



AVIATION LAW

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“Cargo owners have a right of action where there is damage, partial or total loss of their cargo, they must therefore identify the correct person to sue, the correct court and act quickly before the action is statute barred” -Bankole Sodipo Ph.D. (London) B.L. Partner, G.O Sodipo & Co

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EDITOR'S NOTE

In this quarter's newsletter we take a look at Aviation law, highlighting the current developments and various issues in the sector with special emphasis on the situation in Nigeria.

The absence of enabling laws to provide a safety net for professionals in the aviation sector is a critical situation as aviation professionals in Nigeria are exposed to enormous commercial pressure without any protection from the law.

An example of this is a case where a manager is so preoccupied with meeting various targets, such as time performance, schedule integrity, achievement of cost savings, etc that he inevitably compromise safety, other staff including pilots, engineers, air traffic controllers, dispatchers, handling agents, ground equipment operators, etc are not left out in this regard.

Below is a list of some operational safety issues that have arisen:

- Engineers are cajoled into signing certificates of release/guarantee of proper servicing when the aircraft is obviously unserviceable.
- Dispatchers pressured to falsify weights in order to carry all commercial payload.
- Traffic controllers forced to work without the required equipment.
- Staff working overtime due to low manpower levels, resulting in fatigue and low productivity.
- Pilots being reprimanded or fined for safely executing go-arounds from an unstable approach.
- Or writing “serious defects” in the aircraft technical log.
- Or refusing to fly an unserviceable/defective aircraft.
- Or insisting on taking the legally required amount of fuel for each flight.

The law governing the Aviation industry is Nigerian Civil Aviation Authority Act 2004 and Nigerian Airspace Management Agency Act 2004.

One common dispute that arises in the aviation sector is the dispute between a cargo owner and a carrier (by air). Cargo includes goods and animals carried on board an aircraft. When the cargo is undelivered, or mistakenly moved to another aircraft, or partly/entirely lost or delivered in a condition that is bad/no longer merchantable, or stolen at the airport upon delivery, it may give rise to a claim by a dissatisfied cargo owner.

The Airway bill in the Aviation sector serves as the receipt for goods accepted for carriage and the contract of carriage of cargo that is between the carrier (airline) and the cargo owner. Therefore it was formerly the case that in a dispute it is the endorsee of the bill, to whom the cargo is to be delivered to (that is the receiver) that has a right to sue, and not the agent or notify party.



The notify party is often an agent for the receiver of the cargo who pays for and arranges for the clearance and transport to the receivers premises. He is the one who the airline company or its agent informs of the arrival of the cargo at the discharge port.

The Supreme Court of Nigeria's decision in *Basinco Motors Ltd. V. Woermann-Line* (2009) 13 NWLR (Prt. 1157) 149 which was decided in line with section 375 of the Merchant Shipping Act of 1990, was to the effect that a Notify Party is a stranger to the bill, and therefore had no right to sue.

However the reform to the rights of a cargo claimant effected by section 16(3) of the Admiralty Jurisdiction Act 1991 is to the effect that an agent of a disclosed principal can sue and be sued for his acts done within Nigeria, irrespective of the liability of his principal.

Note also that the liability of the carrier is strict, therefore the onus lies on the carrier to discharge the burden of proving it wasn't negligent in dealing with the cargo.

Below is an article I stumbled upon, it is instructively detailed. Do have a pleasant read.

INTERNATIONAL CARRIAGE BY AIR AND RESULTING CONTRACTS

The Civil Aviation Act 2006 is the principal law that regulates civil aviation in Nigeria. The act vests the Minister of Aviation with the responsibility for the formulation of policies and strategies for the promotion of Civil Aviation in Nigeria.

The act also creates the Nigerian Civil Aviation Agency and vests it with the authority to regulate Civil Aviation in Nigeria. The act also established the Accidents Investigations Bureau to investigate accidents. The Act domesticates international treaties to which Nigeria is a party, including (among others) the Chicago Convention 1944, the Montreal Convention 1999 and the Cape Town Convention 2001.

With regard to domestic flights, Nigeria as a signatory to the Warsaw Convention has, like its international counterpart, adopted by way of enactment into its local laws , the Warsaw Convention with special application to non-international flights. This is contained in the carriage by Air (non-international carriage) (Colonies, Protectorates and Trust Territories) Order 1953 (a) which is also found in Volume XI of the Laws of the Federation of Nigeria and Lagos, 1958.

