LIABILITY OF THE AIR CARRRIER FOR PERSONAL INJURY: THE EXTENT OF COMPENSATION UNDER THE CEMAC CIVIL AVIATION CODE

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ABSTRACT

The aviation industry plays an important role in the transportation of goods and persons globally, as such there is the need for adequate regulation especially in the area of safety, the rights of air passengers and the liability of air carriers. Air passengers are faced with the challenge of bodily injury in the case of an accident. As such there is the need for adequate compensation mechanisms to be put in place to see into it that those who suffer from such aviation misfortunes are adequately compensated. This paper appraises the legal regime for the liability of the air carrier as to "bodily injury" and the extent of compensation of such bodily injury. It focuses on carrier's liability towards passengers injured in the course of air transport as brought out by article 7 (2) (6) of the CEMAC Civil Aviation Code. Its objective would be to highlight some of the problems of interpretations in the convention on accidents that cause death or bodily injury while the passenger is on board the aircraft or in the cause of embarking and disembarking. The article tries to find out if the compensation regime applicable to "bodily injury" in air transport within the CEMAC Region permits effective and satisfactory compensation of victims. As such the work would examine air carrier's liability as prescribed by article 7 (2) (6) of the CEMAC Civil Aviation code which is considered as stark and nebulous due to the fact that neither accident, bodily injury, nor embarking and disembarking has been properly defined by the convention. The paper would constantly make reference to the Warsaw Convention of 1929 and the Montreal Convention of 1999 since there are the two regimes used by the CEMAC Civil Aviation Code of 2012.

Keywords: *Air Passenger, Bodily Injury, Liability, Compensation, Aviation Industry, Safety*.

INTRODUCTION

Air transport is fast developing the world over and the CEMAC region is not left out.[1] During the operation of air transportation, accidents might likely occur, the reason much emphasis is laid on the safety of air transport. It has been held by the International Air Traffic Association (IATA) that Africa has an accident rate that is 12 times more than the world's total average.[2] Various key players such as the government, the air carriers and the passengers are involved in seeing into it that air transport is safe.[3] Air transport is mostly of international nature since an aircraft passes through the air space of so many countries. This makes it to naturally fall within the auspices of international law. The international nature of air transport law has made it to be regulated mostly by international treaties and regional laws despite the existence of some national laws.[4] International conventions such as the Warsaw convention 1929 on the unification of Certain Rules Relating to international Carriage by air had as main objective to avoid major conflicts of law and jurisdiction and to protect the infant and financially weak aviation industry.[5] This was followed by the Hague Convention of 1955,[6] the Guadalajara Convention 1961,[7] The Montreal Agreement 1966,[8] The Guatemala City Protocol 1971,[9] the

[1] See IATA Passenger and Freight forecast 2005-2009, Executive Summary, where it is stated "Airfreights flows between Africa and Europe amount to 70% of total flows into and out of the region and are thus of considerable importance. Over the medium term an enlarged European Union will provide a further Market for African goods and should fuel growth, providing the region can retain reasonable and economic stability." It should be noted that the CEMAC member countries make up part of African countries.

[2]M. Ndende, « La Problématique de la Sécurité de Transports Aériens dans les Etats d'Afrique Centrale », RAMATRANS, no.4 Avril 2012, p 10.

[3] Passengers are persons who consent to be carried. A passenger does not have to consent expressly to the terms of the contract or even see the ticket. It is enough that the passenger consents to be carried in the aircraft in question. See Ross v PanAm, 85 2d, 880, 884-885 NY CA 1949.

[4] Cameroon which is a member state of CEMAC has its domestic law that is rarely applicable due to the existence of international and regional conventions in the area of air transport law. Decree no.2009/0052/pm of 22 January 2009 on the regulation of the liability of the transporter.

[5] There were substantial differences among the world's aviation states regarding the rules that governed air transportation creating uncertainties for both passengers and carriers.

[6] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on October 12, 1929, the Hague September 28, 1955.

[7] 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, Guadalajara, September 18, 1961.

[8] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Montreal, May 4, 1966.

[9] Protocol to Amend the Convention for the Unification of certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12, 1929 as Amended by the Protocol done at the Hague on 28 September 1955, Guatemala City, March 8, 1971.

Montreal additional Protocols 1, 2 and 3[10], the Montreal Protocol No.4[11] and the Montreal Convention of 1999[12] which had as objective to modernize the Warsaw system. The Warsaw Convention remains the "backbone" of the Montreal Convention but it consolidates it into one single document using the novelties presented in the Guatemala City Protocol and the Montreal Protocols No.3-4 to modernize the legal rules.[13] After independence the countries within the Central African region saw the need for the free circulation of goods and persons and as such decided to come together and form what was known as UDEAC which later on became CEMAC.[14] With this the institutions of CEMAC have been putting in place various laws to govern the free movement of goods and persons. One of the laws is that of the CEMAC Civil Aviation Code.

In the CEMAC[15] region the CEMAC civil aviation Code that was brought into existence in 2000 and amended in 2012 is applicable to air transport within the CEMAC Region. The CEMAC member states are members to the Warsaw convention and have not yet ratified the Montreal Convention despite the fact that certain countries within the region have gone out to ratify the Montreal convention of 1999.[16] This paper would appraise Article 7 (2), (6) of the CEMAC Civil Aviation Code that has been put in place by the Central African member states[17]

[10] Additional Protocols 1,2 and 3 to amend the Unification of Certain Rule Relating to Carriage by Air, signed on October 12, 1929, Montreal, September 25, 1975.

