A Legal Appraisal of the Liability of the Actual Air Carrier under Ethiopian Law

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Abstract

On September 5, 1961, an Ethiopian Airlines aircraft crashed during a flight from Addis Ababa to Asmara. Some people on board the aircraft dead; some others wounded. Though at the time of the accident the aircraft was chartered by a certain petroleum corporation, claims for personal injury and death were brought against Ethiopian Airlines, the owner and operator of the aircraft. The claimants sought relief under the law of carriage by air. Nevertheless, the High Court of Addis Ababa partly rejected the plea and reasoned that the liability of the "actual" carrier may not necessarily be governed by the law of carriage by air.

It is now five decades since the High Court of Addis Ababa held that the liability of the actual carrier would sometimes be established based on laws other than the 1929 Warsaw Convention and/or the Commercial Code. In this particular contribution, the liability of the actual carrier in chartered and similar flights is appraised in light of historical and recent developments.

Introduction

In Ethiopia, liability of the air carrier has generally been governed by the 1929 Warsaw Convention[1] and the 1960 Commercial Code.[2] Before the coming into force of the 2008 Civil Aviation Proclamation,[3] the liability of the domestic[4] carrier is subject to the rules of Book III, Title II of the Commercial Code. Conversely, the liability of the international carrier is regulated by the Warsaw Convention,[5] which Ethiopia joined in 1950.[6]

Article 69 of the Civil Aviation Proclamation provides that the "the liability of any carrier to passengers and cargo is governed by the rules and

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[1] The Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929 [hereinafter Warsaw Convention].

[2] Commercial Code of Ethiopia, 1960, *Negarit Gazeta*, Proclamation No. 166/1960, 19th Year, No.3 [hereinafter Commercial Code].

[3] Civil Aviation Proclamation, 2008, *Federal Negarit Gazeta*, Proclamation No. 616, Year 15, No. 23 [hereinafter Civil Aviation Proclamation].

[4] Domestic carrier is seen here as air carrier serving domestic routes.

[5] But see *Mengistu G. v Ethiopian Airlines and Customs & Excise Tax Administration,* Supreme Court of Ethiopia, Civil Appeal File No. 825/81, where Ethiopian courts applied the Commercial Code, instead of Warsaw Convention, in determining the liability of an international air carrier.

[6] See <http://www2.icao.int/en/leb/Status%20of%20individual%20States/ethiopia_en.pdf>.

limitations contained in the international legal instruments to which Ethiopia is a party." To date, Ethiopia is a party to the 1929 Warsaw Convention and the four 1975 Montreal Additional Protocols.[7] Applying the theory of Article 69 of the Civil Aviation Proclamation, the liability of the carrier to passengers and cargo (but baggage[8]) is governed by the 1929 Warsaw Convention and the relevant Montreal Protocols. The phrase "any carrier" is obviously broad enough to include domestic as well as international carriers. It may also be argued the phrase any carrier refers to both contracting and actual carriers.

On September 5, 1961, an Ethiopian Airlines aircraft crashed during a flight from Addis Ababa to Asmara. Some people on board the aircraft dead; some others wounded. Though at the time of the accident the aircraft was chartered by a certain petroleum corporation, claims for personal injury and death were brought against Ethiopian Airlines, the owner and operator of the aircraft. The claimants sought relief under the 1929 Warsaw Convention. Yet, the High Court of Addis Ababa[9] rejected the plea on the ground that the carriage was not international. In determining the liability of Ethiopian Airlines based on domestic laws, the court also reasoned that claims involving an actual carrier may not necessarily be determined based on the 1960 Commercial Code either. Would the holding of the High Court be any different if rendered after the coming into force of the 2008 Civil Aviation Proclamation?

This particular contribution attempts to answer the above question. In other words, the Ethiopian law on the liability of the actual carrier is reviewed. First, the scope of application of the existing Ethiopian laws on air carriage is highlighted with a view to provide background for subsequent discussions regarding the liability of the actual or performing carrier. Finally, a concluding remark is provided.

