

# REGULATING THE LIABILITY OF AIR CARRIERS AND COMPENSATION RULES FOR DAMAGE CAUSED TO PASSENGERS, BAGGAGE AND CARGO IN CAMEROON: AN APPRAISAL OF DECREE N° 2009/0052/PM OF 22ND JANUARY 2009

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## ABSTRACT

*Air carrier's liability is an inevitable concept in International Civil Aviation. This is due to the vulnerability of civil aircrafts during air movements whose manoeuvring may subsequently led to a mishap. The 2009 Decree regulating the liability of air carriers and compensation for damage caused to passengers, baggage or cargo derived its originality from the 1999 Montreal Convention. This Convention was incorporated and modified by the Cameroonian legislator to regulate domestic air carriage. Although the institution of air carrier liability is aimed at protecting passengers and baggage on board an aircraft in flight, any lacuna in the legislation could be a huge predicament in establishing and assessing the liability of air carriers. Thus, failure to widen the scope of compensation to third parties' liability may impede on the proper implementation of the 2009 Decree which disregards the concept of privity of contract. Again, it will be pertinent to address carriers' liability with a proper interpretation of the term "bodily injury", which is not the case with the 2009 Decree as such, the Cameroonian legislator needs to carry out some ramifications in its domestic air law.*

**Keywords:** Air, Carriers, Decree, Liability, Regulation, Damage, Compensation, Passengers, Baggage, Cargo, Third parties

## INTRODUCTION

Air carrier's liability for damage caused to passengers has been a significant subject of litigation. In Cameroon<sup>i</sup>, the air carrier will be liable for damage caused to passengers in case of death or bodily injury on board the aircraft or in the course of any of the operation of embarkment or disembarkment<sup>ii</sup> and in case of destruction or loss of baggage or cargo<sup>iii</sup>; in accordance with the regulation guiding the liability of air carriers and compensation rules for damages caused to passengers, baggage and cargo. It is imperative to emphasise that the regulation on the liability of air carriers gained its originality from the Convention for the Unification of Certain Rules for International Carriage by Air of 28<sup>th</sup> May 1999<sup>iv</sup>. This Convention was incorporated and instituted by the Cameroonian legislator to regulate domestic air travel.

According to the 2009 Decree, the carrier will be liable for damage for the sole reason that accident has taken place on board the aircraft or in the course of any of the operation of embarking or disembarking. This aspect is centred on the principal aim of this article. In other words, the plaintiff has to prove that an accident has occurred and that damage have derived from it and as a consequence carrier liability automatically arises. The word aircraft accident has been defined by the Chicago Convention in its Annex 13 as an occurrence associated with the adoption of an aircraft, which takes place between the time any person boards the aircraft with the intention of flight until all such persons have disembarked, in which a person is fatally or seriously injured as a result of being in the aircraft or direct contact with any part of the aircraft including parts which have become detached from the aircraft.<sup>v</sup> This position is different under the 2009 Decree since the liability of the air carrier is limited to passengers who must have sustains injury or death as a result of being on board the aircraft and not to third parties who must have sustain injury resulting from a direct contact with any part of an aircraft detached from it. The article also seeks to examine liability of air carriers as it relates to the destruction or loss of baggage and delay of persons and baggage.

### 1. LEGAL RECOGNITION ON AIR CARRIERS LIABILITY IN CAMEROON

The term liability could be perceived as that act whatsoever of man, which causes damage to another, obliging the one by whose fault it occurred, to compensate the victim<sup>vi</sup>. In other words, liability may accrue from one's fault enforceable by a civil remedy in the form of damages. However, a person may be held liable not only for the damage he causes by his own act or omission but also for that which is caused by the acts of person for whom he is responsible (vicarious liability).<sup>vii</sup> This may also be true with cases of civil aircraft accidents since the incident may be provoked by an individual other than the employee and damages are awarded by another party known as the air carrier. In this situation liability is based on a no-fault system known as strict liability. All that is needed is to prove that the defendant committed the act complained of and that the damage is the result of the act.

### **1.1 Assessing the Liability of Air Carrier to Passengers**

Liability of air carrier to passengers in Cameroon is governed by 2009 Decree align the 1999 Montreal Convention. Under this head, air carriers' liability relates to the death or bodily injury of passengers, from the period of embarkation and disembarkation, destruction or loss of personal property and delay of persons and goods.

#### **1.1.1 Damage resulting from Death or Bodily Injury of Passengers**

In Cameroon, passengers' injuries fall within the terms of article 3 of the regulation on air carrier's liability.<sup>viii</sup> Article 3 (1) states the circumstances under which the air carrier becomes liable. The article provides that the carrier would be liable for the damage sustained in case of death or bodily injury of a passenger upon condition that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. The Cameroonian legislator simply incorporated the provisions of article 17 of the Montreal Convention 1999 into its national legislation. The article does not create a cause of action but merely establishes a presumption of liability under the applicable substantive law<sup>ix</sup>.

The term accident is a condition *sin qua non* for the institution of air carrier's liability<sup>x</sup>. Under the Warsaw System, courts found that the burden is on the plaintiff to prove that there was an

accident.<sup>xi</sup> However, the Warsaw system had become obsolete and was substituted with the Montreal Convention of 1999. Being the most recent and complete international legal document, it was just appropriate for the Cameroonian legislator to incorporate its provisions in its legal instruments regulating civil aircrafts<sup>xii</sup>. As mentioned above, the air carrier becomes liable for damage sustained in case of death or bodily injury, which took place on board the aircraft.<sup>xiii</sup> There is no problem when it is a case of death instead the main problem is to determine what type of injury are contemplated by the term “bodily injury”. There is nothing in both 1999 Montreal Convention and the 2009 Decree to clarify the term. It could be discerned that an accident can be caused both physical and mental injury and the question the courts may struggle with is whether mental injury falls within the precincts of article 3 of the 2009 Decree.