[11] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12, 1929 as Amended by the Protocol done at Hague on September 28, 1955, Montreal Protocols, September 25, 1975.

[12] The Rules for Unification of Private International Air Law had become outdated and putting in place various Legal regimes and to an extent creating disunity rather than unification.

[13] See the Preamble of the Montreal Convention of 1999.

[14] CEMAC member countries are Cameroon, Gabon, Chad, Equatorial Guinea, Democratic Republic of Congo and the Central African Republic.

[15] The convention governing the Economic Union of Central African States in its article 1 that "by the present convention, the contracting states create among them the Economic Union of Central African States (ECAS)…with the aim to establish in common harmonious conditions for economic and social development within an open market and a harmonious legal environment. Article 2 goes ahead to state that based on article 1 and according to the conditions provided for by the present convention, the economic union would realize the following objectives…institute a coordination of national sectorial politics, put to work common actions and adopt common politics notably in the area of transport. (Translation by author since all CEMAC texts are in French, with emphasis added).

[16] Cameroon has unilaterally ratified the Montreal Convention and by so doing it has touched a field that is reserved to CEMAC. Cameroon freely accepted by virtue of the treaty instituting CEMAC member states to be a member of the CEMAC Community and therefore has to exercise in common certain competences including the transportation field. Such ratification brings up the problem the authority of the CEMAC regional Laws. See J. Mbiamo, « La Ratification par le Cameroun de la convention de Montréal de 1999 sur le Transport Aérien International : Autopsie d'une Démarche favorable à une Dérèglementation de l'Ordre Juridique Communautaire en zone CEMAC », Juridis Périodique, No. 100, (2014), pp 123-131, p 124.

[17] The Civil Aviation Code was adopted using Regulation no.10/00-CEMAC-006-CM-04 of 21 July 2000 Amended by Regulation No./12-CEMAC-066-CM-23 July, 2012.

to regulate the relationship between the air passengers and air carriers with a focus on the compensation of victims in the case of an accident that might lead to "bodily injury." The paper states the fact that certain words used in the code are ambiguous and cloudy and also some areas of compensation of personal injury have not been taken into consideration by the Civil Aviation Code thereby limiting the areas to which a victim of personal injury can claim compensation.

The CEMAC civil Aviation Code has simply transcribed the Montreal Convention while still adhering to the Warsaw regime in the case of international air transport,[18] a position which has been criticized by many.[19] This is to state that all international flights within the CEMAC region are governed by the Warsaw convention, while internal flights in the sense of this convention is regulated by the Montreal Convention of 28 May 1999. This has made it such a way the same compensation regime that is applicable in the Montreal Convention is applicable in the CEMAC Civil aviation code for internal flights.

With this the general structure of the Montreal Convention and many of its provisions have been retained by the CEMAC Civil Aviation Code and one of the most important features of the code is that carrier's liability is absolute.[20] The carrier is liable for injury, death or damage caused during carriage. Like the Montreal Convention the amount of damages recoverable is significantly higher than in the former CEMAC Civil Aviation of 2000.[21] Defenses are limited and jurisdiction has been extended to where the passenger has his principal residence.[22] It should be noted that despite the fact that the Montreal Convention has been copied, the Warsaw

[18] Article 7 (2), (2) of the CEMAC Civil Aviation Code holds that; an international air transport contract is submitted to the two regimes of the international air transport in conformity with the rules of the said convention i.e. the Montreal Convention of 28 May 1999; or in the sense of the Warsaw Convention of 12 October 1929 amended by the Hague protocol of 28 September 1955 is submitted to one of the two regimes applicable to the said international transport. It goes further to hold that "an internal air transport contract is one which is not international in the sense of this convention, is governed by the Montreal Convention of 28 May 1999. Author's translation with emphasis added.

[19] J. Mbiamo, « La Ratification par le Cameroun de la convention de Montréal de 1999 sur le Transport Aérien International : Autopsie d'une Démarche favorable à une Dérèglementation de l'Ordre Juridique Communautaire en zone CEMAC », Juridis Périodique, No. 100, (2014), p 124, pp 123-131.

[20] Article 17 (2) (6) of the CEMAC Civil Aviation Code, 2012.

[21] The amounts were based on that of the Warsaw Convention on which the limitation of reparation was indexed on the currency that was in use during the adoption of the various conventions, with an indexation on the gold value. The Warsaw Convention in its article 22 had limited compensation to one hundred and twenty five thousand (125,000) francs in the case of death or bodily injury. The liability regime of CEMAC Civil Aviation Code of 2000 was based on the Warsaw Convention.

[22] Article 7 (2) (19) of the CEMAC Civil Aviation Code, 2012.

convention is still in application which leaves parallel regimes in force resulting to greater complexity and confusion.

A PERFECT FORM OF LIABILITY SYSTEM BASED ON STRICT LIABILITY

The CEMAC Convention like the Montreal Convention of 1999 has actually elaborated to perfection the compensation of bodily injury by making it an absolute liability regime and it has also increased the amount of compensation. However, despite such elaborate mechanisms, it should be noted that the law has not actually defined other areas of compensation of personal injury such as moral compensation. Additionally, the said law has failed to bring out appropriate definitions of accident that would guarantee effective compensation.

