secondly since its trite law that domestic courts have no jurisdiction to rectify or modify any foreign judgement even if that judgement was arrived at through misinterpretation of domestic (Kenyan)

Law, the hands of Kenyan Courts would be tied by the provisions of the Foreign Judgement (Reciprocal Enforcement) Act Chapter 43, Laws of Kenya which binds domestic Courts not to allow awards in excess of any statutory limitation in force in Kenya.

1.4 OBJECTIVES OF THE STUDY

The objectives of the study are to investigate and determine:-

- a) Whether Kenya having ratified the Warsaw Convention and proceeded to domesticate it under the Carriage by Air Act, the current legal provisions meet the challenges faced by the Kenyan civil aviation industry in the area of international carriage of goods and passengers by air.
- b) What are the legal implications of the subsequent ratification of the Montreal Convention 1999 by Kenya, and the corresponding failure to incorporate this convention under municipal law. In that regard, to examine the effect of the apparent conflict between the statutory provisions of the Carriage by Air Act aforementioned and the Provisions of the Montreal Convention 1999 and determine the applicability of the Montreal Convention in Kenya in spite of lack of a local municipal law to incorporate it within jurisdiction of Kenyan Courts.
- c) Whether the limitations created by the Warsaw Convention and adopted by the Carriage by Air Act under Section 6 thereof, have any relevance in view of the amendments to the

Warsaw Convention vide the Additional Protocols and/or the Montreal Convention 1999 to which Kenya is now signatory.

- d) Whether in view of emerging legal developments, globalization, technological advancement and transnational markets and operations there is any justification for amending repealing or substituting the Carriage by Air Act of Kenya (Act No. 2 of 1993.)

1.5 JUSTIFICATION FOR THE STUDY

The study therefore seeks to examine whether the Warsaw Convention which was adopted locally under the Carriage by Air Act has any legal implication to the development of civil aviation industry in Kenya. As Kenya continues to grow as an internationally recognized hub for regional and international air traffic, the implication of the Carriage by Air Act (1993) to international contracts of carriage by air and especially the enforceability of foreign judgement under Kenyan law can not be gainsaid. There is therefore necessity to examine if available law covers sufficiently the legal issues that surround international air transportation with reference to air carriers liability for accidents occurring during international carriage by air.

The rapid expansion of the aviation industry, technological advancement achieved in the last few decades have necessitated rapid evolution of the international air carriage laws.

Even though Kenya has adopted and legislated into local law the Warsaw Convention as amended by the Hague Protocol of 1955 it is necessary to examine the effect of the conflict created by the ratification of the 1999

Montreal Convention by Kenya and establish which of the two Convention is legally applicable in Kenya. It is also necessary to examine if the present law is responsive to or able to adequately cater for the needs of international travelers litigating in local courts.

The fact that in the last forty four years, several amendments have been made to the Warsaw Convention is evidence that the current statute is in urgent need for overhaul, repeal and/or substitution with a modern one.

Of great concern is firstly the provisions of Section 6 of the Carriage by Air Act which apply article 22 of the Convention and therefore sets the liability limitations as 250,000 Francs for injury or death of passengers while for baggage and cargo the limitation is set at 250 Francs per Kilogram. This is far below the 1000 special drawing rights set by the Montreal Convention of 1999 under its Article 22. Secondly the French Franc was not only replaced by the Special Drawing Rights (SDR) in later conventions but the French Franc itself was withdrawn from circulation after France became a member of the European Union and adopted the Euro as its currency. It is therefore difficult to determine what value to give an obsolete currency.

1.6 BROAD ARGUMENT

When Kenya ratified the Warsaw Convention as amended by the Hague Protocol, it must have recognized that for the country to become a major player in the international air transport industry it had to adopt modern international legal norms. However since the domestication of the Warsaw Convention as amended by the Hague Protocol, no steps have been made to keep the country abreast with the rapidly changing legal principles especially as stated in amendments to the Warsaw Convention in the last forty four years until 1999 when Kenya ratified the Montreal

Convention. However, Kenya has still not made any efforts to repeal the Carriage by Air Act and replace it with one that applies the Montreal Convention of 1999.

Naturally this is of great concern to all stakeholders. Kenya has therefore failed in its obligation to the citizens and the international community who are using air transport to travel or to transport goods into or out of Kenya by denying them the benefits of the provisions of all the amendments to the Warsaw Convention since 1955. Kenya's conduct is therefore in breach of the law of treaties and international law in general.

In the event of a calamity, claimants would end up with compensation far below that would be due in other jurisdictions that have ratified the additional protocols and especially the Montreal Convention of 1999. This scenario would present a complication should such a matter end up before local courts as their hands would be tied to the exclusive statutory provisions of the Carriage by Air Act, 1993. Secondly local courts stand to step into the quick sand of conflicting and contradictory legal interpretation of the Warsaw Convention of 1929 and as amended in 1955. Consequently local courts would be denied four decades of negotiated interpretations or jurisprudence.

As the entire world rapidly scrambles to embrace automation and E-commerce, Kenya still lags behind. The fact that Kenya has not incorporated the Montreal Convention would lead to questions whether for example transactions done through other modes like e-ticketing and or notifications through e-mails that are authorized by the additional protocols or the Montreal Convention would be legally recognized under Kenyan legal system. As a consequence such failure to adopt modernity would also pose a legal problem for persons choosing to litigate in Kenyan Courts

1.7 HYPOTHESIS

There is urgent need for Kenya to incorporate the Montreal Convention 1999 through a suitable legislation.

This study therefore proceeds on the hypothesis that:-

- 1) There are direct legal and economic benefits in incorporating the Montreal Convention of 1999 and that the contradictions and conflicts under the current legal regime would be cured by adopting a modern statute.
- 2) The current Carriage by Air Act of 1993 established under Legal Notice number 2 of 1993 is obsolete, incomplete and of little legal benefit in view of the further amendments to the Warsaw Convention or provisions contained in the new Montreal Convention of 1999.
- 3) It is morally wrong and against public policy for Kenya to apply the 1955 Convention.
- 4) The failure to incorporate the Montreal Convention into a local legislation denies Kenya and international carriers based or flying into Kenya as well as travelers, all the rights conferred by the Montreal Convention which therefore they can not enjoy within Kenya or through its Court system.

1.8 METHODOLOGY

The data for the research was collected mainly through library research as well as from internet searches. Due to financial and time constraints it was impossible to conduct interviews with all key players. However the researcher has reviewed material available at the University of Nairobi, Law Campus library as well as at the ICAO regional office at the UNEP, Gigiri Nairobi. The department of air transport at the Ministry of Transport and Communication, which is charged with the duty of negotiating treaties on into air transport did not offer insight into the position of Kenya in respect of the current conventions. Similarly access to Kenya Airways material on settlement of claims under the IATA or Warsaw Convention was not allowed. However, the researcher had the advantage of useful material from the Faculty of Law, Institute of Air and Space Law at the McGill University, Canada.

1.9 CONCEPTUAL FRAMEWORK

The Kelsian argument that law constitutes of norms arranged in a hierarchy and that each norm owes its validity to a higher norm and so on until one reaches the ground norm or the revolution constitution seems far fetched when employed to international law. Kelsen argues that the municipal law owes its existence to the international law merely because states are obligated by international customs to behave in certain ways on account of set moral standards which does not sound convincing.¹⁰

¹⁰ MDA Freeman; Introduction to Jurisprudence 7th Edition. Page 288 -9 (Article 10. Kelsen: General Theory of law and state.)

Admittedly local norms within a definite state carry the authority of sanctions to individual but international law relates to states, so how can individuals become subjects of international law.

In my view there is a clear cut division between international law and municipal law and even though international law is observed by states for the common good, it can not supplant national law and it cannot therefore be superior to municipal law.

This poses important questions that beg answers:- when the two branches of law clash which is superior to the other? Do municipal courts have a duty to apply international law?

In order to answer these questions one has to examine the clash between the dualist approach and the monist approach to the issue. Both agree that international and municipal law operate simultaneously. Simply put, to the dualist there is distinction between international law and municipal law in that international law regulates relations between states¹¹ while municipal law regulates relationship between citizens or between citizens and the state. It is the opinion of the dualist that neither of these two legal orders can control or alter the other. Where however international law is applied by domestic courts, it is only because that international law has been adopted into municipal law.

The monists on the other hand argue that international law is superior to municipal law. They even argue that the individual is subject of international law. The monist approach flies against the principle of state sovereignty as municipal law is relegated to mere footnotes in society.

¹¹ Introduction to Jurisprudence M.D.A Freeman; 7th Edition Page 253 (Province of Jurisprudence determined by J. Austin).

Following the Kelsenian theory of the hierarchy of norms it would appear that monists suggest their international law is higher in hierarchy to the national laws. They argue that national law draws its authenticity from the international law.

However increasingly a third school of thought known as solidarism which has developed as a way out of the dichotomy of the monists and dualism theories. These scholars demonstrate that in reality international and national courts or tribunals do not behave as opined by the dualist or monists. The middle ground thinkers do not see the two systems as being in conflict but rather as masters of their own, in their different spheres. In this case states have obligations created by international law. These obligations do not invalidate national law. However, on the other hand a state can not plead provisions of its international law to avoid its obligations under international law.¹²

There is therefore an agreement that the states form one unit that is interdependent. Consequently, there is need for one legal unit to harmonize those relationships. This principle is premised on the importance of harmonious relationship between states. That the unity of states promotes common good for mankind and therefore leads to prosperity.

The position obtaining in Kenya therefore is the dualist approach. Based on the findings of both the High Court and the East African Court of Appeal in the Okunda cases, international conventions that have not been adopted into Kenyan municipal law, can not be applied by domestic courts. This means therefore, that even though Kenya is signatory to the Montreal Convention and even though it is also signatory to the Vienna Convention

¹² Vienna Convention on the Law of Treaties Article 27.

on the law of Treaties, the obtaining legal position will frustrate the applicability of the Montreal Convention of 1999.

This situation in my view will defeat the purpose of the convention and will also continue to frustrate applicability of other useful conventions whose benefits are denied to the general public due to the lethargy of parliamentary procedure in legislating or due to executive red tape.

There is therefore a need to amend the Kenyan constitution to allow for direct application of international law in Kenyan municipal courts inline with the solidarism approach.

1.10 LITERATURE REVIEW

Nothing has previously been written about the Kenyan experience with respect to the application of the Warsaw Convention rules locally. In that regard the writer was constrained to rely on material and experiences in foreign jurisdiction merely for purposes of expounding or illustrating applicable legal principles.

The research intended to look at local case law touching on the issues arising from application of the Warsaw Convention in Kenya. Unfortunately, no such litigation seems to have been experienced in Kenya, based on this area of Law. It was therefore, necessary to review case law available in other jurisdictions. The research therefore mainly reviewed the relevant provisions of the Carriage by Air Act of 1993.

Most available literature traces the history of the liability limitation clause from the Warsaw Convention of 1929 through to the Hague Protocol 1955, the Guadalajara Convention (1961) the Montreal Protocol 1966 Guatemala

Protocol of 1971, up to the Montreal Convention of 1999. It looks at the evolution of the concept of fault liability on the part of the carrier and the various defences created by the various protocols and the manner in which various courts especially in the U.S. have interpreted what constitutes an international carriage, the exceptions to applicability of the Convention, whether indeed it only applies to signatory states¹³ and what kind of aircraft it applies to.¹⁴ Most writers only examine the definition of a passenger for purposes of the Convention¹⁵ and the definitions of the ticket and airway bill as well the manner in which defects in them can lead to a waiver of the limitation clause on the part of the carrier.

Waigard in: "Accident, exclusivity and passenger Disturbances under the Warsaw Convention",¹⁶ looks at the applicability of the Warsaw Convention in the event of injuries resultant from passenger disturbances during international air travel. In this article he demonstrates the contradictory findings of various courts within the US. Of curious concern is the issue of definition of an "accident" as used in the Convention.¹⁷ Consequently contradictions abound such as where a passenger is attacked by a drunk fellow passenger and courts have held that is not an accident under Warsaw Convention¹⁸ ,but a hijacking was considered an accident¹⁹. He also analyses the four courts before whom any claim under the convention can be entertained²⁰ . The writer argues that the Japanese saw the

¹³ *Philippines –vs- imperial airways* 1939 USA VR 63).

¹⁴ "any machine that can derive support in the atmosphere from the reason of the air" Chicago Convention Article – NBICAO has added to definition other than reaction against earth surface to preclude lower crafts from application of the convention.

¹⁵ [a person carried by an aircraft by virtue of a contract of carriage].

¹⁶ *Private International Air Law*, Vol 1 McGill Faculty of Law Institute of Air and Space Law, 2001 (Prof. Dr. Michael Milde and Hodjat Khadjavi LLM).

¹⁷ Consequently using case law "an accident has been defined as an unexpected and sudden event that takes place without foresight" It follows the occurrence on board must be unusual or unexpected if it is to be regarded as an accident.

