

THE INTERNATIONAL CONVENTION ON CARRIAGE OF PASSENGER(S) BY AIR: THE MONTREAL 1999 CHALLENGE.*

Abstract

In recent times, there has been a tremendous increase in the transportation of goods and passengers from one place to another by air. Be that as it may, the International Civil Aviation Organization has improved her role by providing for a new Convention to regulate the contractual arrangement between the airliner and the passenger. It is on this note that this article analyzes the provisions of the new Convention to see to their application and interpretation. The article finds that some provisions of the Convention pose serious challenges to judges and lawyers in the course of their application and interpretation, and provides some recommendations to address the challenges.

Introduction

The new regime, Montreal Convention¹ was adopted by the diplomatic conference meeting of the International Civil Aviation Organization (ICAO) member States in May 28, 1999 in Montreal. It amended the provisions of Warsaw regime concerning compensations for the victims of air disasters and re-established uniformity and predictability of rules relating to international carriage by air². However, the Convention retained the core

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¹ This Convention is formally referred to as the Convention for the Unification of Certain Rules for International Carriage of Passenger by Air. See Wikipedia Free Encyclopaedia available at Wikipedia.org/wiki/Montreal_Convention accessed on 08/02/10. There are currently more than 135 parties to the Warsaw Convention either in its original form or one of its amended forms. Some States separately have adopted laws or regulations relating to international carrier liability.

² This carriage by air is referring to carriage of passengers, baggage and cargo. See *ibid.* it should be noted that before the adoption of this Convention, Airline operators were subject to different liability regimes, depending upon the treaties to which their states are parties thereto or on their private arrangement. However, upon entry into force of this Convention, it supersedes the Warsaw regime and any other private arrangement relating to liability of the Airline operator. See History of Air law available at <http://www.cargolaw.com/presentations-montreal-cli.html>, accessed on 25/10/2008. p.9; M.K Cunningham: "The Montreal Convention: Can Passengers Finally Recover for Mental Injury?" *Vanderbilt Journal of Transnational Law*, Vol.4, p.1046 available at <http://law.vandabilt.edu/publications/journal-of->

provisions of the Warsaw regime which had successively served the international air transport community for a long time. This paper seeks to analyze the provisions of the Montreal Convention *vis-à-vis* the passengers' rights under the Convention and the challenges faced by both judges and lawyers in the application and interpretation of the Convention.

The Scope of the Montreal Convention

General Application

The Convention applies to all international carriage³ of passengers, baggage or cargo performed by aircraft for reward; gratuitous carriage by an air transport undertaking;⁴ carriage performed by a person other than the Contracting Carrier, subject to the terms stated under Chapter V of the Convention⁵; carriage performed by the State or legally constituted public bodies provided it falls within international carriage as defined in Article 1 of the Convention.⁶

Document of Carriage

In the case of carriage of passengers, an individual or collective document of carriage shall be delivered containing:

a. Indication of the places of departure and destination.

[transportation-law/download](http://www.state.gov/e/eeb/r/rm/2003/21869.html) accessed on 08/02/10 and <http://www.state.gov/e/eeb/r/rm/2003/21869.html> accessed on 4/08/09.

³ The convention defined International Carriage to mean any carriage in which, according to the agreement between the parties, the places of departure and destination, whether or not there be a break in the carriage or a trans-shipment, are situated either within the territories of two State parties, or within the territory of a single State party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. See Montreal Convention, 1999, article 1. Note that Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not International Carriage for the purposes of this Convention. See Article 1(2).

⁴ Montreal Convention, 1999. Article 1 (1).

⁵ *Ibid.* Article 1(4).