Elaborate Compensation Mechanisms

The CEMAC Civil Aviation Code has put in place an elaborate liability system for air carriers who cause death or bodily injury to passengers, a strict liability regime and also an increase in the amount of damages. Article 7 (2) (6) of the CEMAC Code in the same manner as article 17 of the Montreal Convention has actually adopted an objective liability regime, which is very strict and to an extent heavy in transport law. As stipulated by the above article, any death or bodily injury of a passenger suffered during air transport is ipso-facto the liability of the transporter, based on the fact that the accident[23] which has caused the death or injury occurred in the plane or during operations of embarking and disembarking.[24] This is similar to article 17 of both the Warsaw and Montreal conventions from which the CEMAC Civil Aviation convention gets its source.[25] In bringing out a system of strict liability for air carriers, the convention was looking for a better means of protection of the victims of personal injury who

[23] Accident here is considered as an unintended and unforeseen injurious occurrence; something that does not occur in the usual course of event or could not be reasonably anticipated. See B.A. Garner, *Black's Law Dictionary*, 8th ed. West Publishing Co. USA, 2009, p 16.
[24] Article 7 (2), (6) of the CEMAC Civil Aviation Code, 2012.
[25] Article 17 of the Warsaw Convention makes air carriers liable for injuries sustained by passengers "if the accident which caused the damage so sustained took place on board the aircraft or in the course of embarking or disembarking.

have been dispensed of the burden of proof against the air carrier. According to article 7 (2), (6) of the CEMAC Civil Aviation Code,

> "*The carrier is liable for damage sustained in the case of death, harm or bodily injury of a passenger upon condition only that the accident, which caused the death or injury, took place on board the aircraft or in the course of any operations of embarking and disembarking.*"

In its French version states that:

> *« Le transporteur est responsable du dommage survenue en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui cause le dommage s'est produit abord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement. »*[26]

It simply states that the carrier is liable for any prejudice suffered through death or bodily injury by a passenger, giving the fact that the accident occurred in the plane or during operations of embarking and disembarking.[27] The code imposes strict liability on airlines for risks that is inherent in air travel, and that normal cabin changes could be qualified as accident.[28] Liability under article 7 (2) (6) of the CEMAC Civil Aviation Code arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger and not in circumstances where the injury results from the passenger's own internal reaction to the usual, normal, and unexpected operation of the aircraft, in which case it has not been caused by an accident. Under such circumstances, an injured passenger is only required to prove that some link in the chain of causes was unusual or an unexpected event external to the passenger caused the accident.[29] Article 7 (2), (6) needs to be flexibly applied after assessment of all circumstances surrounding the passenger's injuries.

By imposing strict liability, it therefore means that carrier's cannot defend their claims based on the fact all necessary measures were taken to avoid passenger's injury or that it was impossible to take such measures. These due care defenses have been waived by the code to the advantage of the passengers. The purpose of opting for the transcription of the Montreal

[26] It should be noted that most of the CEMAC texts are in French since most of the member states are French. This therefore poses a problem to those of the English speaking part of Cameroon who are monolingual.
[27] See also Article 7 (2) (6) of the CEMAC Civil Aviation Code of 2012 which is similar to article 17 (1)of the Montreal Convention of 1999.
[28]This definition as contained in Annex 3 of the International Civil Aviation Organization as meaning "an occurrence associated with the operation of an aircraft.
[29] In the case of *Air France v Saks, 470 U.S. 392 (1985).*

convention by the CEMAC member states was to speed settlement and facilitate passenger recovery and this was done by actually waiving certain defenses.

However, it would be noted that contributory negligence has been maintained. Where there is proof by the transporter that the negligence or an act or omission of the claimant contributed to the damage, the carrier under such instances would be totally or partially exonerated from his liability if such negligence, act or omission caused the damage or contributed to it.[30] When the claim is made by somebody other than the passenger because of death or injury suffered by the passenger the carrier is also totally or partially exonerated from liability if he can proof that the negligence or the act or omission of the passenger caused the damage or contributed to it.[31] This is to state that to a limited extent, the carrier has been given an opportunity to exonerate himself from liability based on proof but it does not limit to a great extent the extension of liability that has been brought in by the new code by putting aside the defense based on due care.

The law has brought out the conditions under which the carrier can be held liable for bodily injury. Such conditions are set out in article 7 (2), (1) of the CEMAC code which provides that the carrier is liable if the passenger has suffered damages due to:

- death, wounding or other bodily injury
- while a passenger on an international or regional transport
- in an accident on board the aircraft or in the cause of any embarking or disembarking.

Again, the carrier would not be liable for damage in the case where (a) the damage was not due to the negligence of the carrier (b) in the case where the damage was solely due to the negligence or other wrongful act of the third party.[32] Here no difference has been made as to whether the claimant can establish that the accident was caused by intentional or reckless behavior on the part of the carrier, its servants or agents.

The defense that which is seen in most conventions[33] that the carrier had taken all the necessary measures to avoid the damage or that it was impossible for him to do so is no longer available to the carrier. It would be noted that the code is favourable to agents of the transporter as no

[30] Article 7 (2), (13),of the CEMAC Civil Aviation Code 2012.
[31] Ibid.
[32] Article 7 (1), (6) CEMAC Civil Aviation Code of 2012 and Article 21, Montréal Convention of 1999.
[33]See Article 20 of the Warsaw Convention of 1929.

demand for compensation would be formulated against the agents. This therefore means that the text fixes a kind of immunity in relation to agents.

