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AIR CARRIER & INTERNATIONAL LAW

HOSPITALITY LAW



THE WARSAW CONVENTION

INTRODUCTION

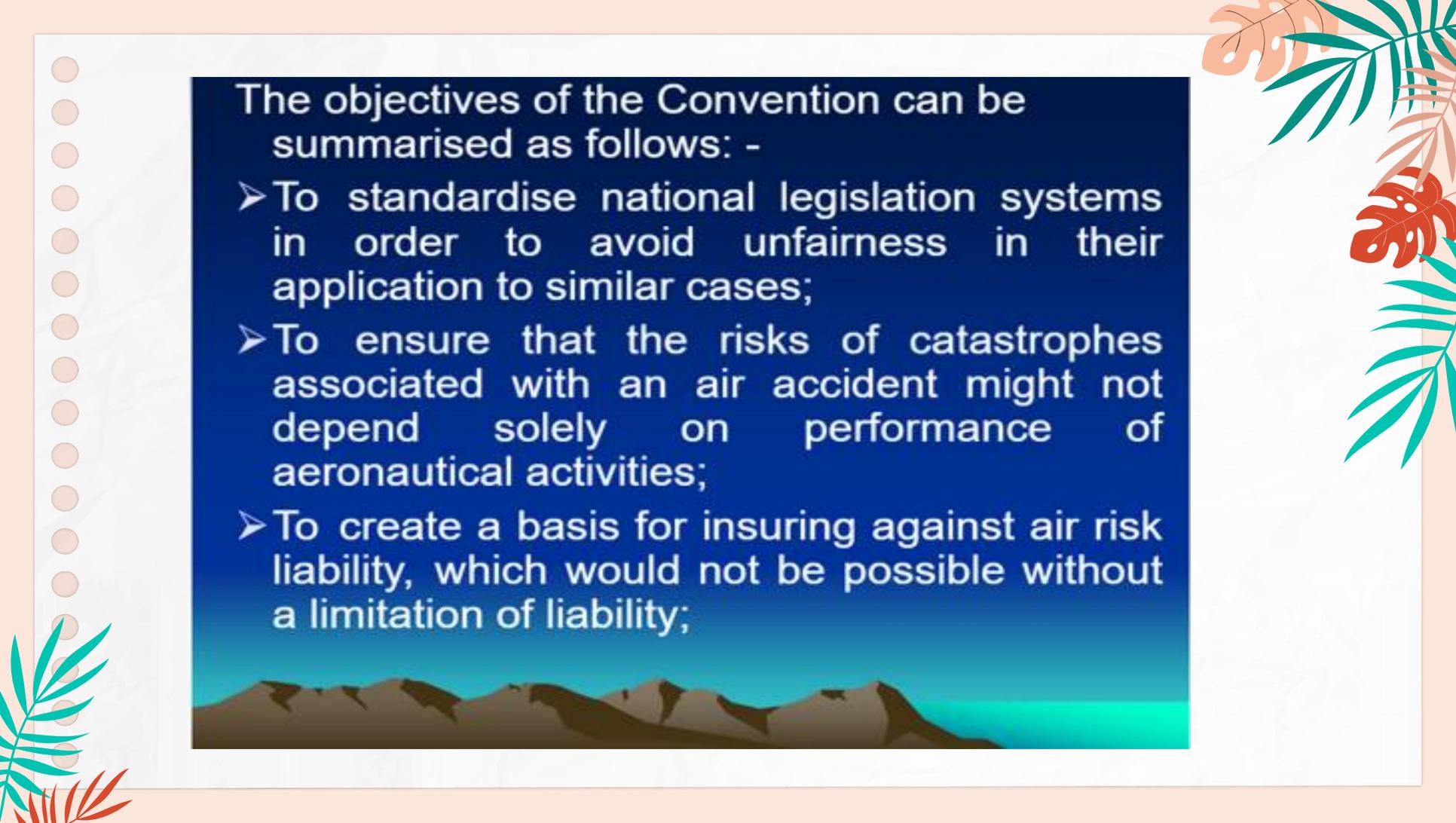
- The Warsaw Convention of 1929 was signed in October 12, 1929 in Warsaw, Poland. **The convention established and elaborated among other things the principles of the air carrier liability for damage caused to passengers, baggage and goods, and also for damages caused by delay.**
- The Warsaw convention of 1929 has since been amended several times, most notably through The Hague Protocol of 1955 and the Montreal Protocol of 1966. In 1999, a conference held in Montreal under the auspices of ICAO created and signed the Montreal Convention which updated and replaced the Warsaw system following its signing by 52 states.