The question of whether the above legislations still have relevance and applicability in Nigeria having regard to the fact that they were not included in the 1990 Laws of the Federation Republic of Nigeria has been a subject of legal tussle which went as far as the Supreme Court of Nigeria and was eventually resolved and otherwise settled in the case of *Joseph Ibidapo V. Lufthansa Airlines* (1997) 4 NWLR (pt. 498) 124.

In that case the Supreme court held that the carriage by Air (Colonies, Protectorates and Trust Territories (Order) 1953, which adopted and otherwise ratified the Warsaw Convention, in Nigeria, was still a relevant and applicable law in Nigeria, notwithstanding the fact that it was not included, by the Attorney General of the Federation, in the 1990, Laws of the Federation of Nigeria.

In the dictum of Wali JSC (then) at page 150 paras. A – B, the Supreme Court stated thus:

"Nigeria, like any other common wealth country, inherited the English common Law rules governing the municipal application of international law. The practice of our courts on the subject matter is still in the process of being developed and the courts will continue to apply the rules of international law provided they are found to be not over-riden by clear rules of our domestic law. Nigeria, as part of the international community, for the sake of political and economic stability, cannot afford to life in isolation. It shall continue to adhere

to, respect and enforce both the multilateral and bilateral agreements where their provisions are not in conflict with our fundamental law.”

The Warsaw Convention, therefore, having been decided to have relevance and applicability to our Nigerian Legal system, now takes the position as the ground norm for regulating and determining the rights of passengers, and owners of goods as well as the liability, defenses or limits to liability of the carriers on all contract of international carriage of passengers and goods by air. In Nigeria, the domestic or non-international carriage of passengers and goods by air is also regulated by legislation which embodies and otherwise adopts the provisions of the Warsaw Convention as earlier stated.

The Warsaw Convention as a regulatory statute, has greatly assisted in bringing uniformity of rules, regulating the rights and benefits of passengers on international flights for accident, delays or loss of their luggage, goods or cargo and the liability of the carrier for such eventualities, as well as the exceptions or limits to such liability.

In further emphasizing its importance and/or current relevance to our legal system the Supreme court in the Lufthansa case (cited above) per Wali JSC (then) (at page 149 paras. A – B) stated thus:

“I have not been able to find any legislation that repealed the 1953 Order or any court decision that has declared it illegal, irrelevant or obsolete. An important international Convention like the Warsaw Convention cannot be said to be implied or repealed when this country is still taking advantage of its provision and has not promulgated similar enactment to replace it. The Convention is so important to this country both domestically and internationally to be avoided. A vacuum of such magnitude cannot be tolerated in our legal system.

It is notorious fact that all air traveling tickets whether domestic or international contain notices alluding to the provision of the Warsaw Convention being referred to in this case as the 1953 Order. The 1953 Order can certainly be taken judicial notice of under Section 74 (1) of the Evidence Act (Cap. 112) Laws of the Federation of Nigeria, 1990.”

The Convention also provides for a time limit within which notice of loss and or non-arrival of their luggage should be made to the carrier by the passenger and a time limit within which the passenger can bring an action in court for damages resulting from loss, or delay in arrival of his luggage or unaccompanied goods or for accident or other injury suffered during an international flight, while it also specifically defines what constitutes international carriage by air.

For example Article 26 (1) of the Warsaw Convention provides that the receipt by a person entitled to delivery of luggage or goods without complaint is prima facie evidence that the goods have been delivered in good condition and in accordance with the document of carriage.

It therefore follows from the above subsection for instance, that a passenger who fails to immediately complain about damage or loss to his luggage, in the event of such damage or loss, may be unable at a later date to succeed in establishing a claim against the carrier for such loss or damage to his luggage or unaccompanied goods.

Similarly, Article 26 (2) of the Warsaw Convention provides that in the event of a damage to luggage or goods, the person entitled to delivery must complain to the carrier immediately after the discovery of the damage or at the latest, within three (3) days from the date of receipt in the case of luggage and seven (7) days from the date of receipt in the case of goods.

The same section provides that in the case of delay in the arrival of the goods the complaint must be made at the latest within fourteen (14) days from the date on which the luggage or goods have been placed at his disposal.

It is equally important to stress that Article 26 (3) of the Warsaw Convention provides that every complaint must be in writing, so a mere phone call or verbal complaint may rob a passenger of his right to claim for loss, delay or damage to his luggage or goods.

Another time limit imposed by the Warsaw Convention is in bringing action for damages. Article 29 of the Warsaw Convention provides that any failure to bring an action within two years from the date of arrival at the destination or from the date on which the aircraft ought to have arrived, and from the date on which the carriage stopped, would extinguish the right of the passenger to damages.

