

## IMPACT OF CONSUMER PROTECTION LAWS ON AVIATION INDUSTRY IN NIGERIA\*

### Abstract

*The Civil Aviation Sector in Nigeria has developed tremendously over the last two decades. This massive development in this sector is merely an off shoot of globalization. As we all know, most development comes with its cost. The basic rights of air transport users are continually being undermined in Nigeria coupled with the fact that there are consumers in their hundreds and thousands. It is therefore appropriate for these reasons to look at the various consumer protection laws, and the legal framework put in place by Nigerian government towards the protection of rights of these consumers of air transport services, and also how those laws implemented impact the aviation industry. Thus, the review of basic laws in our jurisprudence which include, Consumer Protection Council (CPC) Act 2004, Nigerian Civil Aviation Act 2006, Nigerian Civil Aviation Regulations 2015, Warsaw Convention of 1929, Montreal Convention 1999 (on carriage of goods and persons by air 1999); and also, how these laws sufficiently impact the consumer protection structure of the Aviation Industry in Nigeria.*

**Keyword:** Consumer Protection, Civil Aviation, Convention, Evidence, Air Carriage

### 1. Introduction

In our jurisprudence, aviation industry is a complex and pivotal industry plagued with many problems and displeasure from unsatisfied consumers. The role of institutional agencies such as National Civil Aviation Authority (NCAA), National Airspace Management Agency (NAMA), Federal Airport Authority of Nigeria (FAAN) etc. as the legal framework for consumer protection in air services needs to be explored and the extent of their powers, functions and duties are not fully accessed. For example, it is the responsibility of the (FAAN) to develop and maintain airports and other facilities within the Nigerian airspace. The work of (NAMA) is to oversee the provisions and safeguarding of air navigation in Nigeria. While, the (NACA) is in charge of licensing, restoring and regulating aircraft as well as accident control. The Civil Aviation Act of 2006 which is embodied with the duty to regulate aviation in Nigeria. It makes provision for ability in air carriage and it domesticated the Montreal Convention, apparently, the provisions of Nigeria Civil Aviation Regulation (2015) and the Warsaw Convention of 1929 it appears that the laws and the regulations are inadequate and are not well exposed to air passengers. Consequently, many consumers of air services are not aware of the laws and regulation and therefore cannot claim their right to proper services and compensation from the airlines. However, an insight on the Consumer Protection Council Act of 2004 has demonstrated great interest in ensuring that their role as able resort in consumer protection is not neglected. Although, such work still remains to be done in this regard, the role of contract law, tort in consumer protection in air services in the absence of effective adequacy implementation of aviation laws. Sadly, some aviation laws and regulations are neither suitable nor consumer friendly hence, does not meet the needs of consumers. Currently, Nigeria aviation laws are not perfect though not abysmal.

### 2. Enforcement of Passengers Rights under Nigerian Civil Aviation

For nearly three decades in Nigeria, the rights of passengers have largely been ignored by airlines, a situation which has been exacerbated by the absence of relevant laws. Domestic airlines habitually delay, cancel flights without compensation, giving grounds such as bad weather or operational reasons.<sup>1</sup> The authorities' failure to enforce the law and the accompanying apathy on the port of the passenger has continued to make flight delays the norm at the Nigerian airports. In a bid to address these issues, the Nigerian Civil Aviation Authority (NCAA) has introduced a passenger bill of right set out in the Nigerian Civil Aviation regulation volume 4 – Consumer protection which places high value on air travel, its overarching objective is to protect the rights of the passengers and increase their confidence in Aviation Service. To achieve this, the Ministry of Aviation has ordered all aviation companies to set up consumer service units as well as establishing the Aviation consumer council, a compromising of industry stakeholders/ and members of the public to advice the ministry on global best practices. The regulation sets out rules to deal with issues including no shows, overbooking, lost or damaged baggage, denied boarding and delay and cancellation of local and international flights.

### 3. Passenger Compensation Rights

The regulations set out the following rights and protections for consumers.

- i. Where a passenger's flight is to be re-routed or delayed, he or she must be notified at least 2 hours in advance.

---

\*By **Chidimma Stella NWAKOBY, LLB, LLM, BL**, Lecturer of Department of Commercial & Property Law, Faculty of Law, Chukwu Emeka Odumegwu Ojukwu University, Igbariam Campus Anambra State cs.nwakoby@coou.edu.ng; and

\***Adinnu Elton CHUKWUJEKWU, LLB (Hons)**, Faculty of law Chukwu Emeka Odumegwu Ojukwu University, Igbariam Campus Anambra State

<sup>1</sup> Nigerian Civil Aviation Authority, Guidelines for Air Passengers Service (2001) Abuja, Nigeria.