Exonerating causes of liability are very few in this code. The code has brought out only three limitative causes of exoneration. Firstly, if the damage was caused by or contributed by the negligence or wrongful act or omission of the claimant. In that case the carrier is wholly or partly exonerated towards this person in the measure where this negligence or the act or prejudicial omission has caused the damage or contributed to the damage.[34]

Secondly, when a demand for compensation is introduced by some other person and not the passenger due to death or injury suffered by the passenger, the transporter would also be partially or totally exonerated in the circumstances where he can proof that the negligence or the act or omission of the passenger caused or contributed to the harm.[35]

Lastly the code has made it possible for the transporter to claim a defense based on the fact that the action is brought out of time[36] or that it is brought in the wrong forum.[37]The code in its article 7 (2), (18) states that any action for reparation has to be brought within a delay of two years as from the date of arrival at destination or the day on which the airplane could have arrived or the stoppage of transport. Any action that is brought after this period the carrier has the right to exonerate himself.

As to what concerns forum, the possibility has been extended to the fifth jurisdiction at the choice of the victim, it can be in the court of domicile of the air transporter, at his head office, or where he has an establishment, where the contract was drawn up or in the court of place of destination.[38] The convention makes it possible that in addition to the courts above in the case of personal injury or death suffered by the passenger, an action can also be taken in front of the jurisdictions of one of the member states where the passenger has his principal or permanent residence at the moment he had the accident and to which the transporter exploits his air transport services either with his proper aircraft or with the aircraft of another transporter based on a commercial agreement and in which the transporter carries his transport activities in his office or that of another transporter that he has a commercial agreement. This is comforting as

[34] Article 7 (2), (13) CEMAC Civil Aviation Code of 2012; see also article 21 MC.
[35] Ibid.
[36] Article 7 (2) (18) CEMAC Civil Aviation Code 2012; See also Article 35 MC.
[37] Article 7 (2), (19) CEMAC Civil Aviation Code 2012; see also Article 33 MC.
[38] Article 7 (2), (19) CEMAC Civil Aviation Code 2012; see also Article 33 MC.

it gives the victim a large choice or opportunity to take his action for personal injury even if he/her is in the impossibility of doing so out of his place of residence. This is favourable to the victim given the fact that most often air transport accidents for personal injury due occur out of the place of residence of the victim. Again air transport injuries are so serious that they may take more than two years for the victim to recover, giving such a large arsenal of courts, this gives the victim the possibility to sue anywhere. It also gives the family members in the case where death did not occur in the place of residence the opportunity to sue in their place of residence or anywhere

An Increase in the Amount of Limitation Reparation

One of the characteristic of a contract of transport resides in the fact that liability is limited in nature and so an air transport contract is not an exception. Transportation contracts are based on the obligation of results and so in return for such strict obligations on the transporters there is the need to place a ceiling on the amount of compensation to be paid by the transporter to the victim. At first the limitation of reparation was based on the money that was in existence during the adoption of the Warsaw convention, with an index on the gold value at the time. The Warsaw convention limited it to 125 000 Francs in case of death or bodily injury. With the varying rates of inflation, the amount had been constantly modified to an extent that it became difficult to understand the corresponding value to the actual money in circulation. Also, it should be noted that the amounts were to an extent ridiculous making it necessary for the Warsaw Convention to be constantly revised, which also led to a revision of the CEMAC civil Aviation Convention.[39] Additionally, there was the fact that gold on which the value was indexed was not stable, as such the International Civil Aviation Organization (ICAO) decided to initiate the Montreal Protocol of 1975 with the aim of substituting the Franc-or to Special Drawing Rights (SDR) on which its value is based on the various currencies that make it up as it is quoted on a daily basis by the International Monetary Fund (IMF).[40] The advantage with the SDR is that it is easily convertible to other currencies.

[39] The Hague Convention 1955, took up the limitation to 250,000 francs; the Montreal Accord of 1966 took it up to; the Guatemala Protocol 1971, the Montreal Additional Protocols (1-4) 1975. This international instruments motivated the CEMAC Legislator in 2000 to adopt a CEMAC Civil Aviation Code that was revised in 2012 by Regulation No./12-CEMAC-066-CM-23 July, 2012.

[40]These are supplementary foreign exchange reserve assets defined and maintained by the IMF. SDR is a unit of account and not a currency per se. 45% US dollars, 11% pound Sterling, 15% Japanese Yen, and 29% Euro. The composition is revised every five years by the International Monetary Fund (FMI).http.//www.imf.org/external/np/fin/data/pdf/sdrf.pdf. Accessed on December 17, 2018.

In relation to passenger death or bodily injury, the CEMAC Civil Aviation Code states that the carrier is liable without limit for any amount that is not above 100.000 Special Drawing Rights (SDR) per passenger and as such the carrier can neither exclude nor limit his liability.[41] For the exchange rate of Special Drawing Rights into Francs CFA since CEMAC member states are of the Franc Zone, the rate is 15 Francs per SDR.[42] Also the rate of exchange of special drawing rights in francs CFA will be that established by the International Monetary Fund on the day of the judgment.[43] It would be noted that this article is identical to that of the Montreal Convention but for the fact that the Montreal convention has increased the amount of limitation to 113,100 SDR in case of death or bodily injury suffered by a passenger.[44] It is surprising that in adopting the Civil Aviation Code of 2012, the CEMAC member states did not take into consideration the amount of 113,100 SDR.