¹⁸ *Price –vs- British Airways* US DIST Court NY (1992) 23 *Avi*, 18, 465, *Air & Space Law* Vol XIX (1994) P. 44].

¹⁹ *Hussert –vs- Swiss Air* Dist Court US, 1977 *AVI*, Vol 14 P. 18212].

²⁰ *Ibid* Pg 94.

limitation clauses as retrogressive to the growth of their airline industry. He therefore concludes that in order to encourage growth in that sector provision for carriers to waive their defence for limited liability was provided for in the amendments to the Warsaw Convention.

The author argues that the problems with the Warsaw Convention is the fact that many countries in the world seem convinced that the liability limitation principle has outlived its usefulness. Therefore this has led to the creation of IATA as a private inter-carrier agreement under whose terms airlines undertook to raise the liability limitation provisions made in the Warsaw Convention in order to circumvent the Warsaw Convention. However, since IATA is merely a contractual arrangement, it is not legally binding nor can it become a substitute for the Warsaw Convention.

Pisani in his article "The Warsaw System and public policy within the recognition and enforcement stage of a foreign judgement"²¹ argues that public policy is a defence available to sovereign states and it has led to rejection to enforce many external judgements. He also argues that an external judgement should not be recognized if it would lead to a breach of public policy of the state within which enforcement is sought.

Although Warsaw Convention is the "lex specialis" of international carriage by air, yet it contains no provision for the recognition enforcement of foreign Judgements. This dilemma was further discussed in the case of *Goddard -vs- Gray*²² where the Court held that even where foreign court misinterpreted local law, domestic courts lacked the jurisdiction to alter the findings of the foreign court.

²¹ ZLW 50 Jg 2/2001 at Pg 187.

²² *Goddard -vs- Gray* (1870) LR 6QB 139.

Pisani also argues that several countries have also seen limitation to liability as an affront on citizens constitutional rights and therefore a violation of their rights.

Pisani sees the Warsaw Convention as the *lex specialis*, of the law on carriage by air and therefore where a country is signatory to the original Warsaw Convention while another is signatory to all subsequent protocols and conventions, the Warsaw Convention would still apply as the common legal instrument. Correspondingly in Kenya when a claimant brings a suit in any jurisdiction against a national carrier even if his state is signatory to all subsequent conventions and protocols, the Warsaw Convention as amended by the Hague 1955 would apply.²³ Courts in US have held different interpretation as to whether the Warsaw Convention provides exclusive remedy for passengers. In *EL-AL Israel Airlines –vs- Tseng* US²⁴ the Court held: [the convention]

“... precludes a passenger from maintaining an action for personal injury damages under local law when his claim does not satisfy the conditions for liability under the convention.”

It is therefore clear that the Warsaw Convention is a *jus cogen* rule and therefore subsequent unilateral agreements such as IATA can not replace it²⁵.

Milde in his article “Liability in International Carriage by Air”;²⁶ argues that although the limitation clauses were successful, subsequent attempts to amend them over the years has led to the failure of the Warsaw Convention to Unite all relevant norms as it has become muddled up by those amendments.

²³ Loise Cobbs; Shifting meaning of accident under Article 17 [Air and space law vol XXIV No. 3 of 1999].

²⁴ (1999) WL 7729, 1195 Ct 662.

²⁵ Michael Milde Liability in Int. Carriage by air; UNIF L. Rev 1999-4.

²⁶ UNIF.L.Rev.1999-4.

He also argues that:-

- Airlines can afford elaborate insurance.
- Warsaw Convention cumbersome documentation leads to lengthy litigation.
- The fact Warsaw Convention combines both common law and civil law has led to contradictions in definition of its provisions.
- The developing world (Africa/Asia) argue for maintaining the liability limitations merely on an illusion that to remove it would lead to higher insurance premiums and escalation in ticket cost which is unlikely as there is no evidence it has happened elsewhere.

All of these authors agreed that the Montreal Convention of 1999 was inevitable in order to unify the fragmented Warsaw Convention system.

Shaw in his book: "International Law,"²⁷ analyses in detail the process of treaty making, the applicability of international law within domestic sphere and the dualist and monist theories regarding sovereignty of states *vis-a-vis* international law. Of concern to this research, is his views on the role of municipal courts in applying International Law. He also gives useful legal interpretation of international law principles as they are applied in not only the United Kingdom but also in America (U.S.A), Canada, Japan and other countries. This is relevant especially with regard to the principles applicable in the adoption of international law in various states and it allows for useful comparison with the Kenyan situation. Shaw also delves into the procedure in the creation of treaties and how states become bound by them. This is important in view of Kenya's current predicament, having ratified the Montreal Convention and yet not having incorporated it into Kenyan domestic law.

²⁷ 5th Edition Cambridge University Press 2003.

SECONDARY SOURCES

The Carriage by Air Act of 1993 is the principal domestic legislation dealing with air carrier liability for accidents that may occur while passengers are involved in international air travel or are embarking or disembarking from an aircraft or while on board such aircraft during international travel.

Prior to the enactment of Carriage by Air Act of 1993 legal issues involving carriage by air were covered through English statutes extended and applied to Kenya during the colonial era. These statutes were by virtue of the wording of the long title to the Carriage by Air Act of 1993, adopted as applicable law in Kenya at independence by virtue of the provisions of Section 4 of the independence Constitution.

The Carriage by Air Act of 1993 is therefore the first local legislation passed by the parliament of independent Kenya to address issues of legal relationships between an international carrier and its passengers or consignors and consignees of cargo especially with regard to liability of the international carrier in the event of an accident or loss or damage to cargo and baggage.

The question of who can claim is important in that since the Warsaw Convention does not define who a claimant is, then the domestic law of the seat of the court entertaining the claim becomes applicable.

In the Kenyan case, Section 5 of the carriage by Air Act applies the definitions provided by Section 3 of the Fatal Accidents Act (Cap 32 Laws of Kenya) to determine who can claim compensation. Section 6 of the Carriage by Air Act of 1993 adopts the limitation on liability as provided for

under Article 22 of the Warsaw Convention law as amended by the Hague protocol of 1955. Under this section, the liability granted is inclusive of all manner of claims including where the tortfeasor seeks contribution from another tortfeasor. However the only problem is that the wording of section 6(1)(b) suggests that the liability limitation envisaged covers all claims that can be brought in respect of the accident cumulatively in the name of that claimant. This means, there can be a claim by a dependant of a deceased person as well as by an employer of the deceased may claim to have suffered loss by reason of the death of a passenger (employee) or injury of the claimant, or even a rescuer injured while attempting to rescuer the claimant may also lodge a claim within the same limited amount.²⁸

Section 8 of the Carriage by Air Act of 1993 grants domestic courts in Kenya the discretion to exonerate an air carrier, wholly or partly from any liability arising from an accident where such carrier successfully pleads contributory negligence against another party. This provision is specifically important in reference to situations where statutory provisions (such as Section 6 of the Carriage by Air Act) exist, limiting liability and the Act therefore makes it mandatory that the claimant shall not be awarded an amount in excess of that limit.

The Civil Aviation Act (cap 394 Laws of Kenya) is relevant to this study to the extent that it defines what constitutes "an accident" within international air travel. Section 2(1) of the Act defines an accident as"-

²⁸ Rene H. Mankiewicz; The 1971: Protocol of Guetamala City to Further Amend the 1929 Warsaw Convention:" Journal of Air Law and Commerce Volume XXXVIII-1972 Page 531. "Since the Warsaw Convention does not determine "who are the persons who have the right to bring suit and what are their respective rights" it would follow from the construction of their applicable national law, an employer could claim compensation for damages for the injury to or death of his employee, or likewise a rescuer for damages suffered during rescue, then these claimants must compete with the persons entitled under the Fatal Accidents Acts or similar legislation, for an allocation of the maximum compensation that can be accorded under the amended convention."

...any occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight until such time as all such persons have disembarked, in which:-

- a) any person suffers death or serious injury as a result of being in or upon the aircraft or by direct contract with the aircraft or anything attached thereto; or ..

The definition generally agrees with the one found under Article 17 of the Warsaw Convention as amended by the Hague Protocol of 1955.

The Civil Aviation Act also contains Regulations which cover the manner in which notification of accidents occurring on board aircrafts can be made to the Directorate of Civil Aviation and also defines under Rule 2(2) and 3 of the Civil Aviation (Investigation of Accidents) regulations who can claim and under what circumstances. Under the Air Navigation Regulations which are also part of the Civil Aviation Act, the obligation of the aircraft commander for the safety of his passengers and cargo is also spelt out.

This regulations also criminalizes the conduct of any passengers or other person that may endanger the safety of passengers, cargo or the aircraft. For instance these regulations prohibit any drunk person from boarding any aircraft or from getting drunk while on board an aircraft. Passenger claims for injuries have in some cases arisen from injuries, sustained from drunk passengers on board aircrafts.

CHAPTER TWO

2.1 A GENERAL OVERVIEW OF THE WARSAW CONVENTION (1929)

The Warsaw Convention is an instrument of private international law which establishes a legal regime governing liability for international carriage by air between parties.

At the inception of the Warsaw Convention, its subscribers were intended to be state members who were engaged in air travel and naturally these tended to be the industrialized nations. However, because of the rapid expansion of air travel many states have developed their own set of domestic regulatory norms to govern the liability of the carrier for the injury, wounding or death of a passenger or the destruction, loss or damage to baggage and goods.

The upsurge of air navigation was also attributed to the interest of the developed nations to communicate with or to access their colonies. In fact most air travel at the earlier stages was pre-occupied with connection between the colonial capital and the colonies.

At its nascent stage, air travel was considered very risky adventure and as it developed into a popular mode of public transport, air carriers were worried about the possibility of heavy financial losses in the event of accidents. However, air transport is now predominantly private business and technological advances have ensured safer aircrafts. This has led to development of air transportation as the preferred choice of travel due to its relatively shorter duration of travel and the large distances covered. Most of the problems or risks which were associated with air travel in the 19th and early 20th century have since been overcome. Insurance for air travel is

now affordable and is readily available. Virtually every state in the world hosts an international air carrier constantly interacting with other states and carrying passengers from all over the world. Therefore the importance of uniformity of regulatory rules internationally can not be gain said.

At its inception the Warsaw Convention of 1929 established a uniform regime for all international air carriers liability for any injury, wounding or death of a passenger as a result of an accident in the course of international air travel or the loss, damage, destruction or delay of baggage and cargo also in the course of international air transportation that existed at that time.

Several attempts have been made to amend the Warsaw Convention of 1929 with little success and in most cases very few of the resultant protocols and conventions have received sufficient ratification to bring them to life.

There are three protocols that have amended the Warsaw Convention and that govern liability limitation in air carriage as well. These are:-

- i. The Warsaw Convention as amended by the Hague Protocol of 1955
- ii. The Warsaw Convention as amended by the Montreal protocol one
- iii. The Warsaw Convention as amended by the Hague Protocol as amended by the Montreal Protocol three.

As it will be shown later in this chapter, each of these instruments contains different carrier liability limitations. However, the first relies on a currency that has already been superceded i.e the French Franc.¹ All in all of the

¹ The first applies the French Franc while the latter two apply Special Drawing Rights (SDR) established under the International Monetary Fund (IMF).

actual compensation recoverable varies from country to country because of variations in value of various member state currencies which are used to calculate the conversion rate from gold, francs of the Special Drawing Rights (SDR).

Several countries have domesticated some of the conventions, and consequently forced carriers to enter into agreements with passengers or consignors if they do not wish to be governed by the liability limitation clauses of the Warsaw regime applicable in those countries.²

The problem with that scenario is that these statutory provisions apply to the national carriers as well as to any another carrier operating from or flying into or out of such states. Since the various carriers home state may subscribe to different conventions, the resultant confusion leads to significant variations in the law governing air carriers liability.

What this means is that if passengers from different states traveling in an aircraft are killed in an air accident, vastly different amounts of compensation would be payable depending on the victim's nationality. This problem has been illustrated in the hypothetical case of the concorde crash discussed in chapter one herein above.

Apart from the foregoing, international air carriers subscribe to a host of regional private agreements as well as to the International Air Transport Association (IATA) among other private arrangements. These associations have developed a complex but quite exhaustive set of rules with an intention to supplant the Warsaw Convention.³

² Kenya has domesticated the Hague Convention of 1955 under the Carriage by Air Act of 1993.

³ For example the European Union Council Regulation No. 2027/97 on air carrier liability, Montreal Inter Carrier Agreement (1966) Malta agreement etc.