- ii. Where passenger has a printout showing a confirmed reservation for a specific flight on a specific date, he or she cannot be denied boarding on the grounds that there is no corresponding reservation in the airlines data base.
- iii. If a passenger wishes to cancel a ticket purchase under non-refundable fee, he or she must be able to transfer the fare paid to a future flight, minus any applicable charges or cancellation fees.
- iv. Compensation must be paid if flights depart before the ticketed time.
- v. If luggage is delayed or lost, compensation must be paid within five business days.
- vi. If a passengers flights is delayed for more than one hour or cancelled or a passenger is denied boarding, he or she has a right to compensation.
- vii. If as passenger is treated rudely by airline staff or agents, he or she can claim compensation from the airlines.<sup>2</sup>

Adaption of the recommendation listed above would go a long way towards ensuring that the laws is not merely theoretical but rather is capable of being implemented, enforced and respected by all. The laws should not result in passenger apathy; rather it should be enforced strictly until it becomes part of the culture of Nigerian air travel under Nigeria civil aviation regulation. Every airline shall establish a consumer protection desk at every airport it operates in and shall appoint an officer to manage the consumer protection desk for the purpose of receiving, resolving and channeling difficult complaints to their head offices as well as hosing with the authority where necessary.<sup>3</sup> This provision is made possible in view of the importance attached to the benefits or merits of self regulation. However, it is very obvious that most airlines operating in Nigeria do not have this desk (consumer protection desk). Even when they do, they are just there to fulfill all righteousness. Their effectiveness remains questionable; this is shown in a number of situations. For instances, as had already been shown in respect of compensation payable for death and bodily injury provided under the civil aviation action schedule 11 article 17 which states that ‘the carrier is liable for damage sustained in the case of death or bodily injury of the passenger upon conditions only that the accident that caused the death or bodily injury took place on board the aircraft or in the course of any of its operations of embarking or disembarking’. Section 48(3) of the Civil Aviation Act 2006 provides in any case of aircraft accident to such resulting in death or injury of passengers, the carrier shall make advance payment of at least \$30,000 US dollars within, 30 days from the date of such accident to such natural persons who are entitled to claim compensation in order to meet their immediate economic needs ... such advance payments shall not constitute recognition of liability and may be offset against any amount subsequently paid as damages by the carrier.

#### 4. Relevant Statutes that Impact and Protect Consumers of Air Space in Nigeria

**The Warsaw Convention of 1929** is convention for the unification of certain rules to international carriage by air signed at Warsaw on October 1929. This convention applies to all international carriage of persons, luggage, or goods performed by an air craft for reward. It applies equally to gratuitous carriage by air craft performed by an air transport undertaking.<sup>4</sup> The Warsaw convention was domesticated in Nigeria by the carriage by air (colonies, protectorates and trust territories) order of 1953,<sup>5</sup> because the carriage by air (colonial, protectorate and trust territories) order of 1953 was not included in the 1990 laws of the federation of Nigeria, it became an issue as to its applicability. In case of *Ibidapo v Lufthansa Airlines*,<sup>6</sup> the issue as to whether the Warsaw convention still applied was resolved, here, the Supreme Court held that the carriage by Air order of 1953 which adopted and ratified the Warsaw convention in Nigeria was still relevant and applicable in Nigeria. The Civil Aviation Act repealed the Carriage by Air (Colonies, Protectorates and Trust Territories) order of 1953. Consequently, the Warsaw Convention no longer applies to domestic air carriages within Nigeria. Nevertheless, in accordance with Article 1 of the Warsaw Convention, 1929, it stroll applies to all international carriage of persons luggage or goods performed by air aircraft... the Warsaw convention is still recognised in International air carriage as a legal rule/convention for carriage of persons or goods.<sup>7</sup> The Air carrier is liable for damage sustained in the event of death or injury of a passenger or another bodily injury suffered by a passenger, if the accident which caused sustained injury took on board the aircraft or in the course of any of the operations of embarking and disembarking.<sup>8</sup> This Article 17 of Warsaw Convention laid down the international air carriage rule that places obligation to a certain degree, extent on air carrier for the safety of consumers of air services. The carrier is liable for damage sustained in the event of the destruction or loss or damage to any registered luggage or any goods if the occurrence which cause the damage so sustained took place during the carriage by air. The carrier is not liable

---

<sup>2</sup> Nigerian Civil Aviation Regulation (2015) Part 19.