⁶ *Ibid.* Article 2 (1). However, in carriage of postal items, the carrier shall only be liable to the postal administration in accordance with the rules agreed to by the parties to the contract of carriage otherwise the provisions of the Convention are not applicable to postal items. See Article 2(3).

b. If the places of departure and destination are within the territory of a single State party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place.⁷

Baggage

In the carriage of checked baggage, the carrier shall deliver to the passenger a baggage identification tag for each piece of checked baggage.⁸

The passenger shall be given written notice to the effect that where the Montreal Convention is applicable, the carrier's liability in cases of death or injury and for destruction or loss of, or damage to, baggage, and for delay shall be in accordance with the liability limits set out in the Convention.⁹ However non-compliance with the provisions of the articles relating to Document of Carriage of Passengers and Baggage shall not invalidate the contract of carriage.¹⁰

Cargo

In the case of cargo, an Airway Bill or Cargo Receipt¹¹ shall be delivered containing the following:

- a. An indication of the places of departure and destination.
- b. If the places of departure and destination are within the territory of a single State party, one or more agreed stopping places being within the territory of another state, an indication of at least one such stopping place.
- c. An indication of the weight of the consignment.¹²

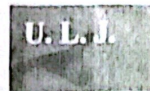
⁷ *Ibid.* Article 3(1) (a) and (b). Note that the Carrier may adopt and deliver, in writing, any other means which preserves the information contained in Article 1. See, Article 3 (2).

⁸ *Ibid.* Article 3 (3).

⁹ *Ibid.* Article 3 (4).

¹⁰ *Ibid.* Article 3 (5).

¹¹ *Ibid.* Article 4 (1).



The consignor may be requested to comply with customs, police and similar public authorities, to deliver a document indicating the nature of the cargo.¹³

Where there are more than one package, the carrier of cargo may require the consignor to make out separate air waybill and the consignor may ask the carrier to make separate cargo receipts.¹⁴

The consignor shall make out an airway bill in three original parts. The first part shall be marked "for the carrier," and shall be signed by the consignor; the second part shall be marked "for the consignee", shall be signed by both the carrier and the consignor and shall accompany the goods. While the third part shall be signed by the carrier and handed by him to the consignor after the cargo has been accepted.¹⁵ The signature of the carrier and consignor may be printed or stamped.¹⁶

The consignor shall be responsible for the incorrectness of any particulars and statements contained in the airway bill; and be liable to indemnify the carrier for any damage suffered by it or by any other person to whom the carrier is liable.¹⁷ Conversely, the carrier shall be responsible for the incorrectness of any particulars and statements contained in the cargo receipt; liable to indemnify the consignor for any damage suffered by it or by any other person to whom the consignor is liable.¹⁸ The airway bill or the cargo receipt is prima facie evidence of the correctness and of conclusion of the contract of carriage¹⁹. Non compliance with the provisions of the articles

¹² *Ibid.* Article 5 (a), (b) and (c). Note that the Carrier may adopt and deliver, in writing, any other means which preserves the information contained in Article 5. See Article 4(2)

¹³ *Ibid.* Article 6

¹⁴ *Ibid.* Article 8.

¹⁵ *Ibid.* Article 7 (1) and (2).

¹⁶ *Ibid.* Article 7 (3). Note that If at the request of the consignor, the carrier makes out the air waybill the carrier shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor. See Article 7 (4).

¹⁷ *Ibid.* Article 10 (1) and (2).

¹⁸ *Ibid.* Article 10 (3).

¹⁹ *Ibid.* Article 11.

relating to Document of Carriage of Cargo shall not invalidate the contract of carriage.²⁰

Liability of the Carrier

In the area of liability, the Convention provides for a strict liability based principle. The liability shall be discussed as follows:

Death and Injury to Passengers

The Convention provides that the carrier shall be liable for damage sustained in the event of the death or bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.²¹

Damage to Baggage²²

The carrier shall be liable for damage sustained in the event of destruction or loss of, or of damage to, checked baggage if the occurrence which caused the damage so sustained took place onboard the aircraft or during any period within which the checked baggage was in charge of the carrier,²³ damage to unchecked baggage and personal belongings.²⁴

²⁰ *Ibid.* Article 9.

²¹ *Ibid.* Article 17 (1). At the Conference on Air Law, at which the Convention was adopted, delegates considered making express reference to recovery for mental injury, but instead resolved to leave untouched legal precedents developed under the language of the Warsaw Convention acknowledging that such precedents currently allow recovery of mental injury in certain situations and that the law in this area will continue to develop in the future. See History of Air Law, (n.2), p.10.