Article 3(1) of the regulation mentioned above makes the carrier liable only for bodily injury, not for mental injury unaccompanied by physical injury. The inexactitude to the meaning of bodily injury whether physical injury should be accompanied with mental injury was raised during deliberations of the Montreal Convention. It was proposed that recovery for mental injury ought to be permitted along with physical injury. This is so because almost half of the passengers on board any given flight may experience fear of flying and if mental injury is included as a compensable damage of Article 17, it would lead to escalated claims and would be highly prejudicial to the interest of air carriers.<sup>xiv</sup> This could be ascertained from the American case of *Ehrlich vs American Airlines*<sup>xv</sup>, in which the court embraced the approach that recovery for mental injury is restricted to that which flows from, or is caused by, bodily injury<sup>xvi</sup>. Though Decree n° 2009/0052/PM of 22<sup>nd</sup> January 2009 fails to provide a clear understanding to the term “bodily injury”, the Cameroonian courts may only resort to foreign cases for an in depth meaning of bodily injury<sup>xvii</sup>.

### **1.1.2 Damage to Passengers resulting from the period of Embarking and Disembarking**

In order to assess passenger’s liability, it has to be established that the accident took place on board the aircraft or during the course of any of the operations of embarking and disembarking. Such liability in Cameroon could be determined by construing the operation of embarking or

disembarking as enshrined in article 3(1). Unfortunately, article 3(1) provides no guidance as to when embarking or disembarking takes place, the courts are left to decide this issue themselves.

Nevertheless, it could be assimilated that passengers will be in the course of embarking or disembarking when he has reached the boarding area after boarding announcement or when he is still on the apron. It will be unfounded to ascertain that the passenger is in the course of embarking or disembarking before check in or even before security and after leaving the apron to reach baggage claiming area. Therefore, if the accident never took place on board an aircraft or in the course of embarking or disembarking, there is no claim against the carrier as the 2009 Decree seems to be an exclusive remedy.

### **1.1.3 Liability accruing from Destruction or Loss of Baggage or Cargo**

Again, the air carrier could be held liable in cases of damage sustained during destruction or loss of baggage or cargo. Article 4(1) of the 2009 decree regulating air carriers liability<sup>xviii</sup> provides that the carrier would be liable for damage sustained in case of destruction or loss or damage to checked baggage upon condition that the event which caused the destruction or loss took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier. However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage.<sup>xix</sup>

Accordingly, liability will be imputed upon the carrier if the plaintiff can prove that his baggage was destroyed or loss or damaged on board the aircraft or at the period within which the checked baggage was in the charge of the carrier.

With regard to cargo, the carrier would be liable for damage, destruction or loss of cargo only if, the act occurred during the carriage by air. The carriage by air should consist a period during which the cargo is in the charge of the carrier. However, under article 4(2) of the 2009 decree, the carrier will be exempted from liability in case of any inherent defect, quality or vice of the cargo and from an act of war or armed conflict. These limitations are inapplicable if the carrier or its agents intended to cause loss or damage or if the loss or damage is done recklessly with

the knowledge that loss or damage could result<sup>xx</sup>. This provision is similar to article 25(1) of the Warsaw Convention, which states that the carrier would not be entitled to exclude or limit his liability if the damage is caused by his wilful misconduct<sup>xxi</sup>.

#### **1.1.4 Liability for Delay of Persons, Baggage or Cargo**

The Cameroonian legislator simply provide that the carrier will be liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. However, he will be exonerated from liability, if there is proof attesting that he and his agents took all measures that could reasonably be required to avoid the damage or that it was impossible to take such measures<sup>xxii</sup>.

The determining factor of whether the air carrier is liable is not what causes the delay, but whether the air carrier took all necessary and reasonable measures to avoid the delay. Again, the air carrier could be wholly or partially exonerated from liability if the delay is caused or contributed by the negligence or other wrongful act or omission of the person claiming compensation or the person from whom he or she derives his or her rights<sup>xxiii</sup>. This provision is detrimental to passengers because it means that no matter the cause of the delay, if the air carrier can prove that it did everything that could reasonably be done to prevent the delay, then the air carrier will not be held liable.

However, if the act that caused the delay is carried out regularly<sup>xxiv</sup> the air carrier would be liable because he must ensure that reasonable measures are taken to avoid the delay<sup>xxv</sup>. The burden is on the airline to prove that it took all reasonable measures to avoid delay or that it was not possible to take such measures<sup>xxvi</sup>. This provision gives the carrier some control over determining its liability.

As regards carrier's liability, delay must last for a certain length of time<sup>xxvii</sup>. Unfortunately, the Montreal Convention is silent on the precise length of time. This notion would be different when it comes to registered baggage or where the air carrier admits loss of baggage in Cameroon. Article 3(3) of the regulation on carrier's liability provides for a given length of time, which is 21 days for the arrival of a passenger's baggage. If this prescribed time is not

respected, the passenger has the right to sue the air carrier. Regrettably, this article does not provide any cause for delay but simply prescribed a time limit.