1. Ethiopian Law on Carriage by Air: Scope of Application

Ethiopia's aviation history dates as far back as the pre-Italian Occupation (1936-1941) period.[10] And, developments related to the law

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[7] *Ibid.*

[8] See note 12 *infra* and the accompanying text.

[9] *Negist Makonnen et al. v Ethiopian Airlines et al.*, Addis Ababa High Court Civil Case No.701/55 E.C [reported in Journal of Ethiopian Law Vo. 3(1), pp. 68-74].

[10] See "The History of Aviation in Ethiopia" at www.ecaa.gov.et [last accessed December 23, 2010]); see also Bahiru, Z., Ethiopia's Entry into the Jet Age, *Selamata*, Vol. 28, 2011, p.54.

governing air carriage appear to have begun with Ethiopia's accession to the 1929 Warsaw Convention in 1950. Moreover, Ethiopia enacted its Commercial Code in 1960. And, this Commercial Code contains rules on domestic air carriage. For over four decades the Commercial Code and the 1929 Warsaw Convention formed Ethiopian law on domestic and international carriage, respectively.[11]

As recently as 2008, the House of Peoples' Representatives has enacted a comprehensive law that governs civil aviation. Article 69 of the Civil Aviation Proclamation No. 616/2008 read:

> "The liability of *any* air carrier for damage caused to *passengers* and *cargo* on board the aircraft or during embarking or disembarking operations shall be governed by the rules and limitations contained in the *international* legal instruments to which Ethiopia is a party." [Italics added]

An interpretation of this provision is that domestic as well as international air carriage of passengers and cargo is governed by international instruments to which Ethiopia is a party. In effect, this would mean the Warsaw Convention along with its Montreal Protocols is the main, if not the sole, source of Ethiopian law on the liability of carriers in general.[12]

Assuming that the above interpretation is agreeable, the Ethiopian law on the liability of the carrier is mainly contained in the 1929 Warsaw Convention and the four Montreal Protocols of 1975.

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[11] See *Negist Makonnen et al. v Ethiopian Airlines et al.*, *supra* note 9 where it was held the Warsaw Convention does "not concern flights within the boundaries of Ethiopia." See also note 13 *infra* and the accompanying text for a review of the scope of application of the Warsaw Convention.

[12] Note however that the literal interpretation of Article 69, Civil Aviation Proclamation, limits the application of international instruments to carriage of "passengers" and "cargo." It may thus be argued that the Commercial Code's rules on air carriage continue to apply vis-à-vis the carriage of baggage in domestic routes. Nonetheless, one may still argue there is no good reason for the legislator to subject the domestic carriage of baggage by air to a different regime. In the opinion of this author, Article 69 is an example of poor draftsmanship; and, it appears that the legislator intended to equate cargo with goods of all sorts including luggage. This however is not compatible with the tradition of the law on carriage by air, where luggage is distinguished from cargo. See, for example, Article 631 of the Commercial Code, Article 18 of the Warsaw Convention, and Articles XV *cum* IX of Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955, Signed at Montreal on 25 September 1975 [hereinafter Montreal Protocol No.4].

In principle, the Warsaw Convention applies to international carriage.[13] Irrespective of Article 2(1) of the Convention, some countries including Ethiopia extend the applicability of the Convention to carriage undertaken exclusively within their boundaries.[14] As a result, the dichotomy between domestic and international air carriage under Article 2(1) of the Convention appears purposeless.[15]

The Warsaw Convention does not apply to (1) "experimental air carriage undertaken with a view to establish a regular line of air navigation;"[16] (2) carriage "undertaken in extraordinary circumstances outside the normal scope of an air carrier's business;"[17] and (3) air transport carried out directly by the State or legally constituted public bodies.[18]

As would be seen further below, the Warsaw Convention may not necessarily govern the liability of the actual carrier in chartered, interchanged, and code-shared flights.[19] It is also argued carriage by some flying machines is excluded from the ambit of the Convention.[20] Similarly, an airline employee cannot normally claim compensation under the Warsaw Convention as she is not "passenger"[21] for the purpose of the Convention.