²² The Convention refers to baggage as both checked and unchecked baggage. See *Ibid.* Article 17 (4).

²³ *Ibid.* Article 17(2).

²⁴ *Ibid.*

Damage to Cargo

The carrier shall be liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event that caused the damage took place during the carriage by air.²⁵

Damage for Delay

The carrier shall be liable for damage caused by delay in the carriage by air of passengers, baggage, or cargo²⁶.

Notice of Complaints

Every notice of complaint must be made in writing and served within twenty-one days²⁷ otherwise no action shall be entertained against the carrier save in case of fraud on his part.²⁸

In case of damage, the person entitled to the delivery must complain to the carrier forthwith after the discovery of the damage and latest within seven days from the date of receipt in case of checked baggage and fourteen days from the date of receipt in case of cargo.²⁹

In case of delay, the complaint must be made latest within twenty-one days from the date in which the baggage or cargo has been placed at his or her disposal.³⁰

Limitation of Actions .

The length of period in which a claim may be brought in case of any damage is two years reckoned from the date of arrival at the destination, or from the

²⁵ *Ibid.* Article 18 (1).

²⁶ *Ibid.* Article 19.

²⁷ *Ibid.* Article 31(3)

²⁸ *Ibid.* Article 31(4).

²⁹ *Ibid.* Article 31 (2)

³⁰ *Ibid.*

date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.³¹

It should be noted that the method to be used in calculating the period of limitation shall be determined by the court seised of the case.³²

Jurisdiction

The plaintiff shall have an option to bring an action in the territory of one of the State parties, either before the court of domicile of the carrier, or its principal place of business, or where it has a place of business through which the contract has been made or before the court having jurisdiction at the place of destination.³³ The claimant may commence an action in the State party where the passenger has principal and permanent place of residence at the time of accident, provided the carrier operates to and fro that State party.³⁴

Insurance Legislation

The Convention stipulates that a State party shall require their carrier to maintain adequate insurance to cover their liability under the Convention.

Award and Limitation of Damages or Compensation

The Convention provides various damages to the victims of damage of air carriage. The Convention provides that in the carriage of passengers, the carrier shall be strictly liable for damages not exceeding 100,000 Special Drawing Rights, for each passenger.³⁵

³¹ *Ibid.* Article 35(1).

³² *Ibid.* Article 35 (2).

³³ *Ibid.* Article 33.

³⁴ *Ibid.* Article 33(2).

³⁵ *Ibid.* Article 21(1).

The limits of liability stated above shall not prevent the court seised with jurisdiction from awarding, in accordance with its own law, the whole or part of the court costs and of the other litigation incurred by the plaintiff, including interest.³⁶

In the case of damage caused by delay in the carriage of passengers, the liability of the carrier for each passenger is limited to 4,150 Special Drawing Rights.³⁷

In the carriage of baggage, the liability of carrier in case of destruction, loss, damage or delay shall be limited to a sum of 1000 Special Drawing Rights, but if the consignor has made a special declaration of the value at the time when the package was handed over to the carrier and has paid supplementary sum if the case so requires, the carrier will be liable to pay a sum not exceeding the declared sum, unless he can prove that the value is greater than the value declared.³⁸

In the carriage of cargo, the liability of carrier in case of destruction, loss, damage or delay shall be limited to a sum of 17 Special Drawing Rights per kilogram, but if the consignor has made a special declaration of the value at the time when the package was handed over to the carrier and has paid supplementary sum if the case so requires, the carrier will be liable to pay a sum not exceeding the declared sum, unless he can prove that the value is greater than the value declared.³⁹

In case of destruction, loss, damage or delay of part of the cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be the total weight of the package concerned.⁴⁰

³⁶ *Ibid.* Article 22 (6).

³⁷ *Ibid.* Article 22(1).

³⁸ *Ibid.* Article 22 (2).

³⁹ *Ibid.* Article 22 (3).

⁴⁰ *Ibid.* Article 22(4).