2.2 INTERNATIONAL APPLICABILITY OF WARSAW CONVENTION (1929)

The Warsaw Convention of 1929 applies to International Carriage by Air⁴ Under Article 2 of the Convention "International Carriage" is defined as any carriage where

...the place of departure and the place of destination, whether or not there be a break in the carriage or a trans-shipment, are situated either within the territories of two High contracting parties or within the territory of a single High contracting party, if there is an agreed stopping place within a territory subject to the Sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention...⁵

The *Ratione Personae* of the Warsaw Convention is any persons who by reason of the existence of a contract of carriage executed between themselves and an air carrier, for reward or gratuitously, are engaged in international travel. Under Article 17 therefore, the air carrier would only be liable for any injury, wounding or death due to an accident while a passenger is embarking or disembarking from the aircraft or while on board the aircraft during international travel.

Similar provisions apply to baggage and cargo⁶ and the carrier would be held liable for the loss, damage or destruction of baggage and cargo if the damage took place during the carriage by air or while the baggage or goods were in the custody of the carrier.

The Warsaw Convention does not define what nature of aircraft is applies to. The only definition of an aircraft for purposes of international air carriage is found in the Chicago Convention of 1944.⁷

⁴ Article 1, Warsaw Convention 1929.

⁵ Article 1, *Ibid.*

⁶ Article 18. *Ibid.*

⁷ Convention on International Civil Aviation, signed at Chicago on 7th December 1944 A.K.A "The Chicago Convention".

The Warsaw Convention makes it mandatory that all passengers traveling in international flight must be supplied with an air ticket which must contain details of place and dates of issue of the ticket, point of departure and destination including any stoppages. The ticket must also state the name and address of the carrier and contain a notice to the effect that the contract of carriage is subject to the provisions of the Warsaw Convention.⁸

The validity of the ticket is not affected by any inaccuracy of information on its face nor is the contract invalidated on account of loss of the ticket.⁹ In those circumstances the convention would still be applicable. However the carrier loses his defence of limited liability where a passenger has not been issued with a ticket or the carrier fails to issue a ticket and an airway bill for baggage and cargo respectively.¹⁰ In fact under the Hague Convention of 1955, which amended the Warsaw Convention of 1929, failure to include the notice of applicability of the Warsaw Convention on both the ticket and/or the airway bill would also deny the carrier of the defence of limited liability.

The Warsaw Convention of 1929 creates four basic conditions for damages to be recoverable against an international air carrier. Firstly, that the claimant ought to have been a passenger in an international flight. Secondly, that the claimant ought to have suffered an accident. Thirdly, the accident should have occurred on board an aircraft or in the course of embarking or disembarking an international flight and fourthly that the claimant must have sustained wounding, or the passenger died as a result of the accident or he sustained other bodily injury.¹¹

⁸ Ross-vs- PAN AM (1949) US.R 168; the Court held that the ticket must be issued to the passenger personally.

⁹ Article 3.2 Warsaw Convention 1929.

¹⁰ Article 4.4 *Ibid.*

¹¹ Article 17 & 18 Warsaw Convention 1929.

The liability of the carrier under the Warsaw Convention is a fault liability with a reversed burden of proof. Under this system the air carrier is held liable for any accident that may occur but in exchange the carriers liability is limited to a figure stipulated under the convention. This system does not prohibit the passenger from taking up extra insurance if he considers the possible compensation under the convention would be too little.

Even though the carriers' liability is almost automatic under the Warsaw Convention, never the less he is afforded defences. Firstly if he can prove that he took all necessary measures to avoid the accident or damage.¹² Secondly that the accident was unavoidable. What would constitute "necessary measures" is however not defined and its definition is therefore left to the discretion of the trial court. The third defence under the Warsaw Convention of 1929, is of no liability for negligent piloting. This defence was however done away by the Hague Protocol. The fourth and final defence under the Warsaw Convention of 1929 is one of contributory negligence. This defence is available if the claimant was in any way responsible for causing the accident.¹³

The courts have however held that a claimant would not succeed also where the cause of injury is as a result of duly unexpected and sudden event that takes place without foresight of the carrier.¹⁴ Such an event would be any occurrence that the air carrier did not with due diligence anticipate.

¹² Article 20.1 *Ibid.*

¹³ Article 21 *Ibid.*

¹⁴ *De Marines -vs- KLM Dutch Airlines* US(DCourt East DIV 1977 Vol 14, Pg 18, 212: a good example of how courts have been developing their own amendment to the convention through their interpretation of the convention.

With regard to loss, damage or destruction of baggage and cargo, the carrier is considered liable at all times and goods are under his control. This continues until delivery of the goods whether in the airport or elsewhere.

The Warsaw Convention makes it mandatory that damages sought are ascertainable with some certainty and must be as a direct result of the accident. However the Warsaw Convention 1929 and its Hague amendment (1955) did not make provision for mental injury as would be associated with shock to passengers if an aircraft loses power while in flight or if it is forced to make emergency landing due to mechanical failure.

2.3 LIABILITY UNDER THE WARSAW CONVENTION

The Warsaw Convention of 1929 set the limit of recoverable compensation for injury, wounding or death of a passenger at 125,000 French Francs. The convention allowed for the carrier to contract with the passenger for a higher limit outside the convention provisions.¹⁵ In the case of baggage or goods, the liability of the carrier was set as 250 Francs per kilogram.¹⁶ However where the consignor has declared a higher value and has paid a supplementary sum if required to do so by the carrier, then the carrier will be obligated to pay no more than that declared value.¹⁷ For loss, damage or destruction of objects checked in but left in the custody of the passenger, the air carrier liability was set at 5000 Francs per passenger.

The French Franc under the Warsaw Convention 1929 was calculated in gold value "...of 65 ½ Milligrams of gold of Millesimal fineness 900..." per French Franc. This was because the convention came into force in

¹⁵ Article 22.1 Warsaw Convention (1929).

¹⁶ Article 22.2 *Ibid.*

¹⁷ Article 22.2 *Ibid.*

between the two world wars and world economies were fluctuating regularly. Gold was therefore seen as the most stable value to peg the limitation to.¹⁸

2.4 INTERNATIONAL DISCONTENT OVER THE WARSAW LIABILITY LIMITATIONS

The liability limitations established by the Warsaw Convention eventually became the cause of its fragmentation. Its liability limitation was increasingly seen as too low when compared with the living standards of most travelers and that it was not reflective of economic realities subsisting since then. Secondly the liability limits were seen as perpetuating lengthy court process as parties sought court interpretation of the convention complex terminologies either to circumvent the limitation clauses themselves, or to apply them exclusively. To the airline industry therefore, these litigations were damaging to the image of the aviation industry.¹⁹

Apart from the foregoing, member states have through the IATA agreement provisions or other instruments, avoided the convention liability limitation and allowed higher limits or no limits at all. This has caused serious disparity between the member states. Indeed the American position has been to have the convention scrapped altogether!

There was therefore need to have these divergent views harmonized through a review of the Warsaw Convention. This created an urgent need to rethink, review or repeal the liability limitation clause. However it was necessary that it should be done in such a manner that passengers were not left at the mercy of the powerful and rich air carriers. The Warsaw

¹⁸ Michael Milde; liability in International Carriage by air: The new Montreal Convention: UNIF. L Rev. 1999-4 Pg 835.

¹⁹ Indeed a good example is the Kenya Airways accident involving flight KQ431 that crashed off the Coast of Abijan. Kenya Airways moved rapidly to negotiate secret settlements with the claimants including making advance payments as required by IATA regulations.

Convention did not even provide for compulsory insurance within the domestic law applying the convention to ensure victims were compensated promptly!

These thorny issues have therefore continued to rear their ugly heads in complex litigation. The U.S Supreme Court has for example reversed a refusal to allow a claimant's wish to have his compensation calculated using the free market value of gold.²⁰

In the Italian Case of *Coccia -vs- Thy*: also known as the "*corte di cassazione*" case²¹ the Constitutional court found Article 22(1) of the Warsaw Convention unconstitutional for being in conflict with section 2 of the Italian Constitution which guaranteed "the inviolable rights of man" and which rights included rights to proper compensation "for damage affecting the supreme asset of life." The court felt that in view of developments then in the aviation industry, the Warsaw Convention limitations were in variance with the Italian constitutional guarantees.

Japan also had its own reservations over the Warsaw Convention liability limitations. In November 1992, Japan unilaterally liberated Japan Airlines from the liability limits of the Warsaw Convention. As a consequence Japan Airlines could not plead limitation of liability in claims resulting in death, injury or wounding of a passenger or loss, destruction or damage to baggage and goods. This waiver was however subject to some conditions. Where the value of the claim did not exceed 100.000 SDR then the airline would waive the defence provided by Article 20(1) of Warsaw Convention 1929, but where the claim exceeded 100.000 SDR, then the defence under

²⁰ *Franklin Mint -vs- TWA* US C.A 28/9/829 (Annals of Air & Space Law Vol VII (1982) P.601)- the supreme Court held that the value of gold calculated at last official price was not inconsistent with the convention.)

²¹ 1985 Air law Vol X Page 297-305 the effect of this decision was that, in Italy you could seek unlimited liability against an air carrier.

Article 20(1) would be retained for the portion of the claim over the 100.000 SDR. The effect was that passengers traveling in Japan airlines had a significant advantage over passengers traveling in other airlines.²²

The European Union on its part also expressed its dissatisfaction with the Warsaw Convention and proposed drastic measures to its member states. It proposed more prompt payment of compensation, a strict liability regime that would guarantee and raise the liability limitation to 100.000 ECU and upon an accident occurring an immediate advance payment of ECU 50.000 in case of injury or wounding.²³

Meanwhile, the United States of America continued to fight the Warsaw Convention and even threatened to withdraw from it while the rest of the world frantically bend backwards to accommodate it through a series of proposed amendments. The USA then insisted on the adoption of the 1966 Montreal agreement with such amendments as to include the IATA conditions. This naturally would have led to contradicting law systems with respect to different claimants arising out of the same accident if all states were not signatory.

The other problem with the Warsaw Convention is that it sought to combine both civil law system of law with the common law system. Under common law, the carrier has a higher duty of care and is expected to employ foresight in all actions. Under civil law however, the carrier's duty is strictly a contractual one to transport passengers safely, unless the damage was caused by the carrier himself.²⁴

²² Reasons for the withdraw of Japan are discussed on page 48 of this research project.

²³ European Union Council Regulation No. 2027/97.

²⁴ Most courts follow the principle in *Milone -vs- Washington Metro Area Transport Auth.* F 3d 229, 231 US Dist Court (Cir. 1996) where the Court stated that a common carrier has a duty to protect its passengers from foreseeable harm arising from criminal conduct of others.

The Warsaw Convention regime has also been associated with laboriously long litigation procedures the very thing it set out to eliminate. This was due to a wide disparity in the definitions of terminologies made by courts in different jurisdictions. For example whether the liability of the air carrier began at the lounge or once the passenger stepped on board the air craft,²⁵ or, whether upon being requested to board a passenger falls on way to airplane, the air carrier would be held liable.²⁶

2.5 TOWARDS AMENDING THE WARSAW CONVENTION OF 1929

The Warsaw Convention of 1929 has been amended severally. These changes have been necessitated by several factors. Very important among these are the fact that air transport has advanced tremendously both in technology and in the scope it now occupies as the largest medium of international transport. The second factor is that safety in air transport has also improved a great deal in the last few decades. Apart from these reasons, the compensation limitations have also been rendered irrelevant by inflation and other socio-economic factors. Air transport insurance is now readily available at an affordable rate. Indeed some countries in the world have already made such insurance mandatory.

The notable thing however is that the changes made to the Warsaw Convention have principally been to placate USA and a few other developed countries from withdrawing from the convention. Withdrawal of such states has been seen as likely to have earth shaking ratification as most inter air carriers mainly fly to cities in the USA and Europe. Very many

²⁵ Consort Saoni –vs Surport de Paris (1976) RFDA 394 Claimant fell at escalator: Held:- area used by many airline passengers so not within exclusive control of airline Claimant was traveling in.

²⁶ Price –vs- British airways US Dist Court (East Div) 1992 Pg. 23 Av, 18, 465 (Air & Space Law Vol XIX (1994) Pg 44.

carriers flying into for example, USA would be exposed to unlimited liability and possibly very large awards in U.S. Courts.

Meanwhile, and in order to cure this problem the International Air Transport Association (IATA) was set up as an association of international air carriers mainly to facilitate uniformity in their operations especially with regard to passenger, baggage and cargo matters. Of concern to most air carriers was the slow growth of their industry as a result of the low threshold of liability limitations. Since their parent states were bound by the terms of the Warsaw Convention, the air carrier sought to find a way to circumvent the limitation clause in order to enhance that limitation or do away with it altogether through a private agreement, which event the Warsaw Convention allows under its Article 22(1).

However the main attack on the limitation clause has not only come from the aviation industry itself but from courts in member states as well. As demonstrated in the *Corte Di Casastione* case, courts are quick to employ the public policy principle to deny the Warsaw Convention applicability. In other cases they have interpreted the Warsaw Convention applicability as to exclude certain type of damage in order for the domestic courts to abrogate themselves jurisdiction to determine compensation.