For any damages that are not above 100.000 SDRs per passenger, the transporter cannot exclude or limit his liability. However, if the sum claimed exceeds 100.000 SDR the carrier will still be liable without limit but may be excused if he can prove that the damage is not due to the negligence or prejudicial act or omission of the transporter or his agents; that the damage resulted uniquely due to negligence or an act or omission of a third party.[45] This is due to the fact that it was argued that, there is no transportation context where liability is both absolute and unlimited and aviation did not wish to be the pioneer.[46] There should be the proof of absence of fault by the transporter or that the fault was solely the fault of someone else. In such instances liability ceases to be strict and is based on fault however with a reversal of burden of proof. This therefore is a limit in the sense of strict liability. The objective of the two tier system was to take into account the diversity of socio-economic circumstances and the variance of the cost of living.[47]

The CEMAC Civil Aviation Code of 2012 goes further to state that a decree can be brought out to revise upwards the liability limits so as to take into account inflation rates.[48] This is in line with Article 24 of the Montreal convention which provides for the mechanisms for the

[41] Article 7 (1), (6) CEMAC Civil Aviation Code of 2012.
[42] Article 7 (2), (24), (a) CEMAC Civil Aviation Code of 2012.
[43] Article 7 (2), (24), (b) CEMAC Civil Aviation Code of 2012.
[44] Article 24 of the Montréal Convention, 1999.
[45] Article 7 (2), (6) of the CEMAC Civil Aviation Code, 2012.
[46] M. A. *Clarke, Contract of Carriage of Goods by Air*, 2nd ed, London, Lloyd's List, 2010, p 64.
[47] M. A. *Clarke, Contract of Carriage of Goods by Air*, 2nd ed, London, Lloyd's List, 2010, p 64.
[48] Article 7 (2) (12) of the CEMAC Civil Aviation Code of 2012.

revision of the limits of liability to curb with the problem of out datedness of treaties and taking into account inflation levels.[49]

However, it would be noted that the amount of indemnity at 100.000 SDR poses a problem. This is because the revision of the CEMAC Civil Aviation Code entered into application in 2012 when the Montreal Protocol had revised the rates of limitation for the first time to 113.000 SDR as previewed by article 24 of the Montreal Convention which states that the limits of liability in articles 21, 22 and 23 would be revised by the depositor every five years.[50] The first revision was done in 2008 five years after the date of entry into application.[51] This rate went operational on the 30th of December 2009 six years after the entry into application of the Montreal convention and six months after notification to the various states.[52] This revision leads to higher limits of reparation of 113.000 SDR in case of death or bodily injury[53] instead of 100.000 in the original version. With this in mind it would be submitted that the higher limits for reparation are highly welcomed but there is the need for the CEMAC Civil aviation Code of 2012 to align with the Montreal Convention whose rate today is 113.000 SDR so as to avoid confusion.[54]

The concern for the protection of passengers by CEMAC member states has led to a liability regime with not only acceptable limits of compensation but also fewer defenses making it advantageous to the claimant. Despite all the elaborate mechanisms, the code has got some imperfections.

[49] See article 31.1 (b) of the Vienna Convention on the Law of Treaties.
[50] IOAC is the depositor of the Montreal Convention Conformingly to its article 53 (5).
[51] Article 24 (1) the Montreal Convention.
[52] Article 24 (2) states that within three months after notification to the various member states. If a majority of these states notify their refusal, the revision will not take place and the depositor IOAC would forward the question to the meeting of the member states. Giving the fact that no refusal notification was refused by the 30th of December 2009, and the first revision simply went applicable as from the 30th of December 2009.
[53] Article 21 (1) Montréal Convention.
[54] E. Kenguep, L'impact de L'entre en Vigueur de la Première mise en œuvre de l'article 24 de la Convention de Montréal sur le Droit des Transports Aériens en Zone CEMAC, Juridis Périodique No.93, pp 73-87, p 77.

IMPERFECTIONS IN THE COMPENSATION OF BODILY INJURY IN THE CEMAC CIVIL AVITION CODE

Despite the fact that the law has an elaborate mechanism for liability and an increased amount of compensation, it can be said the civil aviation code has put in place a double standard for international and national flights, it has not given appropriate definitions to accidents and bodily injury as such giving a limited interpretation to personal injury. It has not taken into consideration certain forms of personal injury such as moral injury. Again, it has failed to take into consideration the liability of the carrier in case of hijacking and robbery or terrorist activities which can lead to bodily injury. Furthermore, as in the Montreal Convention, the CEMAC Civil Aviation Code does not apply to persons out of the contract of carriage. Such as the victims of a crash who were on the ground or persons on board who had "hitched a lift" whether by invitation or by storeways.[55] The CEMAC Civil Aviation Code has also failed to determine the delimitation of embarking and disembarking.

Double Standards Liability in the Scope of the Convention

The CEMAC Civil Aviation Code states that liability for international carriage is based on the Warsaw convention of 1929 and that of internal carriage is based on the Montreal convention. The normal question that would immediately come up is why choose two different regimes to govern air transport within the region especially when a single convention could be chosen to harmonize air transport liability . It should be noted that the CEMAC member states have not ratified the Montreal Convention of 1999, the Warsaw Convention was maintained. This means that in the case of internal carriage in the absence of a national law, the victims would be left without compensation.[56] Such a gap has made Cameroon to ratify the Montreal Convention[57] and this action puts to question the authority of the CEMAC legislation within the sub-region.[58] It is curious to state that the code chose the Warsaw Convention and not the Montreal Convention which is a modern law to govern international flights. At least the CEMAC

[55] M. A. Clarke, Contracts of Carriage by Air, 2nd ed., London, Lloyd's List, 2010, p 94.
[56] The reason the Cameroon government in 2009 through Decree no.2009/0052/pm of 22 January regulated the liability of the air transporters and brought out rules governing the compensation of damage caused to passengers, to baggage and goods.
[57] Cameroon signed the Montreal Convention on the 27 September 2001 and ratified it on the 5th of September 2003.
[58] See J. Biamo " la Ratification par le Cameroun de la Convention de Montréal de 1999 sur le Transport Aérien International : Autopsie d'une Démarche Favorable à une Dérèglementation de l'Ordre Juridique Communautaire en Zone CEMAC », Juridis Périodique, Numéro 100, 2014, pp 123-pp131, p 131.