<sup>3</sup> Civil Aviation Regulation (2012) Part 19. 18.1

<sup>4</sup> Article 1 of the Warsaw Convention, 1929

<sup>5</sup> Vol. x. no. 1 of the Laws of the Federation, 1958

<sup>6</sup> (1997)4 NWLR (pt. 498) 124

<sup>7</sup> Supra

<sup>8</sup> Article 17, Warsaw Convention, 1929

if he proves that he and his agents have taken all measures necessary to avoid the damage or that it was impossible for him or them to take such measures. The consequences of this section is that the carriers liability is limited if there was no way it could have prevented the damage or if the damage resulting from the destruction of persons/goods or loss of goods is caused by uncontrollable circumstances or act of God.<sup>9</sup> In the carriage of goods and luggage, the carrier is not liable if he proves that the damage was occasioned by negligence in the handling of the air craft or in navigation and that in all other respects, he and his agents have not taken all necessary measures to avoid the damage.<sup>10</sup> This Article did not do enough to protect consumers of air services passengers and as such, the Montreal Convention of 1999 came into existence to take care of the obvious defects of this article and other massively defective and inadequate provisions of the Warsaw convention. If the carriers prove that the damages was caused or contributed to by the negligence of the injured parties, the court may in accordance with the provisions of its law, exonerate from his liability. This provision provides a defense of contributing negligence to the carrier. In the carriage of passengers, the liability of the carrier for each passenger is limited to the sum 125,000 Francs... in the carriage of registered luggage and of goods, the liability of the carrier is limited to the sum of 250 Francs unless the consigner has made at the time when the package was handed over to the carriage special declaration of the value at delivery and has paid a supplementary sum in the case so required in that case the carrier will be liable to pay a sum not exceeding the declared sum unless he proves that the sum is greater than the actual value to the consigner at delivery.

As regards objects of which the passenger takes charge himself the liability of the carrier is limited to 5,000 Francs per passenger. The sum may be converted into any national currency figured. A problem of value of French France currency may surface because, what if the converted amount becomes very high or low? The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods. The carrier shall not be entitled to avail himself of the said provisions, if the damage is caused by any agent of the carrier acting within the scope of his employment. The carrier shall not be entitled to exclude or limit his liability of the damage is caused by his willful misconduct.<sup>11</sup> The right to damages shall be extinguished if an action is not brought within two years reckoned from the date of arrival at the destination or from the date on which the aircraft ought to have arrived or from the date on which the carriage stopped.

#### **The Civil Aviation Act of 2006 and the Unification of certain Rules for International Carriage by Air of 1999 (Montreal Convention)**

The Civil Aviation is the main legislation regulating aviation in Nigeria, it makes express provisions for liability in air carriage and it domesticates the Montreal Convention of 1999.<sup>12</sup> The Act adopts the Montreal Convention in Schedule 11 and modifies it to fit domestic air carriages in schedule III.<sup>13</sup> The provisions of the Civil Aviation Act with respect to liability are examined and assessed below together with the Montreal Convention.

#### **Damage Sustained in the Case of Death or Bodily Harm**

The Civil Aviation Act provides that 'The carrier is liable for damage sustained in the case of death or bodily harm of a passenger upon conditions only that the accident that caused death or bodily injury took place on board the aircraft or in course of any of the operations of embarking or disembarking'.<sup>14</sup> While the word accident is defined in the Montreal Convention, the most widely adopted interpretation is the one enunciated by the Supreme Court in *Baks v France*,<sup>15</sup> under this definition, an accident is an unexpected or unduly event or happening that is external to the passenger. The Civil Aviation Act as an adaptation of the Montreal Convention makes the carrier liable only for bodily injury not for mental injury unaccompanied by physical injury.<sup>16</sup> This means that a passenger can recover for mental injury if such injury accompanies bodily injury. In *Ehrlich v American Airlines*,<sup>17</sup> the court embraced the approach that recovery for mental injury is restricted to that which flows from or is caused by bodily harm/injury.<sup>18</sup> Aviation Act in line with the Montreal Convention establishes a two liability system by which a carrier is strictly liable to compensate each passenger who suffers death or bodily harm with one hundred thousand dollars.<sup>19</sup> The carrier may be liable for a higher amount if the plaintiff proves that the damage was due to

---

<sup>9</sup> Article 20(1) Warsaw Convention, 1929

<sup>10</sup> Article 20(2) Civil Aviation Act, 2006.