Defences Available to the Air Carrier

The Convention further provides some specific defences which may be pleaded by the air carrier. The defences are:

Defence of Necessary Measure

The air carrier shall not be liable if he can prove that he and his agent have taken all necessary measures to avoid damage or that it was impossible for him or his agent to take such measures.⁴¹

Defence of Contributory Negligence

The carrier shall not be liable if he can prove that the damage was caused by the negligence or contributory negligence of the injured person.⁴²

Defence of Lapse of Time

Failure of the passenger or person entitled to delivery of cargo or baggage to lodge a complaint in writing within prescribed period automatically bars the complainant from bringing an action against the air carrier save in the case of fraud on his part.⁴³

Further defences available to the carrier in case of destruction or loss of, or damage to, the cargo are:

1. Inherent defect, quality or vice of that cargo;
2. Defective packaging of that cargo performed by a person other than the carrier or its servants or agents;
3. An act of war or an armed conflict; and,

⁴¹ *Ibid.* Article 19.

⁴² *Ibid.* Article 21(2) (a-b) and Article 20.

⁴³ *Ibid.* Article 35.

4. An act of public authority carried out in connection with the entry, exit or transit of the cargo.⁴⁴

Combined Carriage

The combined effect of the provisions of Articles 1; 18(4) and 38 of the Convention enables a claimant to recover for damage arising from an accident that occurred either in the course of road, rail or air transportation⁴⁵. Therefore, any accident occurring during any phase of the combined carriage would be treated as falling within the provisions of the Convention⁴⁶.

Advance Payment

The Convention has a provision on advance payments, which acknowledges the right of States to have national laws that require their own carriers to make such payments in the event of passenger death or injury. It also addresses certain procedural issues related to such payments.⁴⁷ The Convention defines the rights of passengers and consignors in operations where all or part of the carriage is provided by an airline that is not a party to the contract or carriage e.g., code-sharing operations, freight consolidators, etc.

Challenges in the Application of Montreal Convention, 1999

Judges and lawyers face some challenges while trying to interpret and apply the provisions of the Convention. Some of the challenges are: the interpretation of "Bodily Injury"; award of punitive damages; compensation for delay of passenger; flight cancellation, denied boarding and non-performance of contract of carriage and monopoly of cause of action.

⁴⁴ *Ibid.* Article 18 (2) (a-d).

⁴⁵ *Ibid.* Article 34.

⁴⁶ C. E Uwakwe, *Introduction to Civil Aviation Law in Nigeria*, 1st ed., (Lagos: Aviation Publishing and Consultancy Co. Ltd, 2006) p.157.

⁴⁷ Article 28. Note that a Resolution adopted by the Diplomatic Conference as part of the final Act encourages states to adopt such laws. See *History of Air Law* (n.2), p.11.

The greatest challenge to the application of the Convention is the issue of how bodily injury should be interpreted having adopted the wording of Article 17 of the Warsaw Convention. This is because the Convention failed to expressly provide for the universal meaning of "Bodily Injury" for the purpose of awarding compensation. According to Siobhan⁴⁸, while commenting on the above challenge, what constitutes bodily injury for the purposes of awarding compensation under the Montreal Convention is an area of law that has challenged judges and lawyers for so many years⁴⁹.

The basis of the above view is the consensus of the conference at Montreal in 1999. After serious argument on what constitutes bodily injury under Article 17 of the Warsaw Convention, the courts interpreted bodily injury to preclude mental and psychological injury⁵⁰ while in other cases it was interpreted to include mental and psychological injury⁵¹. In one breadth, the courts interpreted bodily injury to include mental and psychological trauma, while in some cases the courts were of the view that the victim of mental and psychological injuries shall only be compensated, if they flow from the physical injury sustained⁵². Others have allowed recovery from mental injuries that arose prior to or simultaneously with bodily injury⁵³. According to the Explanatory Note adopted on 28 May, 1999, the main reason for the adoption of the wording of the bodily injury in the Montreal Convention by the conference is to safeguard already existing judicial precedent on the

⁴⁸ Siobhan Lane, "Ireland: Bodily Injury and the Montreal Convention" <http://www.mondaq.com/article.asp?>8/7/2010>.