2.6 AMENDMENT TO WARSAW CONVENTION

a) The Hague Protocol 1955

The first major amendment to the Warsaw Convention of 1929 came through the Hague Protocol of 1955.²⁷ This particular protocol was spurred by the major expansion in the aviation industry that was being experienced

²⁷ Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12th October 1929, as amended at the Hague on 28th September 1955. The Convention entered into force on the 1st August 1963 and to date has a total ratification of 131 states.

post World War II. The protocol allowed member states to make reservations in respect of military aircraft unlike the Warsaw Convention which covered all manner of state aircraft. It also doubled the liability limitation. Similarly the air ticket was simplified such that all the information necessary, was the place of departure and destination, name of any agreed stoppage place and that it must bear a notice of applicability of the Warsaw Convention.

A relief to most pilots was the repeal of Article 20(2) of the Warsaw Convention of 1929, which had placed liability on the pilot if the damage to goods and baggage was occasioned by negligent piloting or navigation.²⁸ The Hague Convention went further and forbade any member state entering into any agreement whose effect was to relieve the carrier of any liability.²⁹ The Hague Convention also saddled the carrier with the liability for damage to goods and baggage even if the goods were defective, poor quality or there was a vice in the cargo. The period for lodging a claim was extended under the Hague from 3 – 7 - 14 days to 7 – 14 - 21 days for baggage, goods and delayed cargo or baggage respectively.³⁰

The Hague Convention also expanded the provisions of Article 25 of the Warsaw Convention by denying the air carrier the liability limitation under Article 22 if the act was done with intent to cause damage or if it was done recklessly and with knowledge that damage would occur. This was new because Article 25 of the Warsaw Convention only covered wilful misconduct but did not deal with the concept of "intent" in the act. The Hague Convention took the issue further by introducing Article 25A under

²⁸ Air Navigation is no longer done manually on board aircrafts and modern aircrafts have been installed with sophisticated safety features as well.

²⁹ Article 23 Hague Convention.

³⁰ Article 26, *Ibid.*

which liability was extended to servants or agents of the carrier where such agents or servants authored such damage as a result of their omission or action and where their action or omission was intended to cause the claimant to suffer damage.³¹

b) The Guadalajara Protocol (1961)

The second attempt at amending the Warsaw Convention was the Guadalajara Protocol of 1961³². This Convention was inspired by the newly emerging business of air charter. As the world major economies pulled out of the economic slump after the second world war, the air charter business began to boom. This convention's role was therefore to supplement the Warsaw Convention. The Convention distinguishes between the actual and contracting carrier, and provides that both are liable to the passenger, as if they were the contracting carrier for the purposes of the Warsaw Convention. The passenger is entitled to claim against either or both the actual or contracting carrier for bodily injury, loss or damage to baggage and cargo or for delay. The convention therefore aims to cover such arrangements as leasing, chartering, code-sharing and interlining which are commercial practices which have come into prominence since the Warsaw Convention was developed in the late 1920's.³³

c) The Guatemala Protocol (1971)

The third attempt at amending the Warsaw Convention 1929 was the Guatemala Protocol of 1971 signed at Guatemala City. The main issue

³¹ States that are not a party to the Warsaw Convention but which sign the Hague Protocol are considered to be party to the Warsaw Convention as modified by the Hague Protocol.

³² Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules relating to International Carriage by Air performed by a Person other than the Contracting Carrier, done at Guadalajara on 18th September 1961. It entered into force on 1st May 1964 and has a total ratification of 82 member states.

³³ Reform of Carrier liability; The Montreal Convention Discussion paper: www.montrealconvention.com.

behind this Protocol was the dissatisfaction by most member states of the Warsaw Convention with the liability limitations that they felt were stifling the aviation industry. Most of the resentment to the Warsaw liability limitation clauses was being sponsored by the United States of America. The Americans considered the Warsaw limitation of 125.000 Francs and the Hague 250.000 Francs as too low and an insult to their domestic law. The Americans also felt the liability limits denied American claimants maximum awards available under their domestic law. This dispute was so serious that before the Guatemala Protocol, the USA sponsored a protocol known as the Montreal Protocol of 1966, which only applied to passengers injured, wounded or who died while embarking or disembarking at any destination within USA. Under this agreement air carrier limitation was pegged on the American dollar. Passengers were also not required to prove the airlines fault or willful conduct on the part of the carriers agent or servants. Naturally this agreement not being a treaty did not exude a lot of enthusiasm in the aviation industry as it was a selfish agreement intended to kill the Warsaw Convention.

The Guatemala Protocol therefore set out to achieve what the Montreal agreement of 1966 had failed to achieve. Its advocates were convinced that the increase in the volume of air transport would lead to a higher incident of air collisions. They also felt that as aircrafts continued being built bigger and thus accommodating more and more passengers, the likely number of victims in the event of an accident would grow correspondingly. This, to them, posed doom for the aviation industry.

It was therefore proposed that the liability limitation be increased to 100.000 US \$. It was also suggested that the convention should adopt and peg absolute liability for injury or death to a maximum of 100.000 US\$ which could not be varied or set aside. The costs of litigation, where allowed

under domestic law, were also incorporated. However, these costs would only be recoverable if the claim was not settled within six months. It was anticipated that to avoid lawyers charges, the airline companies would rush to settle claims within the suggested six months from date of the accident. Unfortunately the provision only provided the basis for lawyers to stall in order to recover costs once the six months had lapsed .

The convention also mooted the idea of the supplementary compensation plan to be funded from passenger contributions where that awards exceeded 100.000 US\$. Under pressure from the Americans the convention adopted a controvenial provision that not only increased air carrier liability to 100.000 US\$ but also sought to do away with the Warsaw Convention's underlying principle of fault liability and to replace it with a risk liability so that the carrier would bear liability even if he was not at fault, such as in the case of death or injury arising out of hijacking, sabotage or terrorism.³⁴

The Guatemala protocol received very few signatories and it never came into force. More fundamentally, it was to enter into force when ratified by 30 states, including the 5 leading states in total international scheduled air traffic!

d) The Montreal Protocol (1975)

The fourth Protocol to attempt to amend the Warsaw Convention was the Montreal Protocol of 1975. This Protocol gave fruit to four separate protocols which were negotiated in a diplomatic conference. The First Protocol³⁵ introduced the concept of compensation pegged on special drawing rights (SDR) as defined by the IMF. Perhaps the French Franc

³⁴ Gerald F. Fitzgerald Supra at Pg 310-311.

³⁵ The 1st Additional Montreal Protocol entered into force on the 16th February 1996 and 46 States have ratified it.

having lost its glory and the Brenton Wood institutions having emerged as front runners in shaping the world economies, especially after their role in bringing Europe back to its feet after World War II, the SDR was seen as a “currency” of choice. Under this first protocol the Warsaw liability limitations were retained. This situation was intended to serve those states that still applied the Warsaw Convention of 1929.

The Second Additional Montreal Protocol³⁶ applies the SDR to the Hague Convention provisions on liability limitations. These changes were continued with the 3rd Montreal Protocol which addressed the Guatemala Convention. These three protocols also introduced the principle of unbreakable liability limitation clause.

The Third Additional Montreal Protocol³⁷ was like its predecessors, driven by ICAO'S desire to replace the Warsaw currency of *francs poincaré* with the IMF special drawing rights (SDR) in order to eliminate the problems associated with the difficulties of valuing the then out dated *franc poincaré*. The US refused to ratify this protocol as well as the Guatemala protocol and hence the Protocol developed difficulties coming into force. This is because the U.S is considered the biggest stakeholder in the international civil aviation industry and when it fails to ratify a convention most other stake holders in the industry tend to shy away.

The Fourth Additional Montreal Protocol³⁸ was more elaborate in that although it was more preoccupied with air transportation of cargo and baggage, it changed the provision of the words “wilful misconduct” with “...an act or omission..” of the carrier or its agent committed “...with an

³⁶ The 2nd Additional Montreal Protocol also came into force on the 15th February 1996 and has been ratified by 48 states.

³⁷ It has never entered into force to date even though twenty four states have ratified it.

³⁸ The Montreal Additional Protocol No. 4 came into force on the 14th June 1998. it has been ratified by 49 states.

intent to cause damage or recklessly with knowledge that damage would result." However of more fundamental concern is the convention categorical stipulation that no action could be lodged in domestic courts to which the Warsaw Convention was also applicable if the suit was not based on the Conventions provisions. This was to ensure that parties do not engage in fishing for justice.³⁹ Prior to this, in some member states, courts were quick to interpret the Warsaw Convention as not applicable in their jurisdiction. Therefore, claimants whose claims became subject of the Warsaw Convention liability limitation would opt not to claim under the convention and file their claim in domestic courts in order to get higher award in damages.

e) The Inter Carrier Agreements

In spite of all these efforts, member states and other stakeholders were still unhappy with the provisions of the Warsaw Convention and its amendments that far. The biggest problem seemed to be the low threshold of liability limitation. As a result international air carriers, who were an organized group under the International Air Transport Association (IATA),⁴⁰ entered into an inter carrier agreement under whose provisions fundamental changes of the Warsaw Convention regime were agreed. The air carriers idea was to use these agreement in order to circumvent the Warsaw Convention or its subsequent amendments. The IATA membership was not by states but through their national air carriers.

³⁹ Liability is absolute under this protocol and it is also unbreakable at 17 SDR per kilogram. The exception to this rule is where the consignor makes a special declaration notifying the carrier of that the value of the goods is higher. The protocol eliminated the complex cargo handling documentation thus facilitating the use of electronic records for international air cargo. Curiously and inspite of its extensive amendments the US refused to ratify it.

⁴⁰ Founded in 1919 as the International Air Traffic Association and principally based in USA with the intention of assisting members to exchange ideas and experiences during the pioneer years of international air transport. It also set out to establish the first set of uniform procedures and industry standards covering the traffic, technical, legal and accountancy areas. It was instrumental in the setting up of the Chicago Convention on Civil Aviation 1944 which set up the International Civil Aviation Organization (ICAO) to administer development and planning of airways, airports and air navigation facilities.

Liability limitation under the IATA agreement was set at 100.000 SDR and they did away with the provision for waiver of limitation for wilful conduct by the airline or its agents or employees were the airline, its agents or employees were found culpable for any act or omission that led to the injury or death of the passenger. Among other key changes, IATA introduced a new forum where a claim could be lodged. In that regard it allowed a claimant the privilege to choose to pursue his claim through the domestic courts or the courts of his place of permanent residence.

Unfortunately, IATA is not a treaty and even though it has an international character as well as the fact that it is revered as the main fabric that ties the international aviation industry, it does only legally binding as between air carriers and their passengers. Secondly members can withdraw at any time.⁴¹

As stated before the IATA agreement was a private agreement developed by stakeholders but it was not the only one. Among these other agreements is the Montreal Inter-carrier Agreement of 1966 which was sponsored by IATA itself. The focus of the agreement was also an increment of liability limits for international carriage which involved stopping points within the United States of America. In effect it was intended to protect the interest of American travellers whom the US wanted to reap higher compensation possible under domestic law within the US.⁴²

This agreement is also a private document between signatories and even though it adopted the spirit of the Warsaw Convention, passengers are

⁴¹ Article 8 of the IATA agreement.

⁴² The agreement was possible because under Article 22(1) of the Warsaw Convention, a carrier can enter into a special agreement with passengers under which a higher limit of the liability can be agreed above the one set in the Convention.

availed a maximum limitation of 75000 US \$ inclusive of legal fees and costs. Carriers are however required to waive their right to plead that it had taken all necessary measures to avoid the accident, accorded to them under Article 20 of the Warsaw Convention.⁴³

The other agreement is the Malta Agreement of 1974. Under the Malta Agreement some airlines in Europe opted for strict liability principle and a limit of 58,000 US\$ net of legal fees and costs. The only difference was that the carriers did not waive their right to the defence under Article 20 of the Warsaw Convention.

In November 1992, Japan opted out of the Warsaw system and abandoned the concept of liability limitation completely. This move was precipitated by the fact that pursuant to crash of a Japan Airlines flight B 747 in 1985, while on a domestic flight, claimants were paid compensation far in excess of those available to international travellers under the Warsaw Convention. Passengers in that flight who were continuing on an international travel received less compensation. Therefore taking advantage of the elastic nature of Article 22(1) of the Warsaw Convention, the Japan opted to adopt an unlimited liability for injury or death to passengers on board air carriers registered in Japan. They also waived the defences of Article 20 of the Warsaw Convention for the first 100.000 SDR of any claim.