<sup>11</sup> Guseppe Guerrier, willful Misconduct in the Warsaw Convention: A Stumbling Block? *Mc Gil – L – J* 267, 272 (1960) (quoting *Horabin v Boac* (1952), ALL ER 1006 (Nigeria). Also see Article 25(1) Warsaw Convention 1929.

<sup>12</sup> Schedule III, Article 1 of the Civil Aviation Act, 2006

<sup>13</sup> Schedule III, *Ibid*

<sup>14</sup> Schedule II, Article 17 of the Civil Aviation Act, 2006.

<sup>15</sup> 70 v.s. 392 (1985)

<sup>16</sup> During deliberations of the Montreal Convention, it was proposed that re-covering for damages b along with bodily injury.

<sup>17</sup> 360 F. 3d3366,501 2d cir. 20040

<sup>18</sup> *Ibid*

<sup>19</sup> Schedule III Article 21, Civil Aviation Act, 2006

negligence or other wrongful Act or omission of the carrier or its servants or agents.<sup>20</sup> Section 48(3) of the Act provides; in any case of aircraft accident resulting in death or injury of passengers, the carrier shall make advance payments of at least US\$30,000 (Thirty thousand United States Dollars) within 30 days from the date of such accident... to such natural person who are entitled to claim compensation in order to meet their immediate economic needs... such advance payments shall not constitute recognition of liability and may be offset against any amounts subsequently paid as damages by the carrier.<sup>21</sup>

The Civil Aviation Act prescribes a two year limitation period which the right to damages will be extinguished.<sup>22</sup> Recent events in Nigeria have revealed the challenges faced by claimants in receiving compensation for death and bodily injury. In June 2012, a major air accident involving Dana Airlines caused the deaths of the 147 passengers and six crew members on board.<sup>23</sup> Five years after the accident, many families of victims reportedly had yet to receive any compensation from the airline.<sup>24</sup> In 2005, 109 of 110 passengers died in an accident involving Sosoliso Airline and 103 of 106 passengers died in an accident involving ADC airlines.<sup>25</sup> As of 2010, compensation was still outstanding to some families of victims involved in these accidents.<sup>26</sup> The failure of air carriers to comply with compensation provisions usually results in serious agitations against the air carrier by families of victims. Families of the victims of the Dana air plane crash of 2012 planned to institute actions later on, at which time a considerable number of persons entitled to advance payments were still unpaid.<sup>27</sup> It is notable that prior to this, beneficiaries in Nigeria had rarely thought of nor planned to institute actions against air carriers for this purpose as families are often too overwhelmed by the loss of their loved ones to challenge the actions of the carrier in court.

### **Damage Sustained in Case of Destruction or Loss of Baggage or Cargo**

The Civil Aviation Act provides that the air carrier is liable for damage sustained in case of destruction or loss of or damage to checked luggage (if) the event that caused the destruction or loss or damage took place on board the air craft or during any period within which the checked baggage was in the charge of the carrier.<sup>28</sup> However, the carrier is not liable if the damage was caused by a defect or attribute of the baggage.<sup>29</sup> For carryon baggage, the carrier is liable only if the carrier or one of its agents caused the damage. With regard to cargo, the carrier is liable for damage, destruction or loss of cargo only if the cause of the damage received during the carriage by air.<sup>30</sup> The Court of Appeal in *Emirates Airline v Tochukwu Aforka and Anor*,<sup>31</sup> stated that the carriage by air consists of the period during which the cargo is in the charge of the carrier.<sup>32</sup> Thus, it does not matter whether the cargo has been air lifted.<sup>33</sup> Thus, under the Civil Aviation Act, Schedule III Article 18; A carrier is not liable if and to the extent it proves that the destruction or loss of or damage to, the cargo resulted from inherent defects, quality or vice of that cargo, defective packing of that cargo performed by a person other than the carrier or its servants or agent, an act of war or an armed conflict or an act of public authority carried out in connection with the entry, exit, or transit of the cargo.<sup>34</sup>

The compensation available to a passenger in the case of destruction, loss or damage in the carriage of baggage is limited to US\$20 per Kilogram or US\$ 1,000 unless the passenger has made it the time when the checked baggage was handed over to the carrier or special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires.<sup>35</sup> If a declaration is made, the carrier will be liable to pay at maximum, the declared sum; unless the carrier shows that the declared sum is greater than the passenger's variation of the

<sup>20</sup> Ibid

<sup>21</sup> Section 48 (3) Civil Aviation Act, 2006

<sup>22</sup> Schedule III, Article 35. Civil Aviation Act 2006.