### **1.2 Liability of Air Carrier to Third Parties**

Unlike the 2009 Decree, the law regulating civil aviation in Cameroon provides strict liability for air carriers where injury, loss or damage occurs to any person by an article or a person in or falling from an aircraft, while in flight<sup>xxviii</sup>. The provision expressly states that the operating agent of an aircraft would be automatically liable for any damage caused to third parties on the ground by an aircraft in flight or whoever or object falling there from. Such liability shall be mitigated or set aside where it is proved that the victim was at fault. It therefore implies that air carriers would be liable over damage caused to third parties on the ground. Unfortunately, this law does not specify the amount of liability, it does not state the extent of liability that is whether liability is unlimited<sup>xxix</sup>.

Although, there is an existing legal instrument regulating aircraft operator's liability for damage caused to third parties,<sup>xxx</sup> it is nevertheless fraught with a number of shortcomings, which are, failure to ascribe damage either to death or bodily injury or to property, no limit of liability. The legislator leaves it open for the court to determine the circumstances surrounding the event that led to liability and the amount of compensation.

## **2. COMPENSATING VICTIMS OF AIRCRAFT ACCIDENTS**

Compensation for damage caused to passengers, baggage or cargo within the Cameroonian context is regulated by Decree no 2009/0052/PM of 22 January 2009. Article 5 of the 2009 Decree specifically provides for the payment of compensation of 100000 Special Drawing Rights to a passenger who dies or sustains serious injury pursuant to article 3 of the same Decree. This article maintains that the air carrier is responsible for the prejudice caused in the case of death or serious injury of a passenger on board an aircraft or in the course of embarkation or disembarkation. This provision in effect, disregards the common law doctrine of privity. It is exclusively for the benefit of passengers.

Pursuant to the compensation regime created under article 5 of the 2009 Decree, article 7 requires the carrier to make advance payment without delay to persons who are entitled to compensation to meet their immediate economic needs. This provision was quick to add that such payment must not be constructed as a recognition of liability as same may be reduced from the amount subsequently paid as damages by the air carrier. However, in an attempt to establish a legal basis for claiming or benefiting from compensation, article 3 states that claim against the air carrier can only be brought subject to the conditions set out in the 2009 Decree and without prejudice to the question as to who has the legal right to institute an action against the air carrier. It should be noted that the quantum of damages payable to families of the passengers who lose their lives is statutorily settled in the 2009 Decree, while that of ground victims are not.

### **2.1 Compensation of Passenger Victims**

A passenger who must have incurred serious injury or loss of life is entitled to compensation as a statutory right. This is the cumulative effect of article 3(1) and (2) of the 2009 Decree that entitles a passenger to be compensated for injury, damage and loss of life or property. The claim and the passenger's entitlement to compensation was strengthened by article 7(1) of the same Decree, where in case of death or injury, the air carrier shall make advance payment of at least 15000 Special Drawing Rights within 15days from the date of such incident or such other persons who are entitled to claim compensation in order to meet the immediate economic needs of the passenger or such persons.

This rule is in conformity with articles 17 and 21 of the Montreal Convention 1999<sup>xxx</sup> which cumulatively provided that the air carrier shall be strictly liable to pay compensation not exceeding the sum of 100000 Special Drawing Rights (SDRs) to the families of each passenger who lost his life while on board an aircraft or during embarkation or disembarkation of the aircraft.

As a follow up to strict liability of the air carrier, the Cameroonian legislator may be applauded on its effort to provide a specified period for advanced payments to be made to passengers or members of the deceased passengers. The provisions of section 7(1)<sup>xxxii</sup> is categorical on the



advance payment of not less than 15000 Special Drawing Rights<sup>xxxiii</sup> payable to the natural persons or such natural person who are entitled to claim compensation in order to meet immediate economic needs of such person. It is not in dispute that the advanced payment of 15000 Special Drawing Rights payable within 15days from the moment of the identification of the passenger(s) is not paid in most cases within the time frame.

## **2.2 Compensation of Ground Victims**

Article 3 of the 2009 Decree as afore-mentioned, disregards the common law doctrine of privity. This article leaves much to be desired when it comes to compensating ground victims. However, section 66 (1) of the law regulating civil aviation in Cameroon<sup>xxxiv</sup> creates a cause of action in favour of any person who sustains injuries or owners of damaged properties against the aircraft operator. This cause of action attracts payment of compensation to the affected persons. There is no doubt that a third party who might have suffered from serious injury, destruction or damage to property or loss of life is recognised by law and is entitled to be compensated for the loss, injury or damage suffered from the act. What is not catered for by the law is the quantum of compensation payable to such victims and the yardstick to be considered in determining such quantum.

## **2.3 Compensation awarded to Crew Members**

It is interesting to note that section 3 of the law regulating civil aviation in Cameroon defines crew member as that person assigned by an operator to duty on an aircraft during flight. The Chicago Convention of 1944, in its Annex 1 contains standards and recommended practices for the licensing of flight and ground crew necessary for the safe operation of an aircraft. These personnel accordingly include pilots, flight airworthiness engineers, air traffic controllers, flight dispatchers and maintenance technicians. This simply implies that crew members are members of staff working jointly and severally in an aircraft for the purpose of its operations and safety system. This class of people are statutory or contractual staff of the company operating the aircraft. As a consequence, therefore, they have an employment contract regulated by particular terms and conditions, enforceable against their employers.