In 1995, the European Union (EU) following the Japanese example, invited airlines of its member states to adopt unlimited liability which would be absolute for the first 100.000 SDRs but subject to the defences of Article 20

⁴³ Article 20 Warsaw Convention: The carrier is not liable if he or his agents have taken all necessary steps to avoid the damage or it was impossible to take measures to avoid it. Regarding goods and luggage, the carrier is not liable if he proves that the damage was occasioned by negligence piloting or handling of the aircraft or poor navigation.

for any amount above that. The EU also recommended that each carrier takes out appropriate insurance and that upon an accident occurring, they should make an immediate advance payment to the claimants to take care of their immediate economic needs⁴⁴

Finally the IATA, seeking to amend its 1966 agreement, came up with three agreements that form the IATA Inter Carrier Agreements of 1995 to 1997. These are the IATA Inter Carrier Agreement on Passenger Liability (IIA) of 31st October 1995, under which the carriers party to it undertook to waive liability limitations made under Article 22(1) of the Warsaw Convention.

The second one is the Agreement on Measures to Implement the IATA Inter-Carrier Agreement (MIA) of 1996, which was intended to improve on the IIA agreement. Specifically it reiterates the carriers undertaking not to invoke the liability limitations of Article 22(1) of the Warsaw convention. It also bound the carries not to seek the defences of Article 20(1) of the Warsaw Convention where the claims did not exceed 100.000 SDR. However it allowed the carrier to lodge third party claims while also giving the carrier the option of making the choice that the applicable law in determining recoverable damages by claimants should be the law of domicile of the passengers if he so wished.⁴⁵

2.7 GOODS & BAGGAGE

As stated before, the Warsaw Convention of 1929 set out to provide a presumed carrier liability whenever an accident leading to injury,

⁴⁴ This protocol was later reduced into the European Council Resolution No. 2027/97.

⁴⁵ Many air carriers have signed these IATA agreements but they do not constitute the universally agreed law. These agreements received special backing of the US Department of Transport hence their relative success in obtaining signatories.

wounding or death of a passenger occurred.⁴⁶ The Warsaw Convention also provided for a presumed liability on the part of the carrier for the loss, damage, delay or destruction of goods and baggage.⁴⁷

Under the Warsaw Convention the carrier liability for passengers was limited to 125,000 gold francs (approximately \$10,000 US) while for checked baggage and cargo was 250 gold francs (appx \$20 US) per kilogram. The convention also limited any claim for personal effects carried on board by the passenger at 5000 gold francs or approximately \$400 US.⁴⁸

The above mentioned figures were in some cases more than doubled by the Hague Protocol of 1955 which amended the Warsaw Convention of 1929. Passenger claim limits went up to 250,000 gold francs (approximately \$20,000US).

The Guatemala Protocol on the other hand was intended not only to amend the Warsaw Convention further in its substantive form but also to raise the liability limitation further. The Guatemala Convention introduced the concept of strict liability on the part of the carrier and a corresponding unbreakable liability limit in 1,500,000 gold francs (or approximately \$120,000US) for injury or death to a passenger.⁴⁹

In the event of a delay of passengers the Guatemala Protocol allowed a limit of 62,500 gold francs as compensation (approximately \$5000US) and for checked baggage 15,000 gold francs (about \$1200 US) per passenger.⁵⁰

⁴⁶ Article 17 Warsaw Convention (1929) .

⁴⁷ Article 18 *Ibid.*

⁴⁸ Article 22 *Ibid.*

⁴⁹ Article VII(1)(a) Guatemala Protocol.

⁵⁰ Article VII(1)(b) & (c) Guatemala Protocol.

The Guatemala Convention guaranteed that failure to issue documents of carriage or where there were defects in the information contained in the documents, the contract of carriage would still be applicable and the carrier would still be entitled to the limitations on liability.⁵¹ It also introduced the option of alternative methods of recording cargo handling procedures.

The Warsaw provisions on liability limitation with reference to cargo was also the subject of spirited debate between the conservatives led by small air carriers who wanted to keep the low limitation threshold and the others who wanted the limitation done away with or reviewed upwards, which group was led by the Americans and other European countries with large air carriers.

The International Air transport Association (IATA) also jumped into the fray with radical recommendations. According to IATA, cargo documentation under the Warsaw Convention was cumbersome and did not support the growth of the aviation cargo business. To IATA elimination of the complex documentation procedures associated with cargo handling would lead to a saving for the air carriers which would be passed on to the consumer.

At the heart of this controversy however, was the issue of modernizing the Warsaw Convention especially in the area of cargo handling. Majority of stakeholders find the Warsaw Convention out of sync with the technological advancement especially in electronic data processing (EDP) era. The clamor for amendment of the Warsaw Convention therefore was mainly based on the feeling that the Warsaw Convention should embrace EDP method of transmitting information between the air carrier, the consignor and the consignee or their respective agents or servants.

⁵¹ Article II.3, 11.3 *Ibid.*

The only problem was that the air way bill was in reality used as a traffic document containing details of the consignee and destination of the cargo. It was also a rating document which was used to record freight changes. Apart from the foregoing the airway bill doubled up as an accounting document and therefore a financial record of the dealings between the air carrier and the consignor/ consignee. Finally it allowed for the parties to obtain insurance during the period air transportation.⁵²

IATA's argument in favour of modernization of the Warsaw and Hague Conventions was that their cargo handling regime procedures accounted for 50% of the total ground handling costs of most international air carriers. Although this allegation could have been a little exaggerated for effect, it is not lost on anyone that there was an urgent need for having a more flexible system of cargo documentation that allowed for electronic data processing. This was only a problem when computer technology was new and relatively expensive to install. Presently that is not the case as development in electronic data processing now allows for booking and reservation of tickets online or payment on line for all manner of goods and services. Indeed even the Warsaw notices can now be easily transmitted through the internet.

The foregoing scenario was alleviated by the Montreal additional protocols which did away with the Warsaw Convention liability limitation notice on air way bills. The reason for this was simple; since the new protocol adopted a strict liability approach and further since the liability limitation set under the additional protocol was unbreakable, then it did not matter whether a notice was served or not. In other words the fact that a notice was missing

⁵² Gerald F. FitzGerald: The four Montreal protocols to amend the Warsaw Convention regime governing international carriage by air: *Jornal of Air Law and Commerce* Vol XLII-1979 at Page 283.

on the airway bill did not matter because the consignor or consignee could not claim an unlimited compensation any way.

Another addition to the convention was the extension of responsibility for information contained in documents of air carriage especially the airway bill. The Montreal additional protocols made the consignors responsible for his agents actions.⁵³ Similarly the carrier was made liable for any incorrect information that he inserted in the airway bill.⁵⁴

Other changes introduced by the Montreal Additional protocols of 1975 were the amendment of Article 13(1) of the Hague Convention by altering reference to the airway bill to include "...any other means which would preserve a record.." in order to allow for other methods of storing information related to cargo handling. However, it was still felt that modernity may take some time to reach some sectors of the aviation industry and therefore the amendments brought by the Additional Protocols still allowed for a parallel system of documentation as stipulated by the Warsaw Convention.⁵⁵

Among the new defences introduced by the Montreal protocols in those of act of war or armed conflict and act of public authority carried out in connection with the entry or exit or transit of the cargo.⁵⁶ Under these provisions the carrier could escape liability if the damage was caused by either an armed conflict, an act of war or any act by a public authority.

⁵³ Articles 10 of the 4th Additional Protocol.

⁵⁴ Article 16 of the 4th *Ibid*.

⁵⁵ Article 5 of the 4th *Ibid*.

⁵⁶ Article 18(3), Montreal 4th Additional Protocol. Gerald F. Fitzgerald. Ct pg 307-308: Egypt's proposal to the commission for the amendment of the Warsaw and Hague Conventions, to introduce the words "an act of war or an act of armed conflict, whether of an internal or international character" was rejected by other member states as being too broad.

The Warsaw Convention 1929 as well as the Hague Convention of 1955 pegged the liability limitation on the price of gold expressed in French francs. However by late 1960s, the market price of gold had become too erratic. The price was also subject to great variations in various markets around the globe. There was therefore an urgent need for an alternative and additional Protocols adopted the International Monetary Fund special drawing rights as the benchmark.⁵⁷

2.8 THE 1999 MONTREAL CONVENTION

The numerous amendments to the Warsaw Convention of 1929, as well as the private agreements established by air carriers to regulate the industry (eg IATA) as well as the fact many countries have legislated domestic air law that has adopted some and not all the conventions provisions has sadly led to fragmentation of the international carriage by air law.

The Montreal Convention of 1999 was therefore negotiated in the backdrop of such serious threat to the very existence of the Warsaw Convention itself. The Convention was the brainchild of the International Civil Aviation Organisation (ICAO) which was concerned with the fragmentation of the Warsaw Convention system.

The Montreal Convention amalgamated the key provisions of the Warsaw system with the terms of the Hague Convention, Montreal Additional protocol 3 and 4 and elements of the Guatemala Convention and some Articles within the Guadalajara Convention. The net effect is a smoother

⁵⁷ GERAL F. FITZGERALD SUPRA: SDR were calculated on the basis of one SDR being equal to 0.888671 grams of fine gold as of 1974 but the IMF introduced a concept where SDR were henceforth calculated on the basis of the value of sixteen national currencies which constituted a "basket" and in that basket the currencies had different weights".

handling of passengers and cargo as well as a modern and equitable passenger compensation law.

The Warsaw Convention of 1929 had created jurisdictions for the trial of any suit brought under the provisions of the convention before courts within the territory of a High Contracting Party where:

- (i) Carrier is ordinarily resident
- (ii) the carrier has its principle place of business
- (iii) the carrier has an establishment by which the contract of carriage has been made.
- (iv) Or at a court having jurisdiction at the place of destination as shown on the relevant ticket⁵⁸

The Montreal Convention of 1999, has however introduced a fifth jurisdiction. The claim can now be lodged in the country where the passenger has his or her principal and permanent residence at the time of the accident and from which country the carrier operates air transport services using its own aircrafts or leased aircrafts and where the carrier has also leased premises to operate from.⁵⁹

The Montreal Convention 1999 also introduced several other new or improved features:

- (i) It up dated the liability limitation for claims for delay of passengers to 4150 SDR and for loss, destruction or delay of baggage to 1000 SDR.⁶⁰
- (ii) It allowed Special Drawing Rights (SDR) to be used as the monetary unit.

⁵⁸ Article 28. Warsaw Convention.

⁵⁹ Article 33.2 Montreal Convention (1999).

⁶⁰ Article 22.1 & 2 *Ibid*.

- (iii) It allows for a revision of the liability limitation clause every five(5) years to take care of inflationary trends.⁶¹
- (iv) It also allows for payment of advances to the victims or persons claiming as a legal representative of the estate of the deceased passenger.⁶² The convention allowed domestic law to assist in ensuring payments reach deserving cases only. this payment is intended to assist the deceased's family or the injured party to face immediate economic needs.
- (v) It also demands that all airlines must obtain, keep and maintain adequate insurance in the event of a major accident.⁶³
- (vi) Punitive and other exemplary damages are prohibited by the convention.
- (vii) Documentation handling has been fully automated as an option.⁶⁴
- (viii) Member states that have two or more territorial units with different laws relating to matters relevant to the Convention are allowed at the time of signature, ratification, acceptance, approval or accession to declare whether the Convention applies to all or some of its territories.

The Montreal Convention was signed by 52 states at the end of the conference that debated it in May 1999, which demonstrates the immediate appeal it had. It is considered as an amalgamation of the entire Warsaw Convention regime as well as the inter carrier agreements. This convention has therefore finally replaced the Warsaw Convention.

⁶¹ Article 24 *Ibid.*

⁶² Article 28 *Ibid.*

⁶³ Article 50 *Ibid.*

⁶⁴ This will ensure E-ticketing flourishes.

CHAPTER 3

3.1 RELEVANCE AND APPLICABILITY OF INTERNATIONAL LAW IN KENYA

In order to examine the relevance of the Warsaw Convention, it is important to first discuss the conventions provisions briefly. This chapter therefore examines briefly some of the key provisions of the Warsaw Convention to demonstrate its development and subsequent shortcomings.

Although in classical international law theory each state is sovereign and equal, the rapid development in communication and international commerce, and the constant rivalries between states, it has become impossible for any state to claim absolute sovereignty. As a consequence of the interdependence between states both in commercial activities as well as in politics, any action taken by one state in the international arena ends up having profound effect on another state.

Relationships between states therefore is as of necessity regulated through a complex web of international agreements. Save for a few exceptions in human right law and Humanitarian Law, treaties deal with relationships between state parties. It is an establishment principal of international law that treaties only bind parties to them. Municipal or domestic law on the other hand regulates relationships between individuals and the administrative organs of their parent states. The general principle therefore is that international law has no application within domestic courts and vice versa.

The relationship between International law and municipal law can be approached from two different views namely the positivist or naturalist eclectics. The positivists argue that international law is premised on state

consent and that both municipal and international law exist separately. To them where municipal law allows application of international law, it is done merely in muted tolerance.¹ This is the approach adopted by dualists. The second school of thought is that referred to as the "Monists" They view law as comprised of one whole, devoid of any strict divisions. To these scholars, law is promulgated for the common good of mankind. According to Monists, in order to ensure the well being of mankind international law must be regarded as superior to municipal law.