⁴⁹ *Ibid.*

⁵⁰ *Rosman v. Trans World Airlines* 314 N.E.2d 848,850 (N.Y. 1974).

⁵¹ *Hürssler v. Swiss Air Transport Co.* 388 F. Supp. 1238 (S.D.N.Y.1975). This is the position of Saudi Arabia, Uzbekistan, Spain, Russia, and France.

⁵² *Jack v. Trans World Airlines Inc.* 854 F. Supp. 654 (ND Cal, 1994); *Kotsambasis v. Sing Airlines Ltd.* (1997) 140 F.L.R. 318, 323; *Lloyd v American Airlines, Inc.* 537 U.S. 974; *Ligeti v British Airways PLC*, No 98 Civ. 1027(MBM), 1999 WL 1356238, at *4(S.D.N.Y. Nov. 5, 2001)

⁵³ *Re: Korean Air Lines Disaster of September 1, 1983*; *Gilbert v Pan American World Airways* cited in M.K., Cunningham, *op. cit.* at p.1061. This is the position of USA; and United Kingdom. See M.K. *op.cit.* at 1073.

interpretation of bodily injury and for uniformity of purpose amongst the parties to the Convention.⁵⁴

On the basis of the above reason, it is germane to ask the following questions: Have the various interpretations given to the word "*Bodily Injury*" enhanced uniformity and certainty in the application of the Convention as contemplated by the conference? Are the passengers adequately protected in the awarding of compensation?

The decision of the conference not to have universal definition and/or constituents of bodily injury will further compound the problems of both judges and lawyers. This is because courts in Nigeria may interpret bodily injury in its ordinary meaning while another court in Ghana or elsewhere may interpret the same word extensively/widely. Hence the end result of those interpretations has occasioned uncertainty, miscarriage of justice and non-uniformity in the application of Montreal Convention and this has further compounded the problem which the international community tends to solve. Following the precedent dogmatically will impede development of aviation law. According to Gifford and Salter⁵⁵:

The doctrine of precedent, by its very nature, is resistant to drastic or sudden change. Once a principle has been laid down by a court of high status in the hierarchy, it is very difficult to remove or substantially alter that principle. The difficulty of removing or altering such a principle increases with the length of time that has passed since that principle was laid down. During that time, however, social conditions may have changed, and a doctrine or principle which was once

⁵⁴ See ICAO: Convention for the Unification of Rules relating to International Carriage by Air, Explanatory Note for Article 7, May 28, 1999(citing Montreal Minutes Doc. 9775-DC/2 (2001) cited in M.K., *op.cit.*

⁵⁵ D. Gifford and J. Salter, *Understanding the English Legal System* (London: Cavendish Publishing Limited, 1997), pp.41-43.

appropriate may have become very inappropriate in the social conditions now prevailing.⁵⁶

We agree to the above submission. The interpretation of *bodily injury* under the Warsaw Convention, which was designed to soothe the Warsaw regime, appears to be inappropriate under the Montreal Convention as a result of social changes. Hence, to follow the precedent laid down under the Warsaw Convention in the application of Art. 17 of the Montreal Convention would occasion a great deal of uncertainty in the aviation business.

Another challenge facing the application of the Convention is the issue of outright bar to the award of punitive damages⁵⁷. The implication of this is that, for a passenger to recover damages⁵⁸, he must strictly prove the propriety of same to the satisfaction of the court, and thus punitive and other non-compensatory damages will not be recoverable since they are very difficult to prove.⁵⁹ Also, since one of the purposes of the Convention is to protect passengers via the award of damages, the provision of the Convention that disregard the award of punitive damages is not sufficiently protective. It is our view that if the claimant is able to prove any of the actions of the air carrier that will warrant the award of punitive damages, the court ought to award same.

Another challenge is the compensation payable in cases of flight delay, cancellation, and denied boarding. The Convention expressly failed to protect passengers for not providing the amount of compensation that is payable to victims of flight delay, cancellation of flights without just cause

⁵⁶ *Ibid.*

⁵⁷ Punitive damages has been defined as the damages awardable to the claimant if damage caused to the claimant is as a result of malice; gross misconduct or wilful disregard of the other claimant's right or wanton injury caused to the claimant. See *Air crash Near Morrisville* No 1:95MD1084, 1997 U.S. Dist. LEXIS2187 at *22-23 (M.D.N.C, 1997).