Many passengers have lost their right to damages because they failed to observe the time limits set by the Warsaw Convention for either notifying the carrier of their claim or for bringing an action in damages.

It is intended in this Article, to examine the essential ingredients of contracts for the Carriage of passengers, their luggage and goods by Air and the relevant provisions of the law regulating the same.

With respect to International carriage by Air, the Warsaw Convention has application to all international carriage of persons, luggage or goods performed by aircraft for reward. The Convention also has application to gratuitous (or free) carriage by aircraft performed by an air transport company or outfit.

It is important to also stress here that the Convention defines "international carriage" as "any carriage in which, according to the contract made by the parties, the place of departure and the place of destination whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two high contracting parties or within the territory of a single High Contracting Party, if there is all agreed Stopping place within a territory subject to tile sovereignty, suzerainty, mandate or autllOrity of another power, even though that power is not a party to the Convention".

From the above definition, we can see that once the place of departure is outside. the territorial boundaries of the place of destination and if either the place of departure or of destination (or arrival) is within the territorial borders of one of the High Contracting parties (i.e one of the countries that signed and adopted the Warsaw Convention), then the carriage falls under the category of "International carriage" which is governed by the Warsaw Convention.

The Warsaw Convention also requires that the agreement between the parties is paramount in determining whether the carriage is an international one or not. The question is usually that of what carriage was contemplated by the parties i.e. by the passenger or the consignor of goods and the carrier or Airline? If the parties agreed on an international carriage, it is immaterial that the expectation of the parties was not realized, by reason, for example, of a forced landing before leaving the country where the travel/journey began. Also if the journey was a non-international carriage, a forced landing in a foreign country will not change it to an international carriage.

Similarly, it is clear from the above definition that for the Warsaw Convention to be applicable to an international carriage by air, either the country of destination or the country of departure must be a High Contracting Party, i.e. one of the member nations that signed and adopted the Convention.

The Warsaw Convention also classifies a carriage to be performed by several successive air carriers as one undivided carriage for the purposes of the Convention, provided tile parties regarded it as a single operation.

Such a contract will also not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting parties. For

instance, a passenger traveling to China from Warri who buys a British Airways ticket that takes him from Warri to Lagos by Aero Contractors and from Lagos to London by British Airways and from London to China by Cathay Pacific Airlines will be considered to have performed on undivided carriage, and as long as the entire contract was regarded as a single operation, the various carriers or the fact that some of the stops were within the territorial borders of the sovereign state of Nigeria, would not rob the contract or carriage of its international nature.

Similarly, if a passenger embarks on a journey from any point in Nigeria to a place of destination in a country which is not a signatory to the Warsaw Convention, the contract will be an international one governed by the Warsaw Convention so long as Nigeria, being one of the countries in which the place of embarkation is situated, is a High Contracting, notwithstanding that the country in the place of destination (or arrival) is not a High Contracting Party (or a member/signatory to the Warsaw Convention).

A single contract for international carriage may be covered or evidenced by more than one ticket. For instance, where a long journey is undertaken by a series of different flights and each flight is covered by a separate coupon in the ticket booklet. In such situations, the law has always been that the physical make-up of the ticket booklets was not conclusive but the question would always be what carriage was contemplated in the agreement between the parties.

One question that often arises is whether successive carriage arises where one carrier is substituted to another in respect of part of the carriage after the contract has been made?

In the case of *Egan v. Kollsman Instrument Corporation* (reported in *Shawcross and Beaumont on Air Law* (4th Edition)), the original contract contemplated successive carriages and one carrier was substituted for one of the original carriers at the passenger's request, and with the cooperation and assistance of the original carrier. The court held that the substituted carrier was a successive carrier. The court observed in that case as follows:

"The rearranging of schedules due to missed or unavailable flights is a common occurrence and, in most such situations, the ultimate destination remains unchanged. Missed or unavailable flights are rarely caused by the willful conduct of the airline or passenger, and passengers expect assistance from the airline in re-arranging their itineraries. In the typical instance where one must take a different airline, the fare is disbursed between the airlines, and the passenger is not required to pay an additional amount. All of these factors persuade the court that an airline ticket constitutes a highly modifiable contract".

It is also important to stress that a break in the carriage or shipment, may not necessarily rob the carriage of its international nature. For instance, if the carriage broken by say a fortnight between two stops, the journey would still be an international carriage provided that the agreement between the parties was a single one, and one covering the whole of the journey in issue.