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[13] Article 2(1), Warsaw Convention.

[14] Diederiks–Verschoor, I., *An Introduction to Air Law*, Kluwer Law International, The Hague, 2001, p. 60 [hereinafter Diederiks –Verschoor].

[15] But see *supra* note 12.

[16] Article 34, Warsaw Convention.

[17] *Ibid.*

[18] Of course, the Convention applies to carriage directly performed by the State unless a reservation excluding this type of carriage from the scope of applicability is made (Article 2(1), Warsaw Convention). Ethiopia has made a reservation regarding Article 2(1); see <http://www2.icao.int/en/leb/Status%20of%20individual%20States/ethiopia_en.pdf>.

[19] See discussions under sections 2 and 3.

[20] Diederiks–Verschoor, p. 63; Matte, N., International Air Transport, *in* David, R. et al. (eds.) *the International Encyclopaedia of Comparative Law*, Martinus Nijhoff Publishers, The Hague, 1981, Vol. XII, Chapter 6, at § 66 [hereinafter Matte].

[21] The Warsaw Convention governs the relations between parties to a contract of carriage. These parties are the passenger or shippers (consignees) and the air carrier. All other parties are outside the scope of the Convention. For example, damage sustained by third parties on ground as a result of air crash is not redressed under the Warsaw Convention as such parties are not related to the air carrier through contract of air carriage; see Diederiks–Verschoor, p. 63; Matte, at § 71.

Title II, Book III of the 1960 Commercial Code prescribes rules on carriage by air. The rules show huge resemblance (both in form and content)[22] to the Warsaw Convention. It must however be noted that the Commercial Code, owing to its relative modernity, benefited from improvements to the 1929 Warsaw Convention.[23] The majority of the provisions of Articles 604-653 of the Commercial Code govern carriage of goods by air. With the advent of the 2008 Civil Aviation Proclamation, the relative importance of the Code's rules on carriage of goods by air would however be nominal, if not nought.[24] Similarly, the rules on air carriage of passengers have given way to Ethiopia's private international air law, which now govern the domestic carriage of passengers and goods as well.[25]

Nevertheless, the Commercial Code's rules on carriage by air – which used to be the sole source of Ethiopian law on domestic carriage by air – may now arguably apply to domestic carriage of baggage.[26] Yet, the author suspects that it is not the intention of the legislator to subject domestic carriage of baggage to a different regime than the Warsaw Convention.[27]

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[22] The similarity is easily noticeable as some provisions of the former are almost the verbatim copy of the later (compare, e.g., Articles 630-633, Commercial Code with Articles 17-19, Warsaw Convention). Moreover, the Commercial Code's adoption of the form of the Warsaw Convention is apparent from the sequential arrangement of the rules on scope of application, documents of carriage and liability of the carrier.

[23] For instance, two interesting differences exist between the original Warsaw Convention and the Commercial Code rules on documents of carriage. First, the Commercial Code – unlike the Warsaw Convention – expressly recognises the incorporation of the luggage ticket in the passenger's ticket (Article 608(3), Commercial Code *cum* Article 4, Warsaw Convention). Second, the Commercial Code is moderate in sanctioning the carrier's failure to issue ticket and baggage check (compare Articles 607-609, Commercial Code with Articles 3-4, Warsaw Convention).

[24] See *supra* notes 11-12.

[25] *Ibid.*

[26] As seen earlier, this argument is based on the distinction between cargo (which term is used in Article 69, Civil Aviation Proclamation) and baggage; see also Matte, at §§ 95-98 and Philipson, G. & et al., *Carriage by Air*, Butterworths, London, 2000, § 8-6 [hereinafter Philipson et al.], on the distinction between cargo and baggage.