⁵⁸ Damages which the Convention refers to here are general and special damages respectively.

⁵⁹ Julian Hermida, "The New Montreal Convention: The International Passenger's Perspective", (2001). *Air & Space Law*, vol. 26 p.150,

<http://www.julianhermida.com/intlawavclassaifhermida>>8/8/2010.

and denied boarding. For example, an air traveller may be delayed for any number of reasons, for example due to weather or mechanical problems. In most cases, the delay does not cause any hardship. However, there are times when the delays can lead to missed connections, unexpected overnight stay in the airport, or other significant inconveniences. The victim of any kind of these ought to be compensated but there is no provision for same in the Montreal Convention. For example in Europe, recourse has to be made to the European Union Regulation⁶⁰. The importance of adequate protection of passengers' right in the aviation industry cannot be over-emphasised. As Jacques Barrot⁶¹ stated, "The boom in air travel needs proper protection of passengers' right".

The practical implication of the omission is that the Convention leaves it at the discretion of the court. We submit that this is contrary to the spirit of uniformity and certainty as prayed by the conference, as there will be uncertainty in the award of compensation for such liabilities. For example, the EU has fixed its own liability limits in such cases⁶², other continents may decide to fix their own liability limits with respect to the same subject matter of our discussion, hence, the uniformity and certainty purpose of the Convention will be defeated.

Another challenge of the Convention is how to reduce litigation. It is obvious that another purpose of the Montreal Convention is to reduce litigation between the air carrier and the passenger.⁶³ However, this seems to be difficult as some of the provisions of the Montreal Convention actually favoured litigation. For example, the Conference, by way of restatement, reinstated the term "Bodily Injury" as used and interpreted under the

⁶⁰ The New Regulation (EC) No. 261/2004 entered into force on 17th February, 2005. It establishes common rules on compensation and assistance to passengers in the event of cancellation or long delays of flight.

⁶¹ Jacques Barrot is the European Commission Vice President responsible for transport.

⁶² The New Regulation (EC) No 261/2004 entered into force on 17th February, 2005.

⁶³ Julian Hermida, *op.cit.*

Warsaw Convention, which favoured litigation.⁶⁴ Our opinion is that the precise definition of "Bodily Injury" is subject to the court's interpretation; hence, the purpose of the Montreal Convention in this regard is defeated.

Another challenge closely related to the above is the non inclusion of any provision for Alternative Dispute Resolution (ADR)⁶⁵. Julian⁶⁶ opined that ADR should have been provided for the benefit of countries who allow the use of ADR in the settlement of cases relating to death in their jurisdictions. Here, those who cannot settle through ADR may ignore it. We submit that one cannot but agree to the opinion of Julian as this would greatly reduce court litigation, enhance the actualization of the purpose of the Convention; engender continuity of parties' relationship, contribute to prompt settlement of disputes, the avoidance of technical procedure and, in some cases, the reduction of expenses in settling disputes as opposed to the high cost of courtroom litigation.

Other challenge that needs to be looked into is the issue of monopoly of cause of action. For example, the Montreal Convention provides that the Convention is only applicable to international contract of carriage by air. This in our opinion means that the Convention provides for exclusive cause of action as expressed in the case of *Sidhu and others v. British Airways Plc*,⁶⁷ where Lord Hope held that:

The Convention does not purport to deal with all matters relating to contracts of international carriage by air. But in those areas with which it deals – and liability of the carrier is one of them – the code is intended to be uniform and to be exclusive also of any resort to the rules of the domestic law....

⁶⁴ *Ibid.*

⁶⁵ This is the method of settlement of dispute outside the courtroom by way of Arbitration, Conciliation, Mediation, etc.

⁶⁶ Julian Hermida, *op.cit.*

⁶⁷ *Sidhu and others v. British Airways Plc*, [1997] 1 ALL ER 193, p.207.