A pertinent assertion may arise as to whether a crew member may benefit from the provisions of article 3 of the 2009 in compliance with article 17 (1) of the 1999 Montreal Convention when it comes to awarding damages to crew members. There is the general agreement that a person on board who is a member of the operating crew could not be considered a passenger for the purpose of the 1999 Montreal Convention. The 1999 Montreal Convention forms an integral part of the 2009 Decree therefore, where a contract of carriage by air exists and all other conditions for the application of the Convention that is pursuant to Article 1 and the scope of application are fulfilled, it applies, irrespective of the form of contract of carriage might take. It is obvious that where a crew member who is off service and enters into a contract of carriage by air, Article 17(1) of the Montreal Convention 1999 and section 3 of the 2009 Decree could be interpreted to mean it falls within the definition of passenger.

These provisions impute on the air carrier the liability for damages sustained in case of death or bodily injury of a passenger on condition that the incident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. These provisions bring the crew members within the confine of passengers on condition that he is not carrying out his duties and is under a contract of carriage by air with the air carrier. Thus, is entitled to compensation.

## **2.4 Assessment of the Quantum of Compensation**

Claims of compensation are usually settled through three ways, that is, by way of negotiation, by arbitration and by litigation. In any of the three instances, the quantum of compensation is determined by an assessment of the injured person or property with the view to arrive at what is reasonably justified as a basis for an agreement on what is payable as compensation. After assessment, the next stage is the coming together of the parties or their representatives with a view of reaching a compromise. A set back on negotiating compensation is based on the fact that the procedure may be too long especially where victims are many.

### **2.4.1 Quantum Payable as Compensation to Dead Victims**

A dead victim has no legal personality that can sue and can be sued. It is common sense to say that his family can step in on its behalf for the purpose of being compensated. Both the law regulating civil aviation and the 2009 Decree failed to mention who in case of a deceased victim can become his rightful claimant. A rightful claimant borrowed from the 1989 Ordinance may include, the spouse or spouses, the father and mother, legitimate, legitimated, recognised or adopted children, minor full aged as the case may be and minor dependant collaterals<sup>xxxv</sup> (dependant minors include brothers, sisters, aunts and uncles in so far they are still minors)<sup>xxxvi</sup>. It implies therefore that rightful claimants of a deceased person would include the spouse, father and mother, legitimate or legitimated, recognised or adopted child, brothers, sisters; uncles and aunts.

Thus, a deceased victim may have a definite and minimum quantum of compensation in his favour for the benefit of his family<sup>xxxvii</sup>. Consequently, a dead victim or his relation could be entitled to 100000 Special Drawing Rights and the air carrier cannot exempt itself from liability. However, the carrier shall not be liable for damages, if such passenger claims beyond the 100000 Special Drawing Rights. If the air carrier can prove that such damage was not due to the negligence or any other wrongful act or omission of his or its servants or agents or such damage was solely due to the negligence or other wrongful act or omission of a third party, he might be exempted from liability<sup>xxxviii</sup>.

#### **2.4.2 Assessing the Quantum of Compensation on Damaged Property**

The amount paid by the air carrier in the case of destruction, loss or damage of passengers' baggage or cargo is regulated both by the Montreal Convention 1999 and the 2009 Decree. The provisions of article 22 of the Montreal Convention 1999 were incorporated in the Cameroonian legislation for the destruction, loss or damage of passengers' baggage or cargo as provided for in article 6(1)<sup>xxxix</sup> and (2) of the 2009 Decree. In case of damage, destruction or loss of cargo, the air carrier would be limited to a sum of 17 Special Drawing Rights per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum. In that case the air carrier would be liable to pay a sum not exceeding the declared sum,

unless he proves that the sum is greater than the consignor's actual interest in delivery at destination.<sup>xl</sup>

The 2009 Decree is silent on the measures of damages for delay. However, it has been addressed by article 22(1) of the Montreal Convention where damage to baggage or cargo caused by delay, is awarded with a sum of 4150 Special Drawing Rights for each passenger. In case of destruction, loss, damage or delay of part of the cargo, or of any object, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited is the total weight of the package or packages concerned. However, when the destruction, loss, damage or delay of the cargo or of an object affects the value of other packages covered by the same air waybill, or the same receipt, the total weight of such package or packages would be taken into consideration in determining the limit of liability.<sup>xli</sup>

These limitations are inapplicable if the air carrier or its agents intended to cause loss or damage or if the loss or damage was done recklessly with the knowledge that the loss or damage could result.<sup>xlii</sup> This provision is similar to article 25(1) of the Warsaw Convention of 1929, which provides that the air carrier would not be entitled to limit his liability if the damage was caused by his wilful misconduct. Wilful misconduct refers to an intentional act that causes damage.<sup>xliii</sup>

Once more the Montreal Convention of 1999 and the Cameroonian legislator do not provide a given amount to be paid as compensation for any destruction or damage to property on the surface. It simply limits the liability of the air carrier in articles 17 and 3(2) respectively to the destruction or loss of registered baggage, what about damage to property on the surface? Hence, when property is damaged or destroyed, the quantum or assessment of damages is determined by the court.<sup>xliv</sup>

Thus, where there is a claim for destruction of property, damage will be the value of the property at the time of the destruction subject to the principle of restoring the plaintiff as far as it is possible to the position he was before the injury. Computation of damages is not however uniform; it varies between total loss calling for replacement of the destroyed property or repairs of the damaged property. While replacement is static, repairs are subject to unpredictable market forces. It would be wise to say that the award of compensation to the one who suffered

injury should not be limited to the time when the damage occurred. This is so because the assessment of damage for ground victims should take into consideration the current market situation. The court must take into account the economic strength of the economy of the State.<sup>xlv</sup>

### **3. PROBLEMS ENCOUNTERED IN THE PAYMENT OF DAMAGES**

Difficulties could be encountered in the effective payment of compensation to victims of aircraft incidents. The problem of inadequate funds could be raised as an impediment to the compensation of victims of aircraft accidents. It is a matter of concern since huge amounts of compensation may be awarded to victims and families of deceased victims and are not paid within a given time frame or partially paid. This is evident from the CAMAIR Air Plane crash of 3<sup>rd</sup> December 1995, CAMAIR Flight UY3701, where the families of victims have not been paid their full compensation.