[27] See *supra* note12; also, the application of either the Commercial Code or the Warsaw Convention to domestic carriage of baggage may not necessarily result in varying outcomes except with respect to the limitation cap. Under Warsaw Convention (as amended by the Montreal Protocols), baggage claims are limited to 17 SDRs per kilogram or 332 SDRs per passenger. In contrast, the Commercial Code limits liability for baggage claims to Eth Birr 40.00 per kilogram or Eth Birr 800.00 per passenger (see Article 22, Warsaw Convention *cum* Articles 637-638, Commercial Code). Note also that the Commercial Code, unlike the

Ethiopian Airlines – the only scheduled air carrier serving various domestic routes – issues its domestic passengers baggage check, which contains statements excluding the applicability of the Warsaw Convention.[28] Further, the carrier issues passenger tickets containing a notice that "carriage exclusively performed within Ethiopia is subject to the provisions of the Commercial Code."[29] The baggage check which excludes the application of the Warsaw Convention to domestic carriage of baggage may not perhaps offend the provisions of Article 69 of the Civil Aviation Proclamation.[30] Nonetheless, the provisions of Article 69 appear to weigh down the validity of the notice that "carriage exclusively performed within Ethiopia is subject to the Commercial Code."[31] As argued earlier, the Warsaw Convention generally applies to domestic carriage of passengers, baggage and goods.

2. The Carrier

Suppose you bought a ticket from one of Ethiopian Airlines ticket offices in Addis Ababa and flew to your destination, Bahir Dar, from Bole International Airport on an aircraft staffed and controlled by Ethiopian Airlines. Should you sustain any personal injury during the flight, you may lodge claim against Ethiopian Airlines based on Article 17 of Warsaw Convention.[32] If however the whole or part of the carriage was performed by a chartered aircraft controlled and manned by Abyssinian Airways, one would argue that the later airline company – which actually performed the carriage – would be the one claims would be brought against. Such an argument would be upheld in common law countries where liability has traditionally been attached to the so called "actual carrier."[33] In contrast, one would still

Warsaw Convention, does not sanction carrier's failure to issue baggage check containing particulars regarding the number of passenger ticket and number and weight of the packages; see Article 4(3), Warsaw Convention *cum* Article 609(2), Commercial Code.

[28] See *Conditions of Contract* at < http://www.ethiopianairlines.com/en/travel/policies/contract.aspx >.

[29] *Ibid*.

[30] See *supra* note 26 and the accompanying text.

[31] See *supra* notes 11-12 and the accompanying texts.

[32] Article 69, Civil Aviation Proclamation *cum* Article 17, Warsaw Convention.

[33] See, e.g., Banino, B., 'Recent Developments in Air Carrier Liability under the Montreal Convention', *The Brief*, Vol. 38, No. 3, 2009, p. 26 [hereinafter Banino]; Mankiewicz, R., 'Charter and Interchange of Aircraft and the Warsaw Convention. A Study of Problems Arising from the National Application of Conventions for the Unification of Private Law',

maintain that Ethiopian Airlines is the carrier for the purposes of the Warsaw Convention, notwithstanding the fact that it did not actually perform the carriage. The latter interpretation, which distinguishes between actual carrier and contracting carrier, is preferred in civil law jurisdictions.[34]

In contract of air carriage, the contracting carrier refers to the carrier who maintains direct contractual relationship with the passenger or the shipper.[35] Within the context of the hypothetical example above, this would be Ethiopian Airlines. In contrast, the actual carrier is the one who actually undertakes the carriage though it is not the carrier who has contracted with the passenger or shipper (i.e. Abyssinian Airways in the example above). Article I(c) of the 1961 Guadalajara Convention defines the actual carrier:

> "...a person, other than the contracting carrier, who, by virtue of authority from the contracting carrier, performs the whole or part of the carriage...but who is not with respect to such part of a successive[36] carrier within the meaning of the Warsaw Convention."