However, a middle school of thought has also emerged, comprising of persons who consider international and domestic law as equals.² Whatever the case, states are generally obligated by the provisions of the Vienna Convention of the Law of treaties to act in conformity with international law rules.

However before international law can become part and parcel of municipal law it must first be recognized through a process of signature and subsequently ratification. Within the local sphere the international law must be legislated in order to be adopted as domestic law.

The position in England is that customary international law is acceptable as part of domestic common law and common law is one of the sources of law in Kenya. However although in most jurisdictions around the world³ It is the prerogative of the sovereign to enter into treaties, but to give international law effect, parliament must legislate the treaty into municipal law. In *Maclaine Watson -vs- Department of Trade and Industry*⁴ the House of Lords in restating the position in England held that

¹ Malcom N. Shaw; International law, 5th Edition, 2003 PP122.

² MN Shaw *Ibid* at PP 123.

³ eg UK, Russia, Japan etc.

⁴ [1989] 3 All ER 523,531.

as a matter of the Constitutional Law of the United Kingdom, the royal prerogative, whilst it embraces the making of treaties does not extend to altering the law or conferring rights on individuals or depriving them of their civil rights that they enjoy under municipal law without the intervention of parliament. A treaty is not part of English Law unless and until it has been incorporated into the law by legislation.

Lord Templeman in the same decision stated:

Except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by a statute, the courts of the United Kingdom have no power to enforce treaty obligations at the behest of a sovereign Government or at the behest of a private individual.

This position was elaborated more in the case of *Lohnro Exports –vs- ECGD*⁵ when the Court held that the interpretation of treaties not incorporated by statute into municipal law and the decision as to whether they have been complied with, are matters exclusively for the crown as "the court must speak with the same voice as the executive" In other words the executive is under obligation to ensure treaties are brought before parliament for debate and enactment into municipal law.

It follows therefore that although ratification of an international treaty is important, where such ratification is not followed by incorporation of the treaty into municipal law, such international law will have no application within Municipal Courts.⁶

The position in Kenya is stated in the *Okunda Cases* .⁷ According to the Constitutional Court of Mwendwa CJ, Chanan Singh J., and Simpson J., held that even though there is an accepted principle of International Law that where there is a clash between municipal law and treaty law, the treaties should prevail, however, where the conflict is with the constitution, then the constitution would prevail. Secondly they found the Constitution

⁵ [1986] 4 ALL ER 673, 688.

⁶ M.N. Shaw *Supra* at Page 138.

⁷ *Okunda & A. N. –vs- Rep* [1970] E.A. 453.

to be superior to any law, even international law. Therefore, for any international law to be applicable in Kenya, it has to be legislated first. These findings were upheld by the Appellate Court in *Okunda 2*.⁸

What emerges from all these arguments is that if the constitution expressly allows recognition of international law within municipal courts as soon as the treaty is ratified, then the international law would take precedence. However where no such provision exists then, it must first be incorporated as a municipal statute.⁹

The rationale for this principle is that since it's the prerogative of the executive to enter into international agreements, to render treaties directly applicable without any intermediary stage after ratification and before becoming domestic law would amount to the executive legislating law without recourse to the legislature, a clear conflict of the principle of separation of powers and a breach of a fundamental constitutional provisions.

Where however a state such as Kenya is governed by a Constitution and the constitution makes no specific provision for applicability or supremacy of international law then international law will only be applicable if domesticated into local law.¹⁰

⁸ *East African Community –vs- Rep* [1970] EA Pp 457 which upheld the decision of the Constitutional Court in *Okunda –vs- Rep* above.

⁹ International law under the dualist approach is just “other law” and therefore inferior to the constitution.

¹⁰ Constitution of the Federal Republic of Germany states that: “The general rules of Public International Law are an integral part of Federal Law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the Federal state.” Section 231(4) of the Constitution of the Republic of South Africa, stated that: “The rules of customary international law binding on the Republic shall, unless inconsistent with the Constitution or an Act of Parliament, form part of the law of the Republic.” The same situation obtains in both Russia and Japan among other countries. The Constitution of Kenya on the other hand is silent on applicability of international law.

The upshot is that international law will only gain applicability where it forms part of municipal law vide an Act of Parliament.

However this is not to mean that treaties have no legal basis. Indeed the basic principle of the Vienna Convention on the Law of Treaties is that treaties are binding upon the parties to them and that they must be performed in good faith.¹¹

This principle which is also known as "*Pacta sunt servanda*", is based on the assumption that states will perform their obligations in good faith and that they would not have entered into the agreement if they did not wish to do so in the first place.¹²

Article 27 of the Vienna Convention on the Law of Treaties states, a party may not invoke the provisions of an internal law as justification for that country's failure to carry out an international agreement.¹³ All states are still mandated not to conduct themselves in any manner that would frustrate the applicability of any treaty whether they are party to it or not.¹⁴

In the Polish Nationals in Danzig¹⁵ case the Court held that a state can not adduce as against another state its own constitution with a view to evading obligations incumbent upon it under international law or treaties in force.

Generally treaties become operative whenever the contracting states decide they should, but normally they become operative upon execution of the consent to be bound or upon their ratification. However as stated earlier only member states are bound by a treaty.

¹¹ Article 26 Vienna Convention on the Law of Treaties.

¹² M.N. Shaw: *supra*, at Page 811-812.

¹³ PCIJ, Series A/B No. 44, PP21,24.

¹⁴ See the Preamble the Vienna Convention on the Law of Treaties.

¹⁵ 1931 PCIJ, 24.

Kenya has signed and ratified the Montreal Convention of 1999. However even though that creates legal obligation to honour that treaty, the Government of Kenya has not incorporated the Montreal Convention as part of local law. Jurisdiction in Kenya is established under the Judicature Act of Kenya Cap 8 and under this Act of Parliament, the common law of England and therefore by extension customary international law applicable in England forms part of Kenyan internal law by virtue of the provisions of Section 3(1). As shown earlier, under English law, where international law is not part of domestic legislation it is not applicable in Court. The only other method of applying international law in Kenya is through its adoption as part of local law through Parliamentary legislation just like the case of the Warsaw Convention.¹⁶

However it can also be argued that Section 3 of Kenyan Constitution declares the Constitution as the supreme law of the land but at the same time allows laws that are not inconsistent with the constitution to have applicability in Kenya. Clearly the reference to 'Law' in that section does not limit itself to municipal Law only as observed in the *Okunda* case.¹⁷ Consequently one can argue that International Law can be applied in Kenyan Courts so long as it is not inconsistent with the constitution. This is a moot point and there is no local jurisprudence to back this assertion. However under Section 3(g) of the proposed new constitution of Kenya, customary international law and international agreements will for the first time be directly recognized in Kenyan Courts if the constitution is approved.

Therefore the fact that the Montreal Convention is not part of Kenyan municipal law like the Hague Protocol amending the Warsaw Convention,

¹⁶ The Carriage by Air Act of 1993 has incorporated the Warsaw Convention as amended by the Hague Protocol.

¹⁷ *Okunda and another –vs- Republic Supra.*

means that unless and until that Convention becomes municipal law, it has no applicability in Kenya.

It can also be argued that the power conferred upon the High Court under Section 60(1) of the Kenyan Constitution allows the High Court wide and unfettered jurisdiction to apply "any other law" including International Law. This assertion has not been tested within domestic courts and it is also moot.

3.2 THE KENYAN CARRIAGE OF AIR ACT OF 1993

The Warsaw Convention of 1929 has been domesticated in Kenya through the Carriage by Air Act of 1993. This follows Kenya's ratification of the Warsaw Convention of 1929 as well as the Hague Convention of 1955.

The Carriage by Air Act adopts the Hague Convention of 1955 and goes on to append the Convention. In its preamble the Act declares that it is

An Act of Parliament to give effect to the Convention concerning International Carriage by Air, known as 'the Warsaw Convention as amended by the Hague Protocol, 1955, to enable the rules contained in that Convention to be applied, with or without modifications, in other cases and, in particular, to non-international Carriage by Air, and for connected purposes

under its Section 2, the Carriage by Air Act, also declares that upon coming into force, this Act would oust the previous relevant act, that is the Carriage by Air Act (1932) of England which hitherto had been the applicable law in Kenya.

The Act therefore applies to all contracts of Carriage by Air that are subject of the Hague Convention.¹⁸ In order to ensure parties can not exclude its

¹⁸ Section 3 Carriage by Air Act.

applicability by lodging claims in national courts as a way of circumventing the convention, the Act expressly precludes the "substitution for any liability of the carrier in respect of the death of that passenger either under any written law or at common law" ¹⁹

In section 2 of the Act, a court for the purposes of the Act includes an arbitration or arbitration panel. The definitions of courts also includes magistrates courts as well as the High Court. When issuing judgement these courts have power under section 6(2) and (3) to consider any other proceedings relevant to the claimant wherever they are filed and it may grant an award less than that stated in the limitation clause of Article 22 of the Hague Convention. This flexibility is necessary to enable the court to independently assess the damage complained of and the circumstances surrounding the 'accident' and make a considered award. The Act also introduces a limitation clause with reference to period within which the court can entertain any claim within the courts jurisdiction. In this regard it provides two years from "... the date of arrival at the destination or from the date on which the aircraft ought to have arrived or from the date the carriage stopped." Similar provisions are made for any party seeking contribution from a common tortfeasor.

Article 21 of the Hague Convention allows a carrier to invoke the defence of contributory negligence against the injured person. Under section 8 of the Carriage by Air Act such defence of contributory negligence is only applicable subject to the provisions of section 4 of the Law Reform Act (Cap 26 Laws of Kenya.) Section 4(i) and (ii) of the Law Reform Act does not recognize the applicability of any contract or law between parties executed before the injury or damage is suffered, where such instrument does not limit the liability of the Defendant.

¹⁹ Section 4(3) *Ibid.*

The Kenyan law therefore strictly limits the amount recoverable by any claimant under a contract of air carriage. This is significant in view of the fact that the amount of damage recoverable can not exceed the limitations of Article 22 of the Hague Convention. Secondly the actual value of recoverable damage is dependent on the value attached to the French franc, the unit of compensation under the Convention at the time of enforcement of the judgement.

Warsaw Convention and the Hague amendment of 1955 both provide that any action for damages "however founded" could only be brought within the limits set out in the convention. The Guatemala Convention on its part provided that claims "however founded" ... "whether under this convention or in contract or in tort or otherwise" would be determined in accordance with the limitation clauses.

These provisions were intended to avoid inventive judges or astute litigants and judges circumventing the Warsaw Convention by defining their own understanding of the meaning of the limitation clauses or liability clauses as inclusive of national courts jurisdiction as this would lead to a situation where parties would go fishing for a system that would guarantee higher awards. For example some courts could find that a contract of carriage is not part of the matters covered under the Warsaw Convention based on the fact that the claimant can also invoke domestic law of contract in a claim for delayed travel.

Indeed the Guatemala Protocol provided that the limits set out in the protocol constitute the maximum and may not be exceeded whatever the circumstances giving rise to liability

The English Case of Sindhu –Vs- British Air Ways²⁰ restated this position very clearly when the court held that

the Convention ...was designed to ensure that, in all questions relating to carrier liability, it is the provisions of the convention which apply and that the passenger does not have access to any other remedies, whether under common law or otherwise, which may be available within the particular country where he chooses to raise the action.

3.3 COMPENSATION UNDER THE CARRIAGE BY AIR ACT

Section 6 of the Carriage By Act adopts the liability limitations set out under Article 22 of the Hague Convention which the Act sets out to domesticate. Indeed not only does Section 6 comply with Article 22 of the Convention, it goes on to reiterate under section 6(2) that the limitation allowable under the Act is a cumulative limitation in respect of all claims both local and international however or wherever brought by the same claimant against the same carrier arising from the same accident.

Under Kenyan law therefore the maximum award as compensation for passengers injury or death is equivalent to 250,000 French francs. As regards baggage and cargo the limit is 250 French francs per kilogram unless at the time the package was handed over to the carrier, the passenger declared a higher value and paid extra premium for it. In the case of loss, damage or delay of part of registered baggage or cargo or any objects contained therein, the total weight of the items will be considered in ascertaining the recoverable compensation. Finally, loss or damage to hand luggage entitles the passenger to maximum of 500 francs per passenger.

²⁰ [1997] ALL ER 193.

These amounts are ridiculously too low when you consider the variations in standards of living between the time the Hague Convention came into force in 1955 and today in most of the world and especially Kenya. Secondly majority of persons who use air transport are the middle and upper class in any society. These are people who would obtain hefty awards under the common law system of precedents in assessing damages followed in Kenya.