#### **3.1 Insufficient Funds**

The protection of victims and the challenge to seek methods of compensating victims adequately by the air carrier stands a test of time. The Cameroonian legislator makes it possible for passengers to be compensated by the air carrier if they incur any bodily injury or loss from a civil aircraft accident or incident. The amount for death or bodily injury is 100000 Special Drawing Right. This is the amount awarded to passengers on board an aircraft leaving out of its scope third parties who might have suffered the same injury or loss on the surface. It should be noted that the sum mentioned by the Cameroonian legislator is deemed to refer to the Special Drawing Right as defined by the International Monetary Fund (IMF). Conversion of the sum into national currency in case of judicial proceedings would be made according to the value of the Cameroon CFAF in terms of the Special Drawing Rights at the date of the judgement. The value in the CFAF would be calculated in accordance with the method of valuation applied by the International Monetary Fund for its operations and transactions.

As mentioned above, the quantum for liability on air carriers to thirds parties on the surface have not been addressed by the legislator. This legal vacuum consequently makes third parties under Cameroonian law to go unsatisfied. In addition, the amount allocated for the reward of

damage incurred by passengers is too heavy to be borne by the air carrier. Consequently, not all passengers may be adequately compensated. This is due to the contributory factor of poor insurance coverage of aircrafts in Cameroon that may cause air carriers to seek for extra funding from other bodies such as the International Civil Aviation Compensation Fund made up of a conference of parties<sup>xlvi</sup>. This could only be possible if the incident or accident resulted from an act of unlawful interference.

The International Fund may provide supplementary compensation to passengers on board an aircraft involved in an act of unlawful interference where the damages recovered by passengers according to the applicable law did not result in the recovery of compensation with that available to third parties.<sup>xlvii</sup> It should be noted that claims in excess of the amount covered by the aircraft operator are settled by an ICAO compensation fund up to a maximum of 3,000,000,000 SDRs per event.<sup>xlviii</sup> The Unlawful Interference Convention contains a mechanism for relieving operator's liability<sup>xlix</sup>. It is only upon ratification of this Convention that the State of Cameroon may benefit from this privilege. Thus, supplementary compensation shall only be paid to the extent that the total amount of damage exceeds the limit of an operator's liability.<sup>1</sup>

Again, the operator and the international Fund may have to benefit a right of recourse<sup>li</sup> against any person who committed, organised or financed an act of unlawful interference. They may also have the right of recourse against any other person who breached a duty except if the risk could not have been covered by insurance available on a commercially reasonable basis.<sup>lii</sup> Unfortunately this exception may not be invoked by a person who contributed to the occurrence of the event by an act or omission done recklessly and with the knowledge that damage would probably occur.<sup>liii</sup> Moreover, the international fund will refrain from exercising this right of recourse if the Conference of Parties to the Convention determines that to do so would cause insurance to become wholly or partially unavailable<sup>liv</sup>.

### **3.2 The Possibility of having the Court's Judgement Executed**

Where damages have been awarded after judgment has become *res judicata*, the convict may not immediately pay for the damages. The judgment creditor who is the victim and to whom

money is owed by the judgment debtor may through the Simplified Recovery Procedure under the OHADA Uniform Act<sup>lv</sup> requests for the recovery of the debt certain and due for immediate payment following an application for a mandatory injunction to pay<sup>lvi</sup>.

The requirement for the debt to be certain or unquestionable implies that the judge can only make an order of injunction to pay if he has the conviction that the debt is one which cannot be disputed or doubted.<sup>lvii</sup> His conclusion is based on proof tendered to him by the applicant and the defendant must not be present and if present, he would not be heard.<sup>lviii</sup> Therefore, the judgment creditor must annex to his application, documents attesting to the source from which arose the debt and also that the debtor refused to pay.<sup>lix</sup> On the other hand, the requirement of the debt must be due payment implies that, as of the date the application was filed to the judge of the competent court, the debt was not subject to any condition.<sup>lx</sup> This is in conformity with article 13 of the Uniform Act on Simplified Recovery Procedure and Measures. The article provides that the applicant in the injunction to pay shall bear the burden of proving his claim. Thus, it necessitates the applicant or his counsel to make sure that the debt is not subject to any condition.

The application for an injunction to pay may be addressed to the President of the Court of First Instance if the amount is equal or less than 10,000,000FCFA<sup>lxi</sup> or, to the President of the High Court if the amount is above 10,000,000FCFA.<sup>lxii</sup> The application filed to the Registry of the competent court by the applicant or his agent duly authorised by law to represent him in court, under pain of inadmissibility shall mention, the names, profession and residence of the parties and for corporate bodies, their legal form, corporate name and registered office. A clear indication of the amount claimed must also be mentioned.<sup>lxiii</sup> To the application is attached the attested originals or certified true copies of the documents attesting to the existence of the debt. Where the petition is filed by a person not domicile within the State of the competent court, under the same penalty, must contain a choice address for service within the jurisdiction of the said court.<sup>lxiv</sup> It should be noted that the request for payment of debt under the Simplified Recovery Procedures to the creditor must arise from a contract<sup>lxv</sup>. It should be noted that the relationship between the air carrier and the passenger is bound by a valid contract, though not exhausted in this article.