Though it purports to govern the contractual relationship between passengers or consignees on the one hand and the carrier on the other, the Warsaw Convention does not provide any definition of carrier. It appears that the drafters of the Warsaw Convention deliberately avoided any definition of carrier.[37] Yet, a definition of carrier has become important with the advent of charter flights or air taxi services after the Second World War.[38] And, the beginning of code-share arrangements since 1980s has added another force for

The International and Comparative Law Quarterly, Vol. 10, 1961, p. 711[hereinafter Mankiewicz].

[34] See Mankiewicz, *supra* note 33, p. 714; see also Tiwari S. & Chik W., 'Legal Implications of Airline Cooperation: Some Legal Issues and Consequences Arising from the Rise of Airline Strategic Alliances and Integration in the International Dimension', *Singapore Academy of Law Journal*, Vol. 13, pp. 302-305[hereinafter Tiwari & Chik].

[35] See Article I(b), Guadalajara Convention of 1961; officially known as "Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, signed at Guadalajara on 18th September 1961" [hereinafter Guadalajara Convention 1961].

[36] Though there appears to be disagreement on whether the Warsaw Convention covers actual carriers, it is however clear that the Convention governs the liability of contracting and successive carriers; see Article 30, Warsaw Convention; Philipson *et al*, *supra* note 26, at § 1-15.

[37] See, e.g., Matte, *supra* note § 78; Banino, *supra* note 33, pp. 26-27; Tiwari & Chik, *supra* note 34, pp. 303 *et seq*.

[38] *Ibid.*

arguments in favour of defining the carrier for the purpose of Warsaw Convention.[39]

In the absence of any definition of carrier, authorities have thus been divided as to whether the law on air carriage governs the relationship between the actual carrier and the consignee or passenger. Courts in civil law jurisdictions maintain a distinction between the contracting carrier and the actual carrier, the latter of which is not contemplated by the drafters of the Warsaw Convention.[40] On the other hand, courts in common law jurisdictions maintained, albeit not consistently, the actual carrier is liable under the Warsaw Convention.

In *Block v Air France*,[41] *Mertens v Flying Tiger Line, Inc.*,[42] *Warren v Flying Tiger Line, Inc.*,[43] *Orova v Nw. Airlines*,[44] and *Shirobokova v CSA Czech Airlines*,[45] US courts entertained the question whether the Warsaw Convention applies to the actual carrier who did not keep direct contractual relationship with the claimants. In *Block* the Fifth Circuit reached at a conclusion that "the applicability of the Convention undeniably premised upon a contract of particular kind." In contrast, the *Warren* court reasoned "no direct contract between the parties is required" for the application of the Warsaw Convention.[46] Furthermore, some courts[47] held that "a passenger may seek recovery only against the actual carrier, not the contracting carrier."[48]

Literature[49] reveals that courts both in the US and other common law jurisdictions struggled to determine the status of the actual carrier vis-à-vis the

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[39] Tiwari & Chik, *supra* note 34, pp. 303 *et seq.*

[40] See, e.g., Philipson *et al*, *supra* note 26, at § 1-15; Mankiewicz, *supra* note 33, p. 711 *et seq*.

[41] *Block v. Compagnie Nationale Air France*, 386 F. 2d 323 (5 Cir. 1967).

[42] *Mertens v Flying Tiger Line, Inc.*, 341 F. 2d 851 (2 Cir. 1965) [hereinafter *Mertens*].

[43] *Warren v Flying Tiger Line, Inc.*, 352 F. 2d 494 (9 Cir. 1965).

[44] *Orova v Nw. Airlines*, No. 03-4296-CIV, 2005 WL 281197 (E.D. Pa. Feb. 2, 2005) [hereinafter *Orova*].