legislators would have dispensed us such unorthodox formulation giving to the various doctrinal difficulties that have been encountered elsewhere.[59] The fact that the legislator copied the Montreal text and despite the fact that the wordings in article 17 (1) of both Montreal and Warsaw are the same, it would have lead the legislator to preferably ratify the Montreal Convention to boost up the number of ratifications than adhering to the Warsaw regime which seems to be outdated and ambiguous. It would be noted that the context of Warsaw was based on the protection of a nascent and weak air industry and therefore certain liability and compensation limits were made to protect the industry. For example the term bodily injury or "lesion corporel" in the convention was meant to be simply physical injury as has been witnessed in most jurisdictions with various cases.

Meanwhile, the Montreal convention despite using the same wording of bodily injury has a different context, which has as aim the protection the passengers rather than the air industry and as such has a larger scope than the Warsaw Convention.

Undeterminable definition of accident

Accident according to the ordinary dictionary meaning is meant to refer to the event of a person's injury, it also describes the cause of an injury or both the cause and the injury. The term accident has no legal meaning as such complicates compensation. According to article 7 (2), (6) the term accident would mean an unexpected or an unusual event that is external to the passenger and needs to be flexibly applied after consideration of the various circumstances.

Damage sustained has not been properly defined by the code as such most often there would be a narrow interpretation of damage. It has been left to the courts to specify which harm can be recognizable. Questions as to what kind of compensation claimants have to gain have been allowed to the national laws. The kind of damage may mean different things in different context. Damage can be used in more than one sense. At times it may mean monetary loss or it may mean full compensatory damages. The measure of damage has not been indicated in the convention but like the kind of damage recoverable, it is left to the national courts to give an interpretation. Thus, leading to disparity in interpretation and as such not making it possible for everybody involved or affected by air travel to be able to gain compensation.

[59] Doctrinal difficulties that have been encountered with the Warsaw Convention with the definition of bodily injury.

It should be noted that article 7 (2), (6) in the CEMAC Civil Code the same as Article 17 (1) of the Montreal Convention is considered as unclear and can be 'described as stark and undefined'. Many of the terms used are not technical legal terms with a clearly defined meaning, which has led to so many discussions both in court and doctrine.[60] Definitions have not been made to accident and bodily injury, so courts have to grapple with the definitions and interpretations.[61] The fact that the word accident has not been defined has made the interpretation of bodily injury to be ambiguous.

Ambiguous Interpretation and Incomplete Inventory of Bodily Injury

Mental injury is ascribed to fear and anxiety which could have adverse changes to human bodies, such as unpleasant subjective feelings of horror, pounding heart, muscular tension, severe shock etc.[62] Mental injury can be divided into three categories: pure mental injury unaccompanied by physical injury, such as fear instilled on passengers due to drastic jolts of aircrafts which might lead to mental fear; Mental injury caused by physical injury to passengers due to aviation incidents such as mental stress resulting from scalding of the body from hot water due to lack of care from the flight attendants; physical injury caused by mental injury to passengers in an aviation accident.[63] The last two are considered as mental injury accompanied by physical injury.[64] However, it would be noted that the law has not given an appropriate definition to bodily injury and there is an incomplete inventory of what is considered as bodily injury.

Article 7 (2), (6) in the CEMAC Civil Code seems to be unclear based on the fact that the code has simply made mention of "lesion Corporelle" to which the English translation is "bodily injury" which seems to be limited to physical injury. This has led to so many discussions both

[60] T. A. Weigand, *Accident, Exclusivity, and Passenger Disturbances under the Warsaw Convention*, Digital Commons, 2001, p 913.
[61] See the U.S. Supreme Court Judgment in Saks. *Air France v Saks (1985).*
[62] C. C. Hong, "An Inquiry into Legal Considerations for Passenger Mental Injuries in International Aviation Laws," International Journal of Education, Culture and Society. vol. 3, No. I, 2018 pp 19-23, p 19.
[63] C. C. Hong, "An Inquiry into Legal Considerations for Passenger Mental Injuries in International Aviation Laws," International Journal of Education, Culture and Society. vol. 3, No. I, 2018 pp 19-23, p 19.
[64] Ibid.

in court and doctrine.[65] Courts have to grapple with its definitions and interpretation.[66] The Hague protocol and the Guatemala Protocol had tried to give a larger scope by replacing bodily injury by personal injury given the fact that personal injury is a more general term than bodily injury and covers mental injury. But it should be stated that personal injury may likely cover non- material personal harms such as insults, discrimination, fear, apprehension which are not acceptable terms for claims.[67] However, the Montreal convention in its draft by the ICAO in 1997 instead of maintaining personal injury as in the Hague and Guatemala protocols decided to state that *"the carrier shall be liable in the case of death, bodily injury or mental injuries of a passenger upon condition that the death or injuries are caused by accidents on board the aircraft or in the course of the operations of embarking and disembarking; however, if such death or injury is entirely caused by the passenger's own health condition, the carrier shall not be liable."*[68] Developed nations like the U.S. believed that the severity of the consequences from mental injury might be comparable to that from bodily injury.[69] Some developing countries believed that increasing mental damages was against the fundamental principle of balancing the interest between the passengers and carriers in the convention. This is because it is very difficult to ascertain the scope of mental injury and the manner of calculation of damages which lead to uncertainties on the application of the convention. This was against the spirit of unification and codification that the new convention was committed to. The Montréal Convention was finally passed in 1999 simply specifying that *"the carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the "death or injury took place on board the aircraft or in the course of any embarking or disembarking.* The Montreal Convention maintained bodily injury based on the fact that it seems to be more acceptable but might rule out claims for mental injury such as