If in the light of documents submitted the application appears reasonably founded in whole or in part, the President of the competent court shall issue an injunction to pay the amount set by him. The President of the competent court may as well reject the application in whole or in part and his decision shall not be appealed.<sup>lxxvi</sup> As a result, the creditor only remedy shall be an ordinary civil claim.<sup>lxxvii</sup> The application and the decision on the order for payment are kept as minutes by the clerk issuing a copy to the applicant. Original documents submitted in support of the application are returned to the applicant and their certified copies are kept at the Registry. Where the petition is dismissed, the application and the documents are returned to the applicant.<sup>lxxviii</sup>

At the initiative of the judgment creditor, a certified true copy of the petition and the injunction to pay issued shall notify the debtor(s) through an extrajudicial act. An extrajudicial act has been defined as an act served by a bailiff which has legal effects irrespective of judicial proceedings<sup>lxxix</sup>. It can also be defined as a document served by a hussier at the request of a party without legal proceedings.<sup>lxxx</sup> It should be noted that the injunction to pay becomes null and void where it did not notify on the party concerned within 3 months from the date it was issued.<sup>lxxxi</sup>

Under penalty of nullity, the notification of the injunction to pay shall enjoin the debtor either to pay to the creditor the amount indicated in the order, together with interest and registry charges, or if the debtor intends to put forward a defence, he shall file an opposition which shall have the effect of referring the initial petition filed by the creditor<sup>lxxii</sup>. Again, under the same penalty, the notification shall state the time limit within which the opposition must be formed, the court before which it must be brought and the way it shall be processed. It must also notify the debtor that he may obtain the documents submitted by the creditor at the registry of the competent court in which the President made the decision on the order for payment and in the absence of an opposition within the prescribed time limit, he will no longer be allowed to appeal and may be obliged to pay the amount claimed.<sup>lxxiii</sup>

Consequently, an ordinary remedy against an injunction to pay shall be an opposition which shall be brought before the competent court whose President pronounced the injunction to pay. The opposition by virtue of article 10 of the Uniform Act on Simplified Recovery Procedures



and Measures must be filed within 15 days following notification of the injunction to pay. This rule may be derogated from if distance is taken into consideration.<sup>lxxiv</sup> Except in case of derogation, the debtor who fails to file and notify his opposition to the judgment creditor(s) and the court Registry within 15 days, forfeits his right to recovery.<sup>lxxv</sup>

Where no opposition is filed within 15 days from notification of the injunction to pay or where the debtor withdraws his opposition, the creditor may request the insertion of an executory formula on the ruling. The effect of such insertion would be that of a decision taken after an adversary hearing and shall not be liable to appeal.<sup>lxxvi</sup> The application to insert the executory formula shall be made at the registry in a simple written or verbal declaration. The decision shall be null and void where the creditor's application was not present within 2 months following the expiry of the time limit for the opposition or its withdrawal by the debtor.<sup>lxxvii</sup> The registry of the competent court shall keep a register numbered and signed by its President. The register must contain the full names, professions and residence of the judgment creditor(s) and debtor(s), the date of the mandatory injunction to pay or refusal to grant the injunction, the amount and the cause of the debt, the date of issuance of the copy, the date of the opposition, where it was filed, the date on which the parties were convened and the ruling made thereon.<sup>lxxviii</sup>

Hence, from the above discussions, where these procedures enshrined in articles 1 to 18 of Book I of the Simplified Recovery Procedure Act are not adhered to, it may impede on the proper execution of a court's judgment pertaining to the award of damages by air carriers to damage caused to passengers.

## CONCLUSION

Liability could be perceived from different angles; liability may accrue from one's fault enforceable by a civil remedy and liability from damage caused to another and is incurred by another person other than the person who caused the damage. This person is referred to as the aircraft operator. The law provides that the aircraft operator becomes liable for damages on the premise that the passenger sustained bodily injury, death or loss of baggage or cargo during embarkation or disembarkation of the aircraft. Consequences arising from this act requires

reparations. The main prerequisite for compensation of victims of aircraft incident is that they suffer bodily injury, death, damage, destruction or loss of property. A victim can be described as a person who is fatally or seriously injured as a result of being a passenger, crew member in an aircraft or in direct contact with any part of the aircraft. In other words, a victim is a person, who boarded an aircraft and accordingly, suffered a fatal or serious injury as a result of or upon the aircraft or having direct contact with any part of the aircraft, including parts which have become detached from the aircraft. Apart from passengers and crew members being victims, non-passengers such as those on the ground surface can be described as victims of civil aircraft accident. However, section 66 (1) of Law regulating civil aviation in Cameroon creates a cause of action in favour of any person who sustains injuries or owners of damaged properties against the operator of the aircraft. The action so created attracts payment of compensation to the affected persons.

A passenger who sustains injury or loss is entitled to compensation as a statutory right. The cumulative effect of article 3(1) and (2) of the Decree instituting liability of air carriers and compensation rules for damage caused to passengers, baggage and cargo in Cameroon, entitles a passenger to be compensated for injury, damage and loss of life or property. The claim and passenger's entitlement to compensation has been strengthened by article 7 (1) of the same Decree, where in case of death or injury of passengers, the carrier is required to make advance payment of at least 15000 Special Drawing Right within 15 days in order to meet the immediate economic needs of such persons. In the same light, article 5(1) provides compensation to the tune of 100000 Special Drawing Rights for each passenger, while the air carrier in article 5(2) would be exonerated from such liability if the carrier can establish that such damage was not due to its negligence or that of its agents or when such damage was caused by omission of a third party.