[45] *Shirobokova CSA Czech Airlines*, 376 F. Supp. 2d 439 (S.D.N.Y. 2005).

[46] In *Mertens* (*supra* note 43) also, the court applied the Warsaw Convention, notwithstanding the fact that the passengers had no contractual relationship with the carrier.

[47] *Orova*, *supra* note 45.

[48] Banino, *supra* note 33, p. 26.

[49] See, e.g., Conti, C., 'Code-Sharing and Air Carrier Liability', *Air & Space Law*, Vol. 26, 2001, p. 15 [hereinafter Conti]; Sun, C., 'Claims Arising from Air Carriage', *Singapore Academy of Law Journal*, Vol. 12, 2000, pp. 335-340 [hereinafter Sun]; Lacey, F., 'Recent Developments in the Warsaw Convention', *Insurance Counsel Journal*, Vol. 34, 1967, pp. 275-277; Gillies, P. & Moens, G., *International Trade and Business: Law, Policy and*

Warsaw Convention. Despite the pervasiveness of the theory that Warsaw Convention regulates the responsibility of the contracting carrier, the position of the actual carrier under Warsaw Convention has also troubled courts and commentators in civil law jurisdictions as well.[50] Consequently, the scope of application of the Warsaw Convention practically differed from jurisdiction to jurisdiction, threatening the uniformity of private international air law.

The Guadalajara Convention[51] of 1961 was an attempt to ensure the threatened uniformity through a definition[52] of carrier. This supplementary convention was adopted with a view to bring the actual carrier, who under the dominant civil law doctrine was not the carrier contemplated by the Warsaw Convention, under the purview of the Warsaw regime. Similarly, the 1999 Montreal Convention[53] – a modern Warsaw style uniform regime of private international air law – allows claimants the option to seek recovery from the actual carrier.[54] Under the 1961 Guadalajara Convention and the 1999 Montreal Convention, the question whether actual carriers are carriers will not thus arise.

Note however that some Warsaw states including Ethiopia are not party to these Conventions. As a result, one is not dissuaded from doubting the applicability of the Warsaw Convention to actual carriers. In the section below, the liability of the actual carrier in Ethiopia – where the Guadalajara or the Montreal Conventions are not applicable – is discussed in light of case law, foreign jurisprudence and recent developments.

3. The Liability of the Actual Carrier Under Ethiopian Law

From the foregoing, it is clear that there is no conclusive answer for the question who is the carrier for the purposes of the Warsaw Convention. Authorities are divided as some common law courts, unlike their civilian counterparts, are ready to hold performing carriers liable under the Warsaw Convention irrespective of the nonexistence of express contract between the

Ethics, Cavendish Publishing, Sydney, 2000, p. 321; Lacey, F., 'The Warsaw Convention Today', *ABA Sec. Ins. Negl. & Comp. L. Proc.*, 465, 1968, pp. 473-475.

[50] See *Negist Mekonnen et al v Ethiopian Airlines, Inc et al.*, *supra* note 9; see also Mankiewicz, *supra* note 33, pp. 27 *et seq.*; Conti, *supra* note 49, pp. 15-16.

[51] See *supra* note 35 for the full title of the Convention.

[52] See *supra* notes 35-36 and the accompanying texts for definitions of carrier under Article I, Guadalajara Convention 1961.

[53] Convention for the Unification of Certain Rules for International Carriage by Air, Montreal, 28 May 1999 [hereinafter Montreal Convention].

[54] Article 39, Montreal Convention.

passenger and the performing carrier. Nonetheless, no one would doubt the intention of the drafters to limit the applicability of the Warsaw Convention to certain classes of people.