[65]Based on the interpretations of both the Warsaw and Montreal Convention that are both applicable to the CEMAC Civil Aviation code, it would be said that in the case of the Warsaw Convention bodily injury could not be interpreted to include mental injury because it could lead to a floodgate of cases, this is because the Warsaw convention had as aim to protect the air transport industry that was nascent and weak. On the part of the Montreal Convention it would be held that mental injury is considered given the fact that the convention's objective is to protect the passenger.

[66] This is not only a problem of the CEMAC Civil Aviation Code but also the Warsaw Convention of 1929 with its additional protocols and the Montreal Protocol of 1999.See the U.S. Supreme Court Judgment of *Air France v Saks470 U.S. 392 (1985).*

[67] C. C. Hong, "An Inquiry into Legal Considerations for Passenger Mental Injuries in International Aviation Laws," International Journal of Education, Culture and Society. vol. 3, No. I, 2018 pp 19-23, p 20.

[68] T. Mingyu & C.Yu, *International Aviation Private Laws*, Law Press China, 2004, p 257.

[69] If two passengers both became disabled from aviation accident , one passenger disabled only due to mental injury while the other physically disabled due to bodily injury, the former would be entitled to much less damages than the latter, which is obviously unfair. compensation is not supposed to be discriminatory.

shock.[70] It was also maintained based on the fact that French speaking countries like France and Cameroon during the signing of the convention argued that "lesion Corporelle" included both physical and mental injury.[71]

The CEMAC member states have taken the position of the Montreal Convention by clinging to bodily injury as can be seen in its article 7 (2) (6). It has been said that despite the fact that the Montreal Convention maintained bodily injury as in the Warsaw convention of 1929, in treating bodily injury under the Montreal convention courts need to closely look into the intent of the signatories before adopting the previous treaty's precedent.[72] Given the fact that CEMAC Member states are mostly French speaking states, it can be said they have taken into consideration the larger definition of "lesion corporelle" which includes both physical and moral injury.

However, this poses a problem in the sense that the CEMAC Civil Aviation Code has taken into consideration the Warsaw Convention for international flights and Montreal Convention for national flights. It would be submitted that those on international flights would not be given the opportunity to recover from mental, emotional and psychological injury given the interpretation of the Warsaw Convention which was meant to protect the air transport industry. Recovery can only be considered if physical injury resulted in mental injury or mental injury is accompanied by physical injury.[73] Meanwhile those of national flight given that they are governed by the Montreal convention would be given a larger interpretation based on the history and the spirit of the Montreal convention.[74] It is believed the Montreal Convention has broadened the scope of passenger recovery even though the old text remained unchanged.[75] It would be but normal that the CEMAC member states should choose a single regime that is applicable both to international and national flights so as to give equal opportunities to

[70] T. Mingyu & C. Yu, *International Aviation Private Laws*, Law Press China, 2004, p *256.*
[71] M. Cunningham, "The Montreal Convention: can Passengers Finally Recover for Mental Injuries," Vanderbilt Journal of Transnational Law, Vol. 41, (2008), pp 1043-1080, p 1073.
[72] M. Cunningham, "The Montreal Convention: can Passengers Finally Recover for Mental Injuries," Vanderbilt Journal of Transnational Law, Vol. 41, (2008), pp 1043-1080, p 1044.
[73] Eastern Airlines *Inc v Floyd, 499 U.S. 530 (1991),* here recovery was accepted for mental injury that resulted from bodily injury.
[74] The aim of the Montreal Convention was to replace the Warsaw Convention with a new international treaty and recovery of mental injury in the absence of accompanying physical injury was a primary objective and was listed as a primary condition for the participation of the U.S.; See the ICAO, International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air) Montreal (may 10-28 1999), Minutes, Doc 9775-DC/2, at 44 (2001) (hereinafter Montreal Minutes). Accessed on the 28th December 2018.
[75] M. Cunningham, "The Montreal Convention: can Passengers Finally Recover For Mental Injuries," Vanderbilt Journal of Transnational Law, Vol. 41, (2008), pp 1043-1080, p 1046.

claimants using whether national or international flight. This is because if bodily injury is interpreted according to the spirit and history of the Warsaw Convention, victims are likely to get a limited inventory for their bodily injury.

Another problem with bodily injury under air transport law is actually delimiting the moment when the accident occurred.