The above decision of the court is to the effect that if the Montreal Convention failed to provide a remedy against the liability of an air carrier, no resort could be made to any domestic law. We submit that this defeat, one of the major objectives of the Montreal Convention, which is to protect the passenger, is also defeated and is contrary to the equitable principle of *ubi jus ubi remedium* (where there is damage, there is remedy).

Another challenge is the issue of 2nd tier compensation which is unlimited. Siobhan Lane⁶⁸ is of the view that the 2nd tier award of damages to the victim may result in the insolvency of the air carrier involved, more so that the air carrier may also be the victim of third party interference. It is our submission that one would agree with the submission of Siobhan because having provided that the carrier shall be strictly liable to pay 1st tier of compensation as damages, the award of 2nd tier damages without limits would visit a heavy burden on the carrier and may eventually lead to insolvency of the carrier and thereby occasion great miscarriage of justice.

Conclusion

There are some challenges facing the Montreal Convention. The Convention did not provide for the meaning of bodily injury and its constituents but left their interpretation to the discretion of the court. It equally failed to provide for compensation in cases of cancellation of flights, denied boarding and non-performance of contract. Also, the new Convention did not encourage settlement of disputes out of court whereby the litigants may resort to Alternative Dispute Resolution mechanisms but provides for exclusive cause of action.

In view thereof, we suggest the following as possible remedies to the above challenges:

⁶⁸ Siobhan Lane, "Ireland: Bodily Injury and the Montreal Convention" <<http://www.mondaq.com/article.asp?> > 8/7/2010.

The ICAO should convey a meeting that will review the present Montreal Convention in order to:

1. Review some articles of the Convention so as to provide for the intended meaning of "Bodily Injury" rather than leaving it to the discretion of States court. If this is done, it will further enhance uniformity of purpose of the Convention.
2. Provide damages in cases of denied boarding, cancellation of flight without just and reasonable cause as well as non-performance of contract of carriage.
3. Provide for the settlement of disputes out of court through the mechanism of Alternative Dispute Resolution⁶⁹. Provision relating to settlement of dispute generally similar to that of United Nations Convention on Law of the Sea that accommodates ADR processes can be adopted. If this is done it will definitely reduce aviation litigation.
4. The judges should adopt the Mischief Rule of interpretation of statute⁷⁰ in the interpretation of Art. 17 of the Warsaw Convention on award of damages so as to know the position of the Warsaw Convention before Montreal Convention; the hardship the Warsaw Convention occasioned, and the intention of the State parties to the Montreal Convention relating to award of damages; and the reason for the award of such damages under the Montreal Convention. This will equally enhance uniformity of purpose which the Convention seeks to achieve in the aviation industry.

⁶⁹ Such as Arbitration, Conciliation, Mediation, Medarb, etc.

⁷⁰ This rule was propounded by Lord Mansfield in *Heydon's case* [1584] 96 E.R.638, wherein the following rules were made to guide judges in the interpretation of statutes: (a) what was the law before the new law was made? (b) What was the mischief for which the old law failed to provide? (c) What was the remedy the legislature advanced to cure the injustice? (d) What was the true reason for the remedy? See also *Re Mayfair prop. Co.* [1898] 2 Ch. 28 at 35; *Balogun v Salami* [1963] 1 All NLR 129; *Kolawole v Alberto* [1989] 1 NWLR, (pt. 98), 382 at 416. See also J.O. Asein, *Introduction to Nigerian Legal system* (Ibadan: Sam Bookman Publishers, 1998), pp54-58; J.M. Watson, *Essential English Legal System* 2nd ed., (London: Cavendish Publishing Limited, 1997), p.33.

5. Review the provision that bars the award of punitive damages. It is settled law that a party can claim punitive damages if he is able to prove the ingredients. Thus, a passenger ought to be allowed to prove the circumstance(s) that may warrant his entitlement to punitive damages.
6. Adopt the provision of EU Regulation that regulates the award of compensation in cases of flight cancellations and long delays of passengers⁷¹.
7. Limit 2nd tier damages even if the victim is unable to prove its case on the balance of probability.

⁷¹ The New Regulation (EC) No 261/2004.