Clearly, the liability of the contracting[55] and succeeding[56] carrier is subject to the Warsaw rules. On the other hand, general consensus exists with regard to the non-applicability of the Convention to the relations between a carrier and its servants.[57] It is however uncertain whether the relations between (1) the owner of an aircraft and lessee in air charterparty, (2) the charterer and passenger in a chartered flight and (3) the actual carrier and the consignee or passenger in code-share and similar arrangements are subject to the Warsaw Convention. Similarly, the extension of the applicability of the Convention to travel agents,[58] freight forwarders,[59] operators of code-shared flights,[60] and servants[61] of the carrier seem fraught with disagreement. For the sake of brevity, the discussions below however focus only on the (in)applicability of Warsaw Convention to charter flights and code-share arrangements.

3.1 Charter Flights

Charter is the hiring of an airplane.[62] The legal relationship of the charterer and the owner is mainly governed by charterparty, a highly standardised and negotiated contract of lease.[63] Disputes between the parties

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[55] Manzkiewicz, *supra* note 33, p. 709 *et seq.*; Conti, *supra* note 49, pp. 14-15; it seems clear that courts in both common law and civil law jurisdictions are clear on the applicability of the Warsaw Convention to contracting carriers. What divides civil law and common law authorities is the question whether actual carriers are within the purview of Warsaw Convention; see discussions in section 2.

[56] Successive carriers who are "deemed to be one of the contracting parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision," are subject to the rules of the Warsaw Convention; see Article 30, Warsaw Convention.

[57] See *supra* note 21.

[58] Matte, *supra* note 20, §§ 84-85; Sun, *supra* note 49, pp. 340 *et seq*.

[59] *Ibid,* pp. 335-340.

[60] Tiwari & Chik, *supra* note 34, pp. 300-307.

[61] Sun, *supra* note 49, pp. 340-342.

[62] Black's Law Dictionary, 8th ed., *s.v.* "Charter".

[63] This has been particularly the case in maritime charterparty (see Force, R., *Admiralty and Maritime Law*, US Federal Judicial Centre, 2004, p.42 [hereinafter Force]); note that the

in a charterparty relationship are primarily resolved according to the terms of the charterparty.[64] Yet, this has not dissuaded some from raising issues with the applicability or otherwise of Warsaw Convention to charter flights.[65]

The applicability of Warsaw Convention to air charterparty depends on the type of lease involved.[66] The Convention does not govern the relations between the owner and the charterer in "bare hull" charter, as the former is not the carrier for the purposes of Warsaw Convention.[67] Similarly, the applicability of Warsaw Convention to time charterparty is doubted.[68] As regards other types of charters, the Warsaw Convention applies "provided the aircraft is used for the carriage of the lessee himself or his own goods."[69]

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law on air charter is comparable with the law on maritime charter. Crucially, "the principles relating to the charterparty of a ship have generally been accepted and adapted in the case of a charterparty of an aircraft with some exceptions due to the particular features of air navigation;" see *Negist Mekonnen et al v Ethiopian Airlines, Inc et al.*, *supra* note 9.

[64] Within the context of maritime law – the material source of the law of air charter – charterparties have traditionally been treated differently from contracts of carriage supported by bills of lading. Unlike the law on sea carriage of goods under bills of lading, the law on maritime charterparty is predicated on the assumption that "the contracting parties (the owner and the charterer) are "sophisticated and presumably equal in strength". As a result, charterparties are excluded from the terms of the law of transport under bills of lading unless the owner of the vessel issues the charterer a bill of lading and that bill of lading is transferred to a third party. In the later case, the charterparty controls the legal relations between the owner and the charterer, and the bill of lading controls the legal relations between the carrier and the consignee; see Articles 126-209, Maritime Code; Force, pp.42-43; Hailegabriel, G., *Maritime Law Teaching Material*, JLSRI, Addis Ababa, 2008, pp. 94 *et seq*.

[65] See, e.g., Matte, *supra* note 20, § 82; Philipson, *supra* note 26, § 4 –19.