In Cameroon, there is no doubt that a third party who has suffered serious injury, death, damage to or loss of property is recognised by law. What is not catered for is the quantum of compensation payable to third party. Resort can only be made to the Unlawful Interference Convention of 2009, if the act resulting to the aircraft accident is an act of unlawful interference. According to this Convention, the aircraft operator would be liable to compensate

damage due to death, bodily injury, mental injury and damage to property to the tune of 750,000 Special Drawing Rights to 7,000,000,000 Special Drawing Rights based on the mass of the aircraft.<sup>lxxix</sup>

## REFERENCES

<sup>i</sup>The current legal framework governing carrier's liability in Cameroon is Decree no 2009/0052/PM of 22 January 2009 on Liability of Air Carriers and Compensation Rules for Damage caused to Passengers, Baggage and Cargo

<sup>ii</sup> Article 3 (1) of Decree no 2009

<sup>iii</sup>*Ibid*, Article 3 (2),

<sup>iv</sup> The liability of air carriers was regulated by the Convention for the Unification of Certain Rules for International Carriage by Air (Warsaw Convention), signed in Warsaw on 12 October 1929 and came into force on 13 February 1933. The Warsaw Convention has been amended and supplemented by the Hague Protocol in 1955, the Guadalajara Convention of 1961, the Guatemala City Protocol in 1971 and the Montreal Protocols in 1975. The Warsaw Convention and its amendments have been termed as the Warsaw System. The most complete revision of the previous five legal documents known as the Warsaw System was carried out by the 1999 Montreal Convention. (Batra C.J, "Modernisation of the Warsaw System, Montreal 1999" vol 65, Journal of Air Law and Commerce, 2000, p.429-433, accessed on the 10th April 2018, <https://scholar.smu.edu/cgi/viewcontent>)

<sup>v</sup> ICAO Annex 13 "Aircraft Accident and Incident Investigation", Doc, 9156

<sup>vi</sup> Article 1383 of the civil code, (<https://lexinter.net/ENGLISH/civil.code.htm> accessed on the 22nd of January 2018)

<sup>vii</sup> Article 1384 of the Civil Code

<sup>viii</sup> Article 17(1), Montreal Convention *op.cit.*,

<sup>ix</sup>Husserl vs Swiss Air Transport. Co388F .Supp.1238,1234(SDBY)1975(Husserl II)

<sup>x</sup> Supra, p:1

<sup>xi</sup>*Ibid*, in Husserl II, It was stated by the District Judge Tyler, for an injured to be compensated . . . , it must have been proximately caused by an accident, hence to establish liability, one must prove proximate causation and likewise, must prove his actual injuries and their worth"

<sup>xii</sup>Decree no 2009/0052/PM of 22 January 2009 on Liability of Air Carriers and Compensation Rules for Damages caused to Passengers, Baggage and Cargo.

<sup>xiii</sup> Article 17(1), Montreal Convention 1999

<sup>xiv</sup> ICAO Minutes of the International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air, p. 69-73, ICAO Doc 9775-Dc/2 May 10-28, 1999

<sup>xv</sup>Ehrlich V American Airlines, 360, F 3d, 2nd Cir 2004,

<sup>xvi</sup>*Ibid*, p.366-401. "The accident occurred before the ratification of the Montreal Convention, leaving the Warsaw Convention as the governing authority . . . ; however, the court addressed whether and how the Montreal Convention might apply." Cunningham McKay, "The Montreal Convention: Can Passenger Finally Recover for Mental Injuries", Journal of Transnational Law, 2008, p. 1078-1079

<sup>xvii</sup> Burnett V Trans World Airlines Inc 368F. Supp. 1152 (DNM) 1973, Rosman v Trans World Airlines Inc, 34 N.Y.2d. 385, 314, NE 2d, 848, 358 NYS 2d , 1974, p.197, Herman V Trans World Airlines Inc, 40 AD 2d, 850 , 337 NY, 827, 1972, p. 395 etc

<sup>xviii</sup>Decree no 2009/0052/PM of 22 January 2009, *op.cit.*,

<sup>xix</sup>Section 4(2) of Decree no 2009, *op.cit.*, "... the carrier would not be liable if and to the extent it proves that the destruction, loss of or damage to cargo resulted from one or more of the following; (a) inherent defect, quality or vice of that cargo, (b) defective packing of that cargo performed by a person other than carrier or its servants or agents, (c) an act of war or an armed conflict and (d) an act of public authority carried out in connection with the entry , exit or transit of the cargo"