CONT'D

- The Montreal Convention applies to international transportation of passengers, baggage and cargo and replaces the various air carrier liability regimes around the world today with a set of new rules. The Warsaw Convention as amended by the Hague Protocol, 1955, was enacted into the **Kenya law through the Carriage by air Act of 1993 to enable the rules contained in that Convention to be applied, with or without modifications, in other cases and, in particular, to non-international carriage by air; and for connected purposes.**

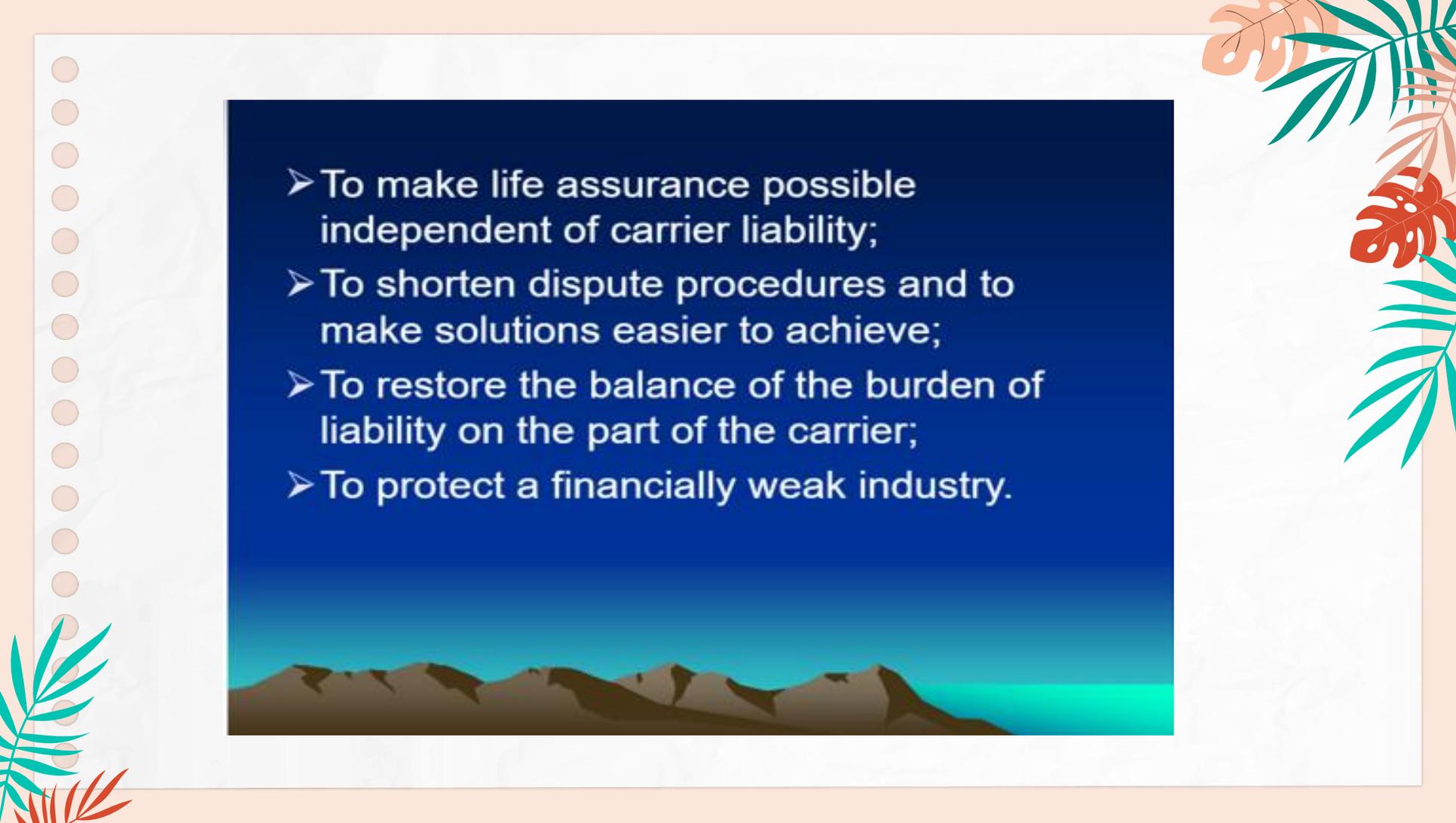
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- Kenya ratified the **Montreal Convention of 1999** in **April 2002**. The provisions of the Convention, so far as they relate to the rights and liabilities of carriers, carriers servants and agents, passengers, consignors, consignees and other persons, and subject to the provisions of this Act, have the force of law in Kenya in relation to any carriage by air to which the Convention applies, irrespective of the nationality of the aircraft performing that carriage.