<sup>23</sup> Monsuru Olowopejo Dana Crash: Two years after relatives' wail awaits compensation. Vanguard (June 3, 2004). Available at [www.vanguard.ng/dana](http://www.vanguard.ng/dana)

<sup>24</sup> Sosoliso, ADC Plane Crashes, Final Compensation this week – DG NCAA NBF news (Dec. 13, 2016). Available at [www.nbfnews.com.ng/danz-crash-awaits-compensation-this-week](http://www.nbfnews.com.ng/danz-crash-awaits-compensation-this-week)

<sup>25</sup> Ibid

<sup>26</sup> Dana Air Crash Consortium of Lawyers Breaks News grounds in Aviation Available at [www.vanguardonline.com.ng/Dana-air-crash](http://www.vanguardonline.com.ng/Dana-air-crash)

<sup>27</sup> Ibid

<sup>28</sup> Ibid

<sup>29</sup> Schedule III Article 18, Civil Aviation Act, 2006.

<sup>30</sup> Ibid

<sup>31</sup> (2014) LPELR 22686 (CA) (Nigeria)

<sup>32</sup> Schedule III Article 18, civil Aviation Act

<sup>33</sup> Ibid

<sup>34</sup> Ibid

<sup>35</sup> Article 22(2) Civil Aviation Act, 2006

baggage.<sup>36</sup> These limitations are applicable if the carrier or its agents intended to cause loss or damage, or if the loss damage was done recklessly with the knowledge that loss or damage could result. This provision is similar to Article 25(1) of the Warsaw Convention which provided that the carrier shall not be entitled to exclude or limit his liability if the damages are caused by his willful misconduct.<sup>37</sup> In *American Airlines v Ulen*,<sup>38</sup> the court held that a willful act done with the knowledge that the act was likely to result in injury to a passenger constituted willful misconduct. In *Horabin v British Corporation*,<sup>39</sup> the court decided that to be guilty of a willful misconduct, the person concerned must appreciate that he is acting in a wrongful manner or is wrongfully omitting to act and yet persist in so acting or omitting to act regardless of the consequences or acts or m\omits to act with restless indifference as to what the result may be.<sup>40</sup> The Nigerian Court of Appeal in *Harkar Air Services v Keazor*<sup>41</sup> stated that an act constitute willful misconduct relates to proof of a conscious intent to do or omit doing an Act flow which harm to another results. Therefore, willful misconduct is or deliberate omission of a manifest duty to which there must be a realization of the probability of injury from the conduct and a disregard of a probable consequence of such conduct. If damage to the baggage is occasioned as a result of delay in carriage by the carrier, it will be liable except it proves that it and its agents took all reasonable measures to avoid the damage. The defense of contributing negligence ensures in favour of the carrier.<sup>42</sup>

Article 17(3) Montreal Convention 1999 further states that if the carrier admits the loss of checked baggage, or if the checked baggage has not arrived at the expiration of 21 days of terms the passenger is entitled to enforce against the carrier the rights which flow from the contract of carriage and simply empowers then passengers to claim and enforce their rights in respect of carriage against the carriers, if the carrier admits the loss of a checked baggage or if the checked baggage of the passenger has not arrived at the expiration of 21 days after the date in which it ought to have arrived. For both international and domestic flights, the carriers liability is limited to 17 special drawing rights per kilogram and U.S \$20 per kilogram respectively.<sup>43</sup> The limitation of liability in the Montreal Convention has a lot of implications for consumer protection. First, it implies that irrespective of whatever is lost and the glaring fact that a luggage is lost; recovery for the consumer would not be possible excerpt the consumer pleads and proves the weight of the luggage. Even at that, the carriers' liability will still not be fully activated except a special contract was entered into between the carrier and the passenger to cover a higher limit of liability. The point of the objection here is why delivering the carrier of liability when there is indisputable evidence that baggage checked in, is lost or damaged? What is the correlation between the weight of an item and the fact that an entire item is missing? A piece of luggage is not like gold which is sold and bought by measuring per kilograms for the most time, the weight of an item may have no relationship with the quality and hence, the cost. In the case of *Kabo Air Ltd v Oladipo*,<sup>44</sup> Kanyip wondered why the court would not grow out these practical facts and precede account for loss or missing goods at his disposal? He further stated that Article 22(3) of the Montreal Convention may provide for recovery of damages by reference to weight but is it categorical that a carrier who is negligent can't be asked to make reasonable corrections? Can't our courts be more innovative in allowing recovering in very clear cases as we have seen in *Kabair*? Of course this question, by every standard should be answered in the affirmative.