The Warsaw Convention does not however, apply to all categories of carriage. An exception to carriage not applicable to or under the Warsaw Convention is carriage performed under the terms of any international postal Convention, in other words, carriage of mail or postal packet.

DOCUMENTS OF CARRIAGE

We shall now consider the documents of carriage, provided for under the Warsaw Convention. This in effect means that for every standard contract for carriage of passengers and/or luggage and goods by air, some specific documents must be issued in evidence of the contract. The entire subject is covered by Chapter II of the Convention. The documents of carriage will be considered with respect to the carriage of firstly

passengers, secondly their luggage all thirdly unaccompanied goods or cargo.

Section 1 of the Chapter II aforesaid and Article 3 in particular, provides that for carriage of passengers, the carrier must deliver or issue a passenger ticket. The Article further goes on to spell out the specific particulars/details that each passenger ticket must contain as follows:

- (a) The place and date of issue
- (b) The place of departure and of destination.
- (c) The agreed stopping places.

The condition of the agreed stopping places being stated on the passenger ticket, however goes with a proviso that the carrier reserves the right to alter the stopping places in case of necessity and that if he so exercises that right the alteration shall not have the effect of depriving the carriage of its international character.

It's important to stress that this proviso is contained in most passenger tickets under the caption "CONDITIONS OF CONTRACT". Many passengers have complained about the carrier altering stopping places and have even instituted claims against such carriers. The truth is that if the alteration was due to a necessity like bad weather, technical fault in the plane or some other emergency e.g. sudden war or coup in the place of destination, the carrier will not be held to have breached the contract for carriage by virtue of the said alteration.

It also needs to be stated here that the burden or legal responsibility to show that the altered stopping place made by the carrier was due to necessity is that of the carrier, he being the one who to benefit from the proviso.

(d) The passenger ticket must also specify the name and address of the carrier or in the event of more than one carrier, the carriers.

(e) The passenger ticket must also contain a statement that the carriage is subject to the rules relating to liability by the Warsaw Convention.

Most (if not all) passenger tickets contain clauses thereon specifically referring to the provisions of the Warsaw Convention as being applicable to the contract for carriage.

In some cases, additional clauses or statements are inserted and printed on the passenger tickets specifically setting out the limit of the carrier's liability in the event of death, damage or baggage loss.

It should be noted that under the Warsaw Convention, the absence, irregularity or loss of a passenger ticket does not nullify the existence of a valid contract of carriage between the passenger and the carrier as the rules, regulations and conditions set out by the Convention will still have statutory application to every contract (whether the ticket is lost or not).

It is however important to stress here that a carrier who accepts a passenger on board its aircraft without delivering a ticket to him will not be allowed to avail himself of the provisions of the Warsaw Convention which exclude or limit the liability of the carrier in the event of death, loss or damage to luggage. So a carrier who picks up passengers without issuing or delivering passenger tickets to such passengers whether for reward or gratis, exposes himself to claims for damages at large in the event of death, or damage to the passengers or their luggage as the law would take it that he did not inform the passenger of the limits to his liability as provided under the Warsaw Convention and will therefore not be allowed to waive or rely on those limits as a defence to any action for damages for death to the passenger, or damage or loss to his luggage.

The next essential document in a carriage by air contract is the luggage ticket popularly

referred to as "luggage tag".

This is specifically provided for Under Section 2 and Article 4 of the Warsaw Convention.

The Article provides that with the exception of small personal objects which the passenger takes charge himself (otherwise called "hand luggage"), the carrier must deliver a luggage ticket to the passenger for the carriage of luggage.

The Section goes on to specify that the luggage ticket must be made out in duplicate with one part for the passenger while the other part is kept by the carrier and then it specifies the particulars that must be contained in each luggage ticket as follows:

- (a) The place and date of issue;
- (b) The place of departure and of destination;
- (c) The name and address of the carrier or in the case of more than one carrier, the names of the carriers;
- (d) The number of the passenger ticket;
- (e) A statement that delivery of the baggage will be made to the bearer of the luggage ticket;
- (f) The number and weight of the packages;
- (g) The amount of the value declared in accordance with Article 22 (2) (which provides for increased liability of the carrier in the event of loss of luggage where the passenger, prior to departure, had made a special declaration of the value of the said luggage and may have paid a supplementary sum as a result of such additional value declaration where applicable);
- (h) A statement that the carriage is subject to the rules relating to liability established by the Warsaw Convention.

Like the passenger ticket, the Warsaw Convention also states that a contract of carriage is not necessarily invalidated by the absence, irregularity or loss of the luggage ticket, as the conditions and rules set out by the Warsaw Convention will be applicable notwithstanding such loss, absence or irregularity.