The objectives of the Convention can be summarised as follows: -

- To standardise national legislation systems in order to avoid unfairness in their application to similar cases;
- To ensure that the risks of catastrophes associated with an air accident might not depend solely on performance of aeronautical activities;
- To create a basis for insuring against air risk liability, which would not be possible without a limitation of liability;

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- To make life assurance possible independent of carrier liability;
 - To shorten dispute procedures and to make solutions easier to achieve;
 - To restore the balance of the burden of liability on the part of the carrier;
 - To protect a financially weak industry.



AIR CARRIERS LIABILITY

- Articles 17, 18, and 19 of the Warsaw Convention are of key importance.
- Article 17 states that an international air carrier will be liable for a passenger's death or injury resulting from an "accident" that takes place when a passenger is:-
 - 1) On an airplane,
 - 2) Boarding an airplane, or
 - 3) Disembarking an airplane.

- Article 18 imposes liability on an air carrier for the baggage that is checked and goods that are damaged while in the care and custody of the air carrier. Exposure to liability for baggage was expanded in the Montreal Convention of 1999 by defining baggage as *both* checked and unchecked (carry-on) baggage.
- Article 19 states that an air carrier is liable for any damages resulting from *delays* of passenger, cargo, or baggage.
- The use of the word *accident* to trigger liability under Article 17 has sometimes spawned conflicting views. In a 1985 case, the U.S Supreme Court defined the term *accident* as “an unexpected or unusual event or happening that is external to the passenger”.



***DEFENSES AVAILABLE TO
AIRLINES***

Defenses available to airlines.

- Article 20 permits an airline to completely avoid liability if it took “all necessary measures” to avoid an accident, or if it was impossible for the carrier to avoid the accident.
- Article 21 permits an airline to mitigate its damages if the injuries to a passenger were caused in part or in their entirety by the contributory negligence of the injured passenger.

Pecuniary limits to liability.

- Article 22 limits an airline's liability to 125,000 francs or approx. \$8300. This limitation has engendered controversy—especially in view of the fact that a passenger injured in a domestic accident could recover damages in the millions of dollars.
- This amount was doubled by the Hague protocol of the Warsaw Convention.
- The Montreal Convention of 1966 modified this to \$75,000.

- The latest revision came with the Montreal Convention of 1999. It created a two-tiered liability structure and modified Articles 21 and 22 of the Warsaw convention.
- First, an air carrier is held strictly liable up to \$140,000 for injuries and/or death of a passenger due to an accident. For claims up to \$140,000 the only defense for the carrier is contributory negligence of the passenger.
- In claims that exceed \$140,000 the air carrier can now be held liable for unlimited amounts. However, the carrier can defend itself by using the defense that the harm caused to a passenger was not due to the carrier's negligence or wrongful act. In claims larger than \$140,000 the air carrier can also claim that the accident occurred due to circumstances out of the carrier's control.



FORUM FOR TRIAL

- Article 28 provides the four possible places where a plaintiff may bring an action against an air carrier:
 - ✓ The place where the air carrier is domiciled
 - ✓ The primary place of business for the air carrier
 - ✓ The country where the contract of travel was made (as long as the carrier does business in that country)
 - ✓ The destination country

- Interestingly, the Warsaw Convention did not permit a plaintiff to bring suit in his or her country. This rule tended to act as a bar to plaintiff's filing suit due to the inconvenience and cost of having to file a lawsuit in a foreign country.
- Ultimately dissatisfaction with the inability of a passenger to bring a lawsuit in his or her home country led to modification of these provisions in the 1999 Montréal Convention.
- Under article 33 of the Montreal Convention, a plaintiff may file a lawsuit in the country of the "principal and permanent residence" of the passenger. However, to make use of this newly available forum the carrier must lease or own property in the passenger's home country and fly to and from that country.