<sup>xx</sup> Article 5(2), Decree no 2009

- xxi Article 25, of the Warsaw Convention 1929
- xxii Article 19, Montreal Convention 1999
- xxiii Article 21 of the Montreal Convention 1999
- xxiv George N. Tompkins, Liability Rules Applicable to International Air Transportation as Developed by the Court in the United States :From Warsaw 1929- Montreal 1999, *op.cit.*, p.137
- xxv *loc.cit.*,
- xxvi Adejoke O. Adediran, Current Regulation of Air Carriers Liability and Compensation Issues in Domestic Air Carriage in Nigeria.,*Journal of Air Law and Commerce*, vol 81, 2016,p.18, accessed on the 10th March 2017, <https://scholar.smu.edu/cgi>viewcontent>
- xxvii Article 19 of the Montreal Convention 1999
- xxviii Section 66(1) of law no 2013/010 of 24 July 2013, to lay down Civil Aviation Regulations in Cameroon
- xxix *loc.cit.*,
- xxx *ibid*
- xxxi Convention for the Unification of Certain Rules relating to International Carriage by Air, *op. cit.*,
- xxxii Decree no 2009/0052/PM of 22 January 2009 on Liability of Air Carriers and Compensation Rules for Damages caused to Passengers, Baggage and Cargo,
- xxxiii *ibid*, Section 7(3),
- xxxiv Law no 2013/010, *op.cit*
- xxxv Section 6(b) of Ordinance no 89/5 of 13 December 1989 substituting the Fatal Accidents Acts 1846-1864, which has been amended by Law No. 2015/013 of 16th July 2015 creating and regulating the Motor Vehicle Insurance Fund in Cameroon.
- xxxvi Ephraim N.N., Motor Accident Compensation in Cameroon after the 1989 Ordinance, University of Regina Press, 1993, p.90
- xxxvii Article 3(1) of the 2009 Decree, *op.cit.*,
- xxxviii *Ibid*, Article 5(1)
- xxxix Article 6(1) of the Decree provides that the air carrier is liable to pay the sum of 1000 Special Drawing Rights in case of destruction, loss or damage to a passenger baggage unless the passenger has made at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum.
- xl *ibid*, Article 6(2) of the 2009 Decree, *op.cit.*,
- xli section 22(4) of the 1999 Montreal Convention
- xlii *ibid*, section 22(5)
- xliiii *Pekelis v Transcon &W.Air, Inc.*, 187F. 2d Cir 1951, p.122-124
- xliv *Shell Petroleum Development Company Ltd Vs Ambah* (1990) 2 MJSC, p. 152-164
- xlvi Ahmed Ahmed Dauda, An Appraisal of Liability Regime for Redress and Compensation for Victims of Aircraft Accidents in Nigeria, *op.cit.*, p.186
- xlvii Article 8 of the Unlawful Interference Convention 2009, *op.cit.*,
- xlviii *ibid*, article 9(j)
- xlvix Article 18(2), Unlawful Interference Convention 2009,
- l The supplementary compensation mechanism is an organisation established by the Unlawful Convention. It is made up of Conference Parties consisting of State parties and a secretariat, headed by a director. Article 8
- li *Ibid*, Article 18(3)
- lii *Ibid*, Article 24(a) and 25(a)
- liii *Ibid*, Article 24(b), 25(c) and 26(1)
- liiii *Ibid*, Article 26 (2)
- liv *ibid*, Article 26(3),
- lv OHADA Uniform Act Organisation Simplified Recovery Procedures and Enforcement Measures
- lvi Article 1 of the Simplified Recovery Procedures, Book 1, Title I- Order of Payment
- lvii Joseph Mbah-Ndam, Practice and Procedure in Civil and Commercial Litigation, Press Universitaire d' Afrique, 2003, p.98
- lviii *loc.cit.*,
- lix Article 4(2) paragraph 2 of the Simplified Recovery Procedures, *op.cit.*,
- lx Joseph Mbah-Ndam, Practice and Procedure in Civil and Commercial, *op.cit.*,p.99
- lxi Article 15 of Law no 2006-15 of 29 December 2006 on Judicial Organisation,
- lxii *ibid*, article 18

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<sup>lxiii</sup> *supra*, foot note 1344

<sup>lxiv</sup> *loc.cit.*

<sup>lxv</sup> article 2(1) of the Simplified Recovery Procedures, *op.cit.*, it states that the order for payment procedures may be introduced when (1) the debt arises from a contract. However, the scope of articles 1 and 2 of the Simplified Recovery Procedures have been criticed by Asuagbor C.J in *Telcar Cocoa ltd v Agwu Joseph Kalu* for being obsolete and limited in scope. As cited in Michael A. Yanou, *Practice and Procedures in Civil Matters in the Courts of Records in Anglophone Cameroon*, Langaa, Research and Publishing CIG, Mankon, Bamenda, 2015, p.41. Apart from contracts, the obligation may arise from the issuance or acceptance of any negotiable instrument, or of a cheque without cover or insufficient cover(*ibid*, article 2(2))

<sup>lxvi</sup> Article 5 of the Simplified Recovery Procedures, *op.cit.*,

<sup>lxvii</sup> *loc.cit.*,

<sup>lxviii</sup> Awusume S.E.N et seq, “An overview of OHADA Laws with Emphasis on Simplified Recovery Procedures and Measures of Execution”, 2016, p.8, retrieved from <https://www.barreaucameroun.org>pdf>, on the 22nd of July 2018 and *ibid*, article 6

<sup>lxix</sup> Raymond G., & Jean Vincent, *Lexique des Termes Jurisdiqques*, Dalloz, 13<sup>th</sup> edition, 2001, p.11. “ acte signifié par un huissier de justice et produisant des effets juridiques en dehors de toute procedure : ainsi une sommation de payer, un protet, un commandement de saisie”

<sup>lxx</sup> Bryan A.Garner, *Black’s Law Dictionary*, 8<sup>th</sup> edition, 2004, p.27

<sup>lxxi</sup> Article 7 of the Simplified Recovery Procedures, *op.cit.*,

<sup>lxxii</sup> *ibid*, article 8

<sup>lxxiii</sup> *ibid*, article 9

<sup>lxxiv</sup> *Ibid*, article 10

<sup>lxxv</sup> *Loc.cit.*,

<sup>lxxvi</sup> Article 16 of the Simplified Recovery Procedures, *op.cit.*,

<sup>lxxvii</sup> *ibid*, article 17

<sup>lxxviii</sup> *ibid*, article 18

<sup>lxxix</sup> Sections 3 and 4 of the Unlawful Interference Convention 2009, op