<sup>36</sup> Ibid

<sup>37</sup> Guisepppe Guerri "willful misconduct in Warsaw Convention, A stumbling block 6mc all L.F. 267, 272 (1960)"

<sup>38</sup> 186 f 2D 529 535 (DC. Cir. 1949)

<sup>39</sup> (1952)2 ALL ER, 1016 at 1019

<sup>40</sup> Schedule III Article 19 Civil Aviation Act

<sup>41</sup> (2006) 1 NWLR (pt. 960) 160.

<sup>42</sup> Article 20, Montreal Convention 1999

<sup>43</sup> Schedule 11, Article 22(3) 22(3) Montreal Convention, 1999

<sup>44</sup> (1999) 10 NWLR (pt. 623)517 the respondent boarded the appellant's aircraft on 30<sup>th</sup> December, 1994 from Kaduna to Lagos. He checked in his luggage and was issues with a luggage tag. On arrival at Lagos, he discovered that his luggage was not in fact checked into the aircraft he boarded. He lodged a complaint at the Lagos office of the appellant and was asked to wait for the next flight of the appellant from Kaduna. The next flight too did not come with the luggage. In an action resulted, the respondent got judgment in default of appellant appearance. Appellant application to set aside the judgment failed. On appeal to the appellant court, deciding on the jurisdiction of the State High Court, went ahead to decide and allowed the appeal. To the court of Appeal, the effect of Article 22(3) of the Montreal Convention in Schedule 11 and 11 of the Civil Aviation Act is that only a limited form of liability is imposed on the carrier, but that, even this liability can only arise when the weight of the luggage is determined. This given this requirement, his action consequently failed. The decision though appropriately founded on the conventions Article 22(3) of the Montreal Convention is rightly criticized in my opinion by the authors. Kanyip<sup>44</sup> observes that it is no doubt that the passenger lost his luggage, yet the legal system couldn't give him any redress due to he did not plead and prove the right of his luggage.

**Delay of Persons or Delayed Flights**

The Civil Aviation Act in tandem with the Montreal Convention does not provide a strict liability regime for damages arising from delay.<sup>45</sup> Thus the Act does not define delay neither the Convention of Montreal.<sup>46</sup> The drafter of the Montreal Convention intended to leave the nature of delay for which the carrier will be liable. This is to be determined by the courts on a case by case basis.<sup>47</sup> The delay seen by the Civil Aviation Act must be that which occurs in the carriage has been reached when the flight ticketed in purchase and before the end of the air carriage when the airplane lands at its arrival location.<sup>48</sup> Thus, the delay can only occur when before the arrival of the passenger at the airport when a text message is received notifying the passenger of a flight delay. Also, a delay can occur at time of arrival at the airport before boarding or even after boarding if the aircraft doesn't depart on time. The delay can also occur when the aircraft is en route or when it is landing.<sup>49</sup> In essence, a flight delay is a shift from the promised time or date arrival of departure of the airplane. Compensation for each passenger from the carrier due to damage resulting from delay is limited to US\$4,150.<sup>50</sup> In case of delay in carriage of baggage, the compensation available to a passenger is restricted to US\$1,000. This is so unless the passenger when checking in, made a special declaration of interest in delivery at the location and has paid a supplementary sum if the case so requires.<sup>51</sup> Unless the carrier proves that the sum declared is greater than the passengers actual interest in delivery at definition as previously explained, the carrier will be liable to pay a sum not exceeding the declared sum.<sup>52</sup> Recovery for damages is linked to consequential loss so there must be a causal link between the delay and the damaged incurred or suffered.<sup>53</sup> The Civil Aviation Act is silent on the determination of text of damages for delay, so it is left at the discretion of the court to determine such extent.<sup>54</sup> However, compensable damage must be established in the cost of accommodation, transportation or another compensable damage that would not have been incurred but for the delay.<sup>55</sup>