STATUTE OF LIMITATIONS

Statute of limitations.

- Article 29 of the Warsaw Convention provides for a 2-year statute of limitations for bringing to an action against a air carrier. Some courts have calculated the 2-year limitation strictly, and others have allowed for suspended periods to the time limits.

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THE HAGUE PROTOCOL

THE HAGUE PROTOCOL OF 1955

- This amended the Convention in terms of travel documents; these regulations represented a substantial rewording in a simpler, more up-to-date form, the doubling of the limits and the concept of wilful misconduct or equivalent negligence which is defined more precisely. Under the said amendment the liability of carriers was given a ceiling of 250,000francs.



***THE SCOPE OF THE WARSAW
CONVENTION***

The scope of the Warsaw convention

- The Warsaw convention applies to the international carriage of persons but excludes international carriage governed by any international postal convention (Article 2), the carriage of post and postal packages, test flights for the establishment of regular routes and flights operated under exceptional circumstances and outside the normal activities of an airline company e.g the case of Vanderburg vs. French sardine company,

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- where an accident occurred to an aircraft bringing a new engine to a ship that had developed engine problem while fishing for sardine. The California superior court held that the Warsaw Convention on the liability of carrier was not applicable.



WHO IS A PASSENGER

Who is a passenger?

- It is a person who is carried by aircraft by virtue of a contract of carriage.
- In *Sulweski vs Federal Express Corporation*, the maintenance representative who was in the aircraft at the time of the accident was held not to be a passenger.

The carrier's liability in the Warsaw System

- The main new features introduced by the Convention, and reinforced by the subsequent acts, are the presumption of the carrier's guilt when one of the facts contemplated in the Convention itself is found to apply: -
- The death of the traveller, or injuries as a result of damage suffered on board the aircraft, during boarding and disembarking operations;

- The destruction or loss of baggage, or damage thereto, during air transport, understood as the period during which the baggage " is in the charge of the carrier in the aerodrome or in any location in the event of landing outside an aerodrome "; though non-air transport outside an aerodrome is generally excluded, transport provided " in execution of the air transport contract in connection with loading, delivery or transshipment" is regarded as coming under the cover of the aircraft;
- Delay.

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THE MONTREAL CONVENTION

1999

THE MONTREAL CONVENTION, 1999

- The Warsaw convention became law during the infancy of inter-continental aviation, and it soon proved itself incapable of adequately regulating liability issues in the burgeoning jet age. Additional instruments were therefore put in place to try and address the inadequacies of the convention. However not all states executed all of these extra instruments resulting in the confused state of the Warsaw “System”.

- As the court of appeals in the USA second circuit describes in *Chubb & Son, Inc v. Asiana Airlines*:
- The Warsaw Convention “system” includes the various laws, treaties and individual contracts governing the international transportation of persons, baggage, and goods by air. No one treaty or contract governs the relationships of one state with other States. A single state might be bound to one version of the Warsaw system convention with one state, and another version of the same with another state, a separate bilateral treaty with another state, and a separate contract with a private party.

- This state of affairs led to the Montréal convention of 1999. The convention “is not an amendment to the Warsaw Convention. Rather, the Montréal Convention is an entirely new treaty that unifies and replaces the system of liability that derives from the Warsaw Convention.”
- The Montréal Convention supersedes the Warsaw Convention as and between states that are party to both the Montréal and Warsaw Conventions. However the Warsaw scheme remains, and governs in cases where a controversy involves states that are signatories to the Warsaw Convention.

- The Montréal Convention differs from the Warsaw Convention in several aspects. For example the English text of the Montréal Convention is equally authoritative to the French text. Under the Warsaw system the French text took control over the English text.

- Similarly, the Montréal Convention finally and authoritatively terminates the Warsaw Convention reliance on the antiquated gold franc as a method of compensating injured passengers. The new system utilizes the system of Special Drawing Rights (SDRs), the value of which is determined by the International Monetary Fund (IMF).

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THANK YOU!