The value of most goods transported out of Kenya or by the air carriers registered in Kenya, is often in hundreds of times above the limitation afforded by the Hague Convention. Even the average hand luggage would attract a much higher value. In fact even the average lap top computer, a popular item of hand luggage for most business travellers costs more than Ksh. 130,000.00

Most travellers therefore are disadvantaged when using locally registered air carriers. Similarly the low liability limitation cut off does not encourage cargo transport business. Kenya is a local hub for commercial transactions and therefore a focal point for international business with or within the region i.e. East and Central Africa including Ethiopia and Sudan. Kenyan law on carrier liability is outdated in view of the new provisions of the Montreal Convention and therefore the situation is giving advantage to other emerging players such as the Republic of South Africa.

The local air carrier industry is also adversely affected in that air travel and cargo transportation is likely to suffer in the long run as other airlines whose state of registration have embraced new conventions and progressively thinking are likely to dominate the local market. The only reason this has not happened in my opinion is mainly because very few travellers or even average people, are aware of the Warsaw System limitations on passenger

liability. Very few notice Warsaw Convention applicability notice on their tickets. Majority of travellers are not even aware the Carriage by Air Act exists. The present Law is therefore not consumer friendly.

The absence of any local jurisprudence on the matter is also a major contributory factor in passenger apathy. The local air carrier business is dominated by the Kenya Airways and in the absence of serious competition, no serious need may be felt for extending to the passengers and consignors the benefit of a higher liability limitations or scrapping them altogether.

But the problem of recoverable damage is not just limited to the now outdated liability limitations contained in the Hague Convention nor does the problem lie just with the currency employment by the convention. Section 6(4) of the Carriage by Air Act, grants the Minister for Finance exclusive power to periodically publish through a Gazette Notice the official exchange rate to be applied to determine the value of damages recoverable under Article 22 of the Convention.

This section does not say that the value of the franc will be that published by the Central Bank from the time to time or the exchange rate available on the free market situation. Indeed the value of the franc is totally at the whim of the minister for Finance. Such decision therefore may get bogged down in executive red tape and other bureaucratic complexities. Further the section does not obligate the Minister in arriving at such value of the franc as he may gazette, that he should be guided by any set principles, monetary or otherwise nor is he obligated to consider the views or representations of any party. The section does not also obligate the Minister to review the value of the currency within specific period.

In any event it is inconceivable that the minister for Finance would Gaze a value of the franc which is higher than that quoted by the Central Bank of Kenya. Parties litigating under the present Carriage by Air Act would therefore have to be satisfied with the likely small awards.

However the problem is even more complex than stated above. Member states of the European Union abandoned their domestic currencies and adopted the Euro as the uniform currency in continental Europe. It is not clear therefore where the Minister for Finance would get valuation for an obsolete currency or if the applicable exchange rate would be that prevailing at the time the currency was abandoned. If parliament were to amend the Act to introduce any other currency, such amendment would be illegal as it would be in contravention of the Hague Convention. There is therefore no option but for the Kenyan Law to be repealed.

3.4 ENFORCEMENT OF LIABILITY AND JUDGEMENTS

Section 3 of the Carriage by Air Act declares that the Hague Convention shall in respect of any carriage by air to which it ought to apply, be the only instrument with force of law in that regard in Kenya.

However the Act is silent on the question of enforcement of liability upon parties as well as the recognition and enforcement of foreign judgements locally. The only option left is to refer to the provisions of the Foreign Judgements (Reciprocal Enforcement) Act, Chapter 43 laws of Kenya. The Act declares that it is:-

An Act of Parliament to make new provisions in Kenya for the enforcement of judgement given in countries outside Kenya **which accord reciprocally**

treatment to judgements given in Kenya and for other purposes in connection therewith²¹

From the wording of the above preamble, foreign judgements which are enforceable in Kenya are those that emanate from countries with which Kenya has established reciprocal relationship with respect to admissibility and enforcement of judgements.

The importance of this Act is evidenced in relation to the provisions of Article 28 of the Hague Convention which stipulates that an action to recover damages shall be brought before a competent court in any of the following jurisdictions but within the territory of a High Contracting party:-

- (i) Where the carrier is ordinarily resident,
- (ii) Where the carrier has his principal place of business
- (iii) Where the carrier maintains an establishment by which the contract of carriage was made.
- (iv) Or at the place of destination.

Passengers or the other claimants who wish to invoke this right in respect of Kenyan Courts have therefore to content themselves with the extremely low threshold on liability availed under the carriage by Air Act. However should they pursue their claim under any law in any other country, for example those that have domesticated the Montreal Convention of 1999, then they would have to pass certain test in order to realize their awards within Kenya. This would only be possible if the carrier against whom they claim either is ordinarily resident in Kenya, or has his principal place of business within Kenya or maintains an agency office within Kenya from

²¹ Emphasis mine.

which the claimant would have purchased his ticket or consigned the goods through.

The same situation would obtain where a party seeks contributory negligence on a claim filed in Kenyan courts.

However of more concern is where a judgment has been awarded to a claimant by a court in whose jurisdiction a higher limitation on liability is allowed by a different Convention or Protocol subsequent to the Hague Convention. Similarly a difficulty would arise where the award is issued by a country which either is not a signatory to any of the Conventions or for that matter to the Hague Convention itself and or one which has opted for a waiver of the limitation clause.²²

Under the Foreign Judgements (Reciprocal Enforcement) Act, for foreign judgements to be enforced in Kenya, they must emanate from countries that have signed a reciprocation agreement with Kenya. Under Section 13(1) of the Act, the Minister has to be satisfied that

“....once the provisions which are substantially reciprocal will be or have been made by a country outside Kenya for the enforcement therein of judgements by the superior courts in Kenya, [then] he may, by order declare that country to be a reciprocating country for the purpose of this Act”

Naturally this would mean that claimants seeking to enforce judgement against local carriers would need to pass the reciprocity test first.

This would not be the only hurdle that such parties would face. Even assuming that the award was registered in Kenya, the judgement debtor

²² E.g. Japan has waived the liability clause all together and accepted absolute liability for claims. This has led to quick settlement of claims and reciprocal growth in its civil aviation industry with more people opting to fly its airlines. The hypothetical case discussed in chapter one above best illustrates this point.

can still move the court under the provisions of section 10(2) (i) of that Act and obtain an order to set aside the judgement. Under that section the court has wide and unfettered discretion to set aside a registered foreign judgement where:-

there are provisions of law..... which, by virtue of private International law of Kenya, would have been applicable notwithstanding any choice of another system of law by the judgement creditor and the Judgement debtor, had the proceedings been brought in the High Court and the judgement disregards those provisions in some material respect.

It appears therefore that since the Carriage by Air Act specifically applies the Hague Convention and by extension the limitations contained in Article 22 thereof, then if a party obtains a judgement based on a system of law in conflict with the Kenyan law, the High Court can set aside such judgement and thus deny the decree holder right to enforce it.

The fate of a foreign judgement must also pass the test set by Section 10(4) of the Foreign Judgements (Reciprocal Enforcement) Act. Under that section, the High Court can set aside a registered judgement and by extension can also refuse to register a foreign judgement if it is satisfied on an application brought by or on behalf of a judgement debtor that the sum awarded to the decree holder as well as the costs thereof, .."are substantially in excess of those which would have been awarded by the High Court [itself]"

A successful claimant therefore who has been awarded a judgement based on unlimited liability under, for example the Montreal Convention, and who wishes to enforce that judgement in Kenya, must hope that it is equivalent to what the Kenyan High Court would award in similar circumstances. This scenario creates two issues. Firstly, the Kenyan Courts follow the common law system of precedents. Consequently any award in

damages would be regulated by past decisions. Unfortunately there is hardly any case law creating local jurisprudence in that area. In the circumstances, the High Court would have constraints in determining if the foreign judgment is excessive or not. Secondly, the hands of the High Court in Kenya are in any event tied by the provisions of section 6 of the Carriage by Air Act. Any award in damages that exceeds the limitations under the Hague Convention would be null and void and therefore unenforceable.

The only point of agreement between the foreign judgements (Reciprocal Enforcement) Act and the Montreal Convention is that they both prohibit punitive or exemplary damages.²³

3.5 CONFLICT IN INTERPRETATION

The Warsaw Convention has had the misfortune of receiving very wide and varying interpretation of the provisions by courts in different parts of the world. In fact because of its inhibiting liability limitations, frustrated claimants as well as national courts, some smarting from the conventions ouster of their jurisdiction, have gone ahead to so to speak re-write the convention through precedent by awarding higher awards than allowed by the liability limitations under Article 22.²⁴

The Conventions judicial products also encounter problems at enforcement stage, as often the matter becomes a public policy issue. However it is also possible to sometimes use public policy argument for good. This is possible where the resultant judgement contains serious errors or is contrary to principles of law applicable in the country of enforcement.

²³ See section 3(3) Foreign Judgements (Reciprocal Enforcement) Act and Article 29 Montreal Convention respectively).

²⁴ According to Dr. Christian Pisani: Warsaw System and Public Policy within the recognition and enforcement of a Foreign Judgement, this has been so especially in US where the Warsaw Convention is regarded as an impediment to development of air carrier law on compensations.

The foreign judgements (Reciprocal Enforcement) Act grants the "Minister" power to grant reciprocal rights yet the Act does not say which ministry is responsible for so doing²⁵. Since the enforcement of judgements is a judicial function, it is not clear in view of the principle of separation of powers the role the executive should play in this regard. Indeed this would possibly lead to a conflict between the two arms of Government as the executive using its statutory power can revoke the reciprocation facility just to frustrate a court order allowing enforcement. In doing so the executive can plead public policy considerations.

Interpretation of foreign judgements also brings problems especially in the state of enforcement or in common law countries keen on following precedence. Even where foreign courts misinterpret local law, domestic courts lack jurisdiction to alter or to rectify the finding of a foreign court.

3.6 ENFORCEMENT AND PUBLIC POLICY

Section 10(2) (n) of the foreign judgements (Reciprocal Enforcement) Act grants the High Court the jurisdiction to disallow enforcement of any foreign judgement if it would violate public policy. The concept of public policy is very abstract and therefore prone to different definitions depending on many factors, principal among which is politics.

Often the public policy is invoked where judgement is sought to be enforced against a state or public institution. Interestingly it is not a defence that parties ever invoke prior to the hearing and/or determination of any suit. It therefore rears its ugly head at the enforcement stage.

²⁵ Section 13 and 14 Foreign Judgements (Reciprocal Enforcement) Act.

The defence of public policy leads to several challengers. First, there is always uncertainty as to the appropriate source of the public policy. Secondly, public policy is unpredictable and expansive and courts often have problems agreeing on what it constitutes. Third, it is often hard to distinguish public policy from politics.

In the circumstances even though Kenya has ratified and even domesticated the Hague Convention, a party wishing to enforce a foreign judgement based on that convention against the national flag carrier (Kenya Airways) may be frustrated as 'the national pride' may be equated with public policy.

3.7 WARSAW CONVENTION AS THE "LEX SPECIALIS" IN AIR CARRIAGE LAW

As stated before, the Warsaw Convention is the *lex specialis* concerning the law on international carriage by air of passengers, baggage and goods. Even though several conventions have been passed and even ratified by a number of countries, under the provisions of Article 30 of the Vienna Convention on the law of treaties, unless both state parties have ratified the same convention, then the earlier convention to which they are both parties prevails.²⁶

Consent to be bound by a treaty may be expressed by a party signing a treaty, or exchanging instruments constituting the treaty, by ratification, acceptance, approval, accession or by any other means that may be agreed.²⁷ If a claimant therefore seeks to enforce a judgement based on a treaty provision to which Kenya is not signatory, the award will be unenforceable in Kenya. This is a real problem considering Kenya has so far

²⁶ Article 30(4) Vienna Convention on the Law of Treaties.

²⁷ Article 11 *Ibid.*

only ratified the Warsaw Convention of 1929 and the Hague Convention of 1955 before ratifying the Montreal Convention of 1999. In between these conventions are very many conventions and protocols that have been ratified by various states.

If Kenya signed the Montreal Convention of 1999 on the 28th May 1999 and proceeded to ratify it on 7th January 2002 and even set the 4th November 2003 as the date it would enter into force, it is inexplicable why Kenya has not taken steps to repeal the Carriage by Air Act of 1993 and substitute it with one that would incorporate the Montreal Convention. This is necessary to avoid the confusion and contradiction of having two conventions applicable in Kenya at the same time.

The Montreal Convention, unlike the previous ones after the Warsaw Convention of 1929, was not intended to merely amend the Warsaw Convention System. It was intended as I have argued before, to consolidate all the fragmented air carriage norms and then replace the Warsaw Convention all together. This is even clear from the wording of the title of the Convention: "*The Convention for the Unification of Certain Rules for International Carriage by Air (signed at Montreal 28th May 1999).*" This is distinguishable from for example, the Hague Convention whose header talks of "...amending the convention on unification certain rules on carriage by air signed at Warsaw in 1929." Some of the benefits of adopting the Montreal Convention of 1999 are enumerated in Chapter two hereinabove. However air carriers continue to loose from the Governments failure to embrace the new convention.