Imprecise Delimitation of Embarking and Disembarking

It would seem absurd that the liability of the air carrier should be limited only to accidents that occur on board the aircraft even with the very flexible interpretation of the notion of "on board the aircraft" The operations of embarking and disembarking therefore should not only be limited to entering and getting out of the aircraft. It as such should cover the period from which the passenger is found in the area of airport risk.[76] This is to say when the passenger is exposed to the inherent risk of air navigation and exploitation. The transporter is held liable for an obligation of safety as from when the passengers are under his control from the time of carrying out embarking formalities until when they are disembarked at their of destination. As to what concerns embarking or disembarking, neither the CEMAC civil aviation code nor the Warsaw and Montreal conventions, have given an appropriate definition to it as to show when the operations of embarking starts and when the operation of disembarking comes to an end. It should be understood that most often, legal formalities always precedes the material operations of embarking and air transport only comes to an end when the passenger has descended from the steps of the plane. The fact that the notions of embarking and disembarking are imprecise, it should not give room to restrictive interpretation of these operations. French Cour de Cassation had indicated that passengers at times have to go through certain distances to get to the aircraft and as such are exposed to dangers from air transport.[77] The court from this arret brought out a criterion which permits to appreciate the liability of the transporter: that of being exposed to risks that are inherent to air navigation. Hence any damage caused in an area where the passenger is exposed to air transport risk leads to the liability of the transporter who has an obligation of results to see into the safety of passengers. Conversely when the passenger is no

[76] See the case of *Dame Toby Rose nee Ngobo v Air France Cameroon, Tribunal de Grande Instance de Mfoundi, judgment No. 422/ Civil of April 2005.*

[77] Cass. Civ 1er, 18 Janvier 1966, Bull. civ.I, no.38, D. 1966, Somm.85, RFD aérien 1966. 32, note E Du PONTAVICE. In this case, the passenger was no longer at the landing area but at the customs office. The Judge exonerated the transporter based on the fact that at the moment of the fall, the passenger was no longer submitted to the risks of air transport.

longer around the airport but in a hotel in the case of a transit, the transporter can eventually be held liable based on obligation of means.[78] Here the British Airways made a non-previewed transit in Kuwait city immediately after Iraq had invaded Kuwait, passengers were put in a hotel due to bombarding which had led to the closure of the airport. They were detained and made prisoners by the Iraq army for one to three months in different places in Iraq and in Kuwait. Here the French court of Appeal put aside the Warsaw convention and handled the action under contractual liability.

The criteria for the exposure to air risks has gotten some limitations based on the fact that today preparatory operations and posterior operations to air transport are done through telescopic passages or road shuttles which removes the traveler from the difficulties of going through passages and reduces to nothing risks that are purely of air travel.[79] It is believed that the liability of the transporter has to start from the moment the passenger is under the control of the agents of the transporter and comes to an end when the passenger has been liberated by the company's representative.

CONCLUSION

It is clear that the question to ameliorate the rules of liability and compensation of bodily injury caused by airplane accidents has become a major and urgent preoccupation. This is the reason the CEMAC member states decided to amend the 2000 Civil Aviation code in 2012 so as to be in line with the modern day compensation regime brought out by the Montreal Convention. The CEMAC member states have chosen a hybrid mode of compensation where internal flights are governed by the Montreal Convention and international flights by the Warsaw Convention. In the compensation of bodily injury, those of international flights would have to grapple with the problems of definition of accidents and bodily injury as was intended by Warsaw Convention and those of internal flights would have to benefit from the interpretation of

[78] CA Paris, 12 Novembre 1996, RFD aérien 1997.155, D.1996, IR 264, GAZ. Pal.1997. 173, concl. BENAS; rejet du pourvoi par cass.civ.1er, 15 Juillet 1999, Bull. civ. i, no.242, D.1999, IR 283, D.2000.283 ; RFD aérien 1999.353.

[79]K. P. H. Kagou, "Transports Substitue- Passager Victime d'un Accidents Pendant le Transit – Passager Soumis aux risques du Transport aérien ? Oui, Juridis Périodique, No. 100, (2014), pp 66-76, p 72, citing B. Mercadal, *Transport aeriens*, Prec, no. 118

Montreal based on the spirit of the drafters of the convention.[80] It would be noted that the Civil Aviation Code is ambiguous in relation to the issue of compensation of bodily injury, so courts in the different member states are given the leeway to interpret the convention and in some sense the discretion to apply the convention in the manner they think fit.

In surmounting the incoherence's and insufficiency of air transport law, it is necessary that the reparation of the moral prejudice should be reconsidered and actually spelt out so as to avoid differential and confusive interpretations by the courts. The hope here hinges on the clarification of terminology and concepts such as bodily injury, accidents, embarking and disembarking. There should also be a timely revision of the code so as to adapt the needs of passengers and industry to the advancing modern technological transport sector and the protection of rights of passengers.

Additionally, the CEMAC Civil Aviation Code was adopted in 2012 after the limitation of liability that was 100.000 SDR in the Montreal Convention had been revised to 113.000 and therefore there was the need to upgrade the limitation to 113.100 SDR but it maintained it at 100.000 SDR bringing in some controversy in its understanding and application. There is therefore the need for the CEMAC Civil Aviation Code to be revised so as to take into consideration such amounts.

It could be suggested that the CEMAC Civil Aviation Code of 2012 is a modern code and as such there is the need for legislators of the sub- region to consider applying simply the Montreal convention which is a modern law that would uniformly handle matters of bodily injury rather than having the Montreal Convention for internal flights and Warsaw for International Flights. This would avoid national governments within the CEMAC region going out to ratify the Montreal Convention as it is the case with Cameroon or enacting their own Civil Aviation laws as it is the case with Cameroon and Gabon which as such puts to question the authority of the CEMAC member states on the control of the actions of some national governments.

Further, it would be suggested that to achieve uniformity there is the need for the Montreal Convention to be ratified by the CEMAC member states. This would make sense for it would

[80] Warsaw intended to protect the industry and so gave a limited interpretation to bodily injury, while Montreal had the intention of protecting the passengers and based on the spirit of the law, had the intention to broaden the allowable recovery beyond strict bodily injury. Based on this, mental injury would not be compensated in Warsaw but might likely be compensated in Montreal.

increase the number of ratifications and give the Montreal Convention a wider scope of application.