The factor that determines whether the air carrier is liable is not the cause of the delay, but whether the air carrier took all rescannable and necessary steps to prevent delay.<sup>56</sup> However, if the negligence or wrongful act or omission of the passenger contributes to the delay caused, then the air carrier shall partly or wholly be exonerated or exempted from its liability.<sup>57</sup> This provision is unfavourable to passengers because it entails that no matter the cause of the delay, if the carrier can establish that it did everything that could possibly be done to avoid such delay, then the air carrier won't be held liable as in the case of *Martel v Air France*,<sup>58</sup> Delay resulting from external forces cannot amount to liability on the part of the carrier. However, if the act that resulted in the delay is carried out often or regularly,<sup>59</sup> then the liability will fall on the carrier because the carrier must ensure that reasonable measures are taken to avoid or prevent delay from occurring.<sup>60</sup> It is not enough for airlines to offer general reasons such as technical failure, bad weather, crew problems or cleaning in situations like this.<sup>61</sup> The burden is on the airline to prove that it took reasonable measures to prevent delay or it was not feasible to take such measures.<sup>62</sup> Evidence and details must be provided by the carrier to establish that it took all necessary and reasonable measures to avoid the delay before the burden can be discharged. This provision gives the carrier some control over determining its liability. However, it has been observed that the delay in arrival of incoming planes often occurs as a result of common practice of airlines to operate flights within very tight schedule, resulting in small time

---

<sup>45</sup> Article 19 Civil Aviation Act, 2006.

<sup>46</sup> Ibid

<sup>47</sup> Ibid

<sup>48</sup> Ibid

<sup>49</sup> See generally the Civil Aviation Act 2006.

<sup>50</sup> Schedule III Article 22(1) Civil Aviation Act, 2006

<sup>51</sup> Ibid

<sup>52</sup> Ibid

<sup>53</sup> III Diederites Verschoor, an introduction to Air Law 141 (8<sup>th</sup> edition, 2003)

<sup>54</sup> Ibid

<sup>55</sup> Ibid

<sup>56</sup> Article 19. 22 Civil Aviation Act 2006, Court Appeal (CA) (Regional Court of Appeal) Aix-en provence, 1984, RFDA 208, Audients-verschoor at 136-137

<sup>57</sup> Article 20, and Aviation Act 2006.

<sup>58</sup> Courd'appel (CA) (Regional Court of Appeal) Aix-en provence, 1984 RFDS 298, Diederites – Verschor at 136-37 the court hesitated in holding a carrier liable where delay was caused by a technical defect of the aircraft. In his defense, the carrier held on to the fact that according to the manufacturer's instructions for operation, the hydraulic equipment of an air bus had to be checked only after 230 hours of flight. However, the pump in question had broken down at take off only after 179 hours. The court considered this a case of "Force Majeure" and held that because the carrier took necessary measures, it therefore was not liable for the delay.

<sup>59</sup> Nordic council of ministers, the right of air passenger in event of delays and cancellation 15 (2002). Denmark

<sup>60</sup> Supra

<sup>61</sup> Chapter 7, section 20 of Swedish Aviation Act 2016 as amended; Shrawcross and Beaumont; Air Law Section 1002.

<sup>62</sup> Schedule III Article 19 Civil Aviation Act, 2006.

margins for crews to transfer from one plane to another. To amount to carrier liability, the delay must last for a certain period of time, but the Civil Aviation Act<sup>63</sup> is silent on the accurate or specific length of such delay.<sup>64</sup> In his suggestion, Shaw Cross indicated that difference is to be made to the rule of common law that in the absence of an express constrict, a carrier is only obliged to perform the carriage within a reasonable time.<sup>65</sup>