However a carrier shall not be entitled to rely on the provisions of the Convention to exclude or limit his liability in the event of loss or damage to the passenger's luggage where he accepts luggage from a passenger and fails to deliver a luggage ticket to such passenger or if the carrier issues a luggage ticket to a passenger which does not contain the particulars, required particularly the following:

- (i) The number of the passenger ticket.
- (ii) The number and weight of the packages and
- (iii) A statement that the carriage is subject to the rules relating to liability established by the Convention.

This condition is safe haven for the decided cases (both in Nigeria and abroad) that have held that a passenger who claims for loss or damage of his luggage must establish the declared weight of his said luggage, to be able to claim for damages for loss or damage to his luggage. If the passenger can establish that at the material time of checking in his luggage, even though the carrier issued him with a luggage ticket or luggage tickets, the carrier failed to state the exact weight of the particular luggage or any of the vital particulars required by the Convention on the luggage ticket, then the passenger can claim for and indeed get damages at large against the Carrier, without the carrier having the benefit of invoking the limits to the carrier's liability as provided by the Warsaw

Convention.

Section 3 of the Warsaw Convention deals with Air Consignment note. This is the document that is issued in respect of unaccompanied goods or cargo. This particular section contemplates the existence of three parties namely:

- (a) The consignor or the sender of the goods or cargo.
- (b) The carrier who transports the goods or cargo, and
- (c) The consignee or the recipient of the goods or cargo.

Article 5 (1) of the Warsaw Convention establishes the right of the carrier of goods to require the consignor to make out and hand over to him a document called an "air consignment note" and the Article also establishes the right of the consignor of the goods to require the carrier to accept this document.

The absence, irregularity or loss of this document does not affect the existence or the validity of the contract of carriage, which shall be governed by the rules of Warsaw Convention except where the carrier accepts goods without an air consignment note having been made out or where the air consignment note so made out does not contain vital particulars provided for by the Warsaw Convention under Article 8 (a) to (1) and q of the Convention.

Article 6 of the Convention specifically provides for the air consignment note to be made out by the consignor in three original parts to be handed over with the goods. 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" and shall be signed by the consignor and by the carrier and shall accompany the goods; while the third part shall be signed by the carrier and handed by him to the consignor after the goods have been accepted.

The Air consignment note must also contain certain vital particulars set out in Article 8 of the Convention as follows:

- (a) The place and date of execution;
- (b) The place of departure and of destination;
- (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity; and that if he exercises that right the alteration shall not have the effect of depriving the carriage of its international character;
- (d) The name and address of the consignor;
- (e) The name and address of the first carrier;
- (f) The name and address of the consignee; if the case so require.
- (g) The nature of the goods; ,
- (h) The number of packages, the method of packing and the particular marks or numbers upon them;
- (i) The weight, the quantity and the volume or dimensions of the goods.
- (j) The apparent condition of the goods and of the packing;
- (k) The freight, if it has been agreed upon, the date and place of payment, the person who is to pay it;
- (l) If the goods are sent for payment on delivery, the price of the goods and, if the case so requires, the amount of the expenses incurred;
- (m) The amount or the value declared in accordance with Article 22 (2) (which enables a Consignor to declare all additional value for his goods and to pay a supplementary sum

therefore);

(n) The number of the parts of the air consignment note;

(o) The documents handed over to the carrier to accompany the air consignment note;

(p) The time fixed for the completion of the carriage and a brief note of the route to be followed, if these matters have been agreed;

(q) A statement that the carriage is subject to the rules relating to liability as established by this Convention;

Article 9 of the Convention provides that the carrier will not be entitled to take protection under the limits to liability provided by the provisions of the Convention in the event of loss or damage to goods if he accepts goods without an air consignment note having been made out or if the air consignment note does not contain the particulars set out in Article 8 (a) to (l) inclusive and (q) of the Convention.

The Consignor is deemed to be responsible for the correctness of the particulars and statements relating to the goods which he inserts in the air consignment note and the air consignment note are prima facie evidence of the conclusion of the contract, of the receipt of the goods and of the conditions of carriage.

It is the duty of the carrier to give notice to the consignee as soon as the goods arrive, unless it is otherwise agreed by the parties.

Upon the expiration of seven days after the date on which the goods ought to have arrived or if the carrier admits the loss of the goods, the consignee is entitled to put into force against the carrier the rights which flow from the contract of carriage. (Culled from the internet October 2014)

Aviation and Maritime Law

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