It is also arguable that Kenya's lethargy is comparable to the situation that appertained at the time the Warsaw Convention itself came into force. At that time, the air carriers were mainly state owned and therefore the states

wished to protect their investment by setting very low threshold for liability limitations so that awards did not wipe out the industry. The status quo prevailing now may therefore be favourable in respect of settlement of claims locally.

The failure of the Government to endorse progressive conventions may therefore be seen in two ways. Firstly as a way of maintaining low liability limitations and secondly because there is no serious private competitions locally.

However the biggest loss for the civil aviation industry in Kenya is the Government failure to approach the liability limitation provisions as impediment to the growth of the aviation industry. Most Western countries as shown in examples in chapter two, led by Japan, have quickly moved to embrace such provision of international law on air carriage as would afford their citizens as large compensation as they would receive under their respective national laws.

This approach benefits the international traveller and goes to increase business for the aviation industry. Secondly it does away with the rider on the Warsaw Convention that travellers ought to be notified of applicability of the Warsaw Convention and its limits to liability that can attach on the carrier so that they can make arrangements for extra insurance if they considered the possible awards too low in the event of an accident.

Most travellers or consignors therefore will only want to travel or ship goods on airline whose states of registration has embraced the new conventions. Indeed the Warsaw Convention can be viewed as overly protective of airlines to the detriment of the consumers.

Some countries have held the position that limitation of liability in personal injury claims arising out of accidents in carriage by air may constitute a violation of human rights. Signing the Montreal Convention with its progressive options on liability limitation would therefore be seen as a vote for human rights. This has been the basis for the rejection of the Warsaw Convention by the American Government. In their view the convention denies American citizens the right to large awards in damages that their domestic law would otherwise provide.

Italy has similar reservations. In the Corte Di Cassazione case²⁸. The constitutional court in Italy found that although the liability limitations clauses of the convention were not unconstitutional *par-se*, however, the limitations were contrary to key principles of Italian Constitution on the rights to personal liberty in that they denied parties the rights to full compensation for personal injury. They felt that the Warsaw Convention did not meet the legal standards of the Italian Constitution and any domestic court applying it would be acting unconstitutionally.

3.8 IMPLICATIONS OF DOMESTICATING THE MONTREAL CONVENTION OF 1999

As stated before the 1999 Montreal Convention establishes comprehensive up to date rules defining and governing the liability of air carriers in relation to loss, damage or delay of passengers luggage and cargo. It will soon replace the Warsaw Convention and its protocols. The Montreal Convention's objective is to provide a higher level of financial protection for air passengers their baggage and for consignors of cargo.

²⁸ Coccia -vs- THY (Supra).

Kenya signed the Montreal Convention on the 28th day of May 1999, and ratified it on 7th January 2002 with the 4th November 2003 as the date of entry into force. Many countries in Europe, America, Middle East and Asia have also ratified the convention. These countries are the major destinations of cargo and passengers from Kenya. It is also noteworthy that tourism is rapidly becoming the leading foreign exchange earner for Kenya. The civil aviation industry is therefore at cross roads whether to move with the rest of the world or to remain with the minority. The Montreal Convention will therefore apply to all airlines engaged in international carriage between Kenya and other states party to the convention.

There are several benefits associated with the Montreal Convention. Firstly the Convention introduces the possibility for airlines to utilize modern electronic documentation techniques in relation to the provisions of certain information which under the Warsaw Convention had to be given in a written form. This will allow the full development of electronic ticketing which for those passengers who wish to make use of it, will simplify international air travel. It will also allow airlines to reduce administrative costs significantly. This reduction will not be mainly in relation to whatever documentation they currently must provide to passengers but mainly in relation to the global systems of inter-airline billing.²⁹ It will also eliminate the need for cargo consignors to complete detailed paper based air waybills so that simplified electronic records can be used.

Secondly, even though Kenya has ratified both the Warsaw Convention of 1929 as well as the Hague Convention of 1955 and even domesticated the Hague Convention of 1955 into the present Carriage by Air Act of 1993, there are certain limitations to that convention.

²⁹ Article 3.2 Montreal Convention 1999.

The Hague Convention does not provide separate liability limit for delay, as damage occasioned by delay forms part of the general provisions for damage to passengers and carries and currently carries a limit of 250 francs.

This poses a problem in that although many passengers constantly suffer delays when flying, it is unusual for compensatable damage to occur and the number of claims made under this provision are therefore very few. The normal practice is for airlines to make provisions for delayed passengers subsistence or where necessary organize accommodation. The proposed limit of 4150 SDRs under the Montreal Convention, (which is approximately Ksh 140,000/-) should be sufficient to cover any situation where the airline does not organize accommodation or subsistence in the event of delay.³⁰ This limit may of course, be insufficient to cover other consequential damage such as missed holidays, meetings and so on which may in any event be covered by the passengers own insurance.

Thirdly, the present baggage limit of 250 francs per kilogramme of checked in baggage if applied to a typical 20Kg suitcase comes to a paltry approximately Ksh. 25,000/-. The Montreal Convention on the other had introduces a new limit which is not weight related but rather based on a single maximum amount of approximately 1000 SDRs. Therefore since the Hague Convention limit is too low (unless the passenger has separate insurance) the new Montreal Convention limit will allow most passengers to receive full and better compensation.³¹

Of course, this new system will benefit passengers and translate into loses for the airlines since unlike damages for delay, baggage claims often

³⁰ Article 22.1 *Ibid*.

³¹ Article 22.2 Montreal Convention 1999.

represent a significant cost to airlines and naturally implementation of this provision will increase that cost. However, the airlines will also be more obligated to improve on their baggage handling. On the other hand and/or in addition to such improvements, the airlines can invest in appropriate insurance cover.

Fourth, the Montreal Convention unlike the Warsaw System, has put in place a semi automatic liability review clause for every five years.³² This will prevent the liability limitations falling out of date or out of touch with economic realities. This means with changing inflationary trends, the member states will not need to negotiate another convention soon as the value of the actual compensation was always the main issue in dispute.

Fifth, the Montreal Convention has introduced a new jurisdiction; that of state of claimant. This will translate to a benefit to claimants because it will allow the claims to be lodged in the national courts of the country of passenger concerned, if the airline conducts business or maintains presence in the passenger's country. This will reduce the cost of litigation for most claimants significantly. It will also translate to a benefit for the airline if both the claimant and the airline are from the same country as litigating in foreign states has its own pitfalls and in any event its cheaper to litigate at home.³³

Sixth, the New Convention will make it mandatory that all air carriers subject to the convention must take out sufficient insurance cover. This will be an advantage to claimants as they will be guaranteed of recovering their compensation even if the carrier was wound up after the accident or was unable to pay for any other reason. However there will be need for

³² Article 24. *Ibid.*

³³ Article 33 Montreal Convention.

corresponding mandatory statutory provisions to be provided for within domestic law to ensure regulatory framework is in place on the necessary insurance to make mandatory provisions for the insurance companies to pay assessed or agreed compensation even if the carrier is put under receivership.³⁴

The clamor for the adoption of the principles set in the Montreal Convention was itself driven by air carriers. The impact of any new law applying the convention ultimately should be in the interest of the air carriers.

³⁴ Article 5 of *Ibid.*

CHAPTER 4

4.0 CONCLUSION AND RECOMMENDATIONS

There are obvious benefits contained in the Montreal Convention that Kenya should seriously consider in order to expedite incorporating it into local legislation. This is because the convention's provisions allow for domestic passengers to enjoy equal rights to those currently enjoyed by a majority of passengers on international flights elsewhere.

These benefits include:-

- A second tier liability for passengers suffering death, bodily or personal injury and the provision of unlimited liability where there is a presumption of fault on the part of the carrier.
- Regular review of liability limits in order to take account of inflationary trends (review automatically due every five years).
- Advance payment for accident victims and their relatives to help meet the immediate economic needs.
- Proven damages rather than exemplary damages as the basis for compensation.
- Clarification of the responsibilities between actual carriers and sub-contracted carriers, for code-sharing arrangements.
- Modernization of documentation relating to passengers, baggage and cargo, to provide for electronic commerce (e-Ticketing)
- The introduction of compulsory air carrier insurance programme guaranteeing compensation.

By adopting a modern convention, the law will boost commercial activities in the civil aviation sphere in that, for example, adoption of electronic

method of recording, airway bills will be easily negotiable as an instrument of trade.

The lengthy and tedious procedures associated with paper trails under the Warsaw Convention will also be replaced by a faster, more efficient method of handling cargo.

The introduction of a new jurisdiction allowing a claimant to lodge a claim at his domestic court will ease the burden and complexity of litigation in foreign courts as well as give Kenyan courts wider mandate to handle claims arising from international contracts of carriage. This will also encourage claimants to have confidence in local courts and to lodge claims there thus creating local jurisprudence in the matter.

The Warsaw Convention has clearly been overtaken by events. There exists no moral or legal justification for the Government of Kenya to continue dragging its feet on the repeal of the present law.

Although Milde argues that;

Warsaw Convention was a brilliant and far sighted unification of law and even today it deserves all respect and recognition. It helped to avoid major conflict of laws and conflict of jurisdiction.... It also assured considerable unity of law, meaningful risk management by affordable insurance... in some cases the convention represented progressive development in private law.

The Warsaw Convention dates back 76 years ago when air transportation was considered a dangerous adventure and when most airlines were Government owned and Government operated. The low liability limitation clauses were therefore useful for those times. The tremendous developments in air safety, technological advancement and availability of

reasonably priced insurance does not support the liability limitation principles set out 76 years ago.

Indeed the civil aviation market itself has been full of dissent over the provisions of the Warsaw Convention. This has led to serious fragmentation of the law on air carriage both at the international as well as at the national level.

Only a global unification of the law of liability in international carriage by air can secure stability and predictability and facilitate effective risk management on a world wide basis, as well as remove chaotic conflicts of laws and jurisdictions. Victims should be able to obtain fair and equitable compensation for damages. Consequently there is need for clear rules to avoid conflicts in court decisions. Such clear rules will also assist in developing an effective and economic insurance policy.¹

Already nearly all airlines have embraced the concept of e-ticketing, virtually creating a "Ticketless" travel. This has simplified and minimized cost of documentation.

The new provisions under the Montreal Convention regarding litigation establish sufficient forums where claims can be lodged for the convenience of the claimant rather than as a way of manipulating the outcome.

There is therefore an urgent need for Kenya to domesticate the new convention to which they have become signatory. As stated earlier until the provisions of the Montreal Convention are incorporated under a domestic law, the only applicable international law will continue to be the

¹ Prof. Dr. Michael Milde; Warsaw Requiem or Unfinished symphony; Private International Air Law Vol.1; McGill Faculty of Law, Institute of Air and Space Law, 2001.

Warsaw Convention of 1929 as amended by the Hague Protocol of 1955 a situation that as stated earlier is not only creating a conflict of laws but which also is an impediment to the growth of the aviation industry.

The Judicature Act, under section 3, allows for application in Kenya of English law and even though, such law can only be applicable if not against public interest, the position in law in England is that in the absence of a legislative enactment of international law, it has no applicability in their domestic courts. This sadly is the position in Kenya vide the provisions of Section 3 of the Judicature Act aforementioned. The Montreal Convention of 1999 has therefore no legal basis in Kenya until that is done. One of the easiest ways to solve the impasse, is through application of Section 3(g) of the proposed new Constitution, if it ever becomes law.

In my view public interest can best be served by Kenya expediting domestication of the Montreal Convention.

BIBLIOGRAPHY

1. Gerald F. Gitzgerald: The four Montreal Protocols to amend the Warsaw Convention regime governing International Carriage by Air; Journal of Air and Commerce Vol.XLII (1979) Pp283.
 2. Thomas J. Wharleen; Liability in International Carriage by Air; The New Montreal Convention; Journal of Air Law and Commerce UNIF. Rev. 1999-4, 837.
 3. Malcom N. Shaw: International Law; 5th Edn, Cambridge University Press (2003).
 4. Prof. Michael Milde; Warsaw Requiem or Unfinished symphony; Private International Air Law Vol.1; McGill Faculty of Law, Institute of Air and Space Law, 2001.
 5. Prof. Michael Milde; Liability in International Carriage by Air; UNIF. L. Rev 1999-4.
 6. Rene H. Mankiewicz; The 1971 Protocol of Guatemala City to further amend the 1929 Warsaw Convention; Journal of Air Law and Commerce (1972) Pg 521, Southern Methodist University School of Law, Dalas, Texas, USA.
 7. Reform of Carrier Liability, The Montreal Convention discussion paper; www.montrealconvention.
 8. IAN Brownlie; Principles of Public International Law 5th Edition, Oxford Press 2001
 9. M.D.A Freeman: Introduction to Jurisprudence, 7th Edition, Sweet and Maxwell 2001.
 10. J. W. Harris: Legal Philosophies, 2nd Edition, Lexis Nexis 2003.
-