Furthermore, the Consumer Protection Regulations are part of Nigeria Civil Aviation Regulations. They provide temporal and monetary care obligation on the part of the carrier or the passengers in the event of certain things or mishaps.<sup>66</sup> The consumer protection regulations address issues such as compensations for denied boarding, delays and cancellation of flights.<sup>67</sup> It makes provisions for the minimum rights of passengers and obligation of air carriers.<sup>68</sup> The compensation provided under these regulations is supplementary to similar compensation under the Civil Aviation Act as regards to Denied Board, Delay of Persons Cancelled Flight or Cancellation, Delayed, Lost and Damaged Baggage. Thus, the consumer protection regulations require that when the passengers are informed of cancellation, an explanation shall give concerning possible alternative transport.<sup>69</sup> A carrier is not obliged to pay compensation for cancellation if it can prove that the cancellation is caused by extra ordinary circumstances that could not have been avoided even if all reasonable measures had been taken.<sup>70</sup> Compensation according to the consumer protection regulations connotes 25% of the fares or passenger ticket price.<sup>71</sup> Extraordinary circumstances according to the regulations include natural disasters or air traffic control strikes and exclude technical problems identified during routine maintenance.<sup>72</sup> The regulations also place the burden of proof concerning any questions as to whether and when the passenger has been informed of the cancellation of the flight upon the air carrier. The consumer protection regulations however, make provisions for the complaints to be lodged with the consumer protection directorate about an alleged infringement of the regulations.<sup>73</sup> It is noteworthy that consumer protection regulations do not prevent passengers from exercising their right under any other applicable laws.<sup>74</sup> But where the air carrier complied with conditions precedent, he may still be liable of other breaches under the Nigeria legal system.

## 5. Conclusion

Despite the existence of numerous laws (with specific reference to consumer protection) in Nigeria, protection of consumers has remained rather low, this is attributed to a myriad of factors, prominent among which are the ignorance of the consumer, weak implementation machinery and inadequate publicity of the activities of enforcement agencies. A carrier is not obliged to pay compensation for cancellation, if it can prove that the cancellation is caused by extraordinary circumstance that could not have been avoided even if all reasonable measures had been taken.<sup>75</sup> Part 19.7.3 of the Nigerian Civil Aviation Regulation 2015 provided that extraordinary circumstances includes natural disasters or air traffic control strikes and excludes technical problems identified during routine maintenance. The Nigerian Civil Aviation Regulation further in part 19.7.4 provides that the burden of proof concerning the question as to whether and when the passenger has been informed of the cancellation of the flight rest upon the air carrier. This regulation is commendable but the technical meaning of extraordinary circumstances must be identified by the Nigeria courts. The Nigeria Civil Aviation Regulation provides for air traffic strikes as part of extraordinary circumstances. The average consumer of air services may hardly understand what traffic strikes means and therefore cannot tell whether air traffic strikes happened or not. The air carriers can hide under this fact and cancel flight stating or relying on air traffic strikes when nothing like that actually happened. The courts therefore should interpret clearly and unambiguously what extraordinary circumstances are or better still the Nigeria Civil Aviation Authority should further break down in simple and clear sentences words that are extraordinary circumstances really connote. Finally, there is need to reform Insurance Coverage of air craft in Nigeria which has made it difficult for air carriers to effectively pay compensation when required. A notable reason for this is that aviation insurance premiums in other jurisdictions quite favourable and effective. Insurance should cover instances of damage and injury and must be procurable at a reasonable cost. Furthermore, the NCAA Regulation (2015) part 19.3.2 that permits over booking and derived boarding (both voluntary and

---

<sup>63</sup> Ibid

<sup>64</sup> Ibid

<sup>65</sup> Nigeria Civil Aviation Regulations (2015) part 19.4.1

<sup>66</sup> Ibid, part 19.3.2

<sup>67</sup> Ibid

<sup>68</sup> Ibid

<sup>69</sup> Ibid

<sup>70</sup> (2004) EWCA (civ) 791, (2014) Bus L.R. 1324 (ENG)

<sup>71</sup> Ibid

<sup>72</sup> Nigeria Civil Aviation Regulations (2015) part 19.8

<sup>73</sup> Ibid part 19.20

<sup>74</sup> Ibid

<sup>75</sup> Nigerian Civil Aviation Regulations (2015) part 19.7.3

involuntary denied boarding) should be amended. The consumer Protection Directorate of the NCAA needs to intensify its effort in assessing and investigating cases reported to it. In addition, air carriage users in Nigeria need to be enlightened and sensitised not only on their rights but also to the duties and liabilities of the air carriers during air carriage because there is not sufficient precedent (case laws) in reference to issue of liability of air carriers to passengers for delay in the Nigerian courts. It is pertinent that Nigerian courts interpret these laws and give justice as deemed fit. Notably, that air carriers have taken advantage of the fact that in average air passenger in Nigeria sees delay as a norm and accommodates such acts without challenging them by taking the course of law.