[66] *Ibid*; three types of air charter are distinguished. The first is "bare-hull" charter where the owner parts with control of the aircraft for the period of the charter. It is known bare hull as the aircraft is leased without its pilot and crew. The second and the third types of charter are similar in that the aircraft is hired with its pilot and/or crew. Yet, they are different with regard to who exercises control and direction vis-à-vis the aircraft and its crew. Note also that the second and third types of air charter may further be classified based on whether the space of the aircraft is let for a particular journey (voyage charter) or for a specified period (time charter).

[67] *Id.*

[68] *Id.*

[69] *Id.*; this is particularly the case in voyage charter where the space of the aircraft (not the aircraft as such) is leased for a particular voyage. The relations between the lessor and the lessee in voyage charter may thus be characterised as contract of carriage which may be subject to the rules of Warsaw Convention.

Aside from the question whether the different types of aircraft lease would be governed by the law on carriage by air, one may wonder whether the charterer may be the carrier vis-à-vis passengers or goods that he carried using the leased aircraft.[70] This question appears to be more serious and important than the question regarding the applicability of Warsaw Convention to charter agreement.[71] In 1965, an Ethiopian court was called on to rule on this very question in an interesting case[72] involving the crash of Douglas C-47A No. ET.T. 16 – a belonging of Ethiopian Airlines – which, when the accident occurred, was chartered to Coronado Petroleum Corporation. Ethiopian Airlines, the owner and operator of the aircraft, was sued under the Ethiopian law of carriage by air. The airline argued "it was not liable as, at the time of the accident, the aircraft was not on a normal scheduled flight but had been chartered by Coronado Petroleum Corporation." In an instructive ruling, the High Court of Addis Ababa tried to distinguish between different forms of air charter so as to establish whether Ethiopian Airlines was a carrier for the purpose of the Commercial Code – which, back then, was the Ethiopian domestic law[73] on carriage by air. Accordingly, it identified three main types of air charter: (a) hire of aircraft without pilot or any crew, known as 'hull' or 'bare hull' charter; (b) hire of aircraft with pilot and/or crew who are to be under the direction and control of the hirer; and (c) hire of aircraft with pilot and crew (or both) who are to remain the servants and under the control of the owner. Subsequently, the court eloquently reasoned:

> "The 'bare hull' charter corresponds to a charterparty by demise in maritime law; its main characteristic is that the aircraft itself, without crew, is let or hired for a particular journey or a specified period. In the

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[70] Mankiewicz, *supra* note 33, p. 712; Sun, *supra* note 49, pp. 335-340.

[71] Note that the uncertainties relating to the applicability of Warsaw Convention in determining the liability of the actual carrier in chartered and interchanged flights were the reasons behind the adoption of the 1961 Guadalajara Convention; see Conti, 5-7; see also Mankiewicz, *supra* note 33, p. 712, who *en passant* mentions "the question whether the rules of the Warsaw Convention govern the respective rights and obligations of the charterer and the passenger or consignor is more relevant than the question whether the charter agreement is governed by the Convention".

[72] *Negist Mekonnen et al v Ethiopian Airlines, Inc et al.*, *supra* note 9.

[73] The claimants sought relief under the more favourable Warsaw Convention. Yet, the court rightly rejected their plea as the Addis Ababa - Asmara - Addis Ababa flight cannot be considered international. The flight was domestic as it was undertaken exclusively within the boundaries of Ethiopia. Incidentally, it must be noted that Asmara, the capital of the now independent Eritrea, was an Ethiopian city when the accident occurred.

> other two types of charter the whole capacity of the aircraft, rather than the aircraft itself, equipped with crew, is let or hired for a particular voyage(voyage charter) or for voyages to be ordered by the charterer during a specified period(time charter). In the case of a 'bare hull' charter it is clear that the charterer would be the carrier as the aircraft is under his control and direction together with the crew supplied by him; the charterer assumes the mantle of the owner for any liability in respect of injuries to passengers and goods... [T]he position is not the same in [the lease of the aircraft with its crew who are under the direct control of the charterer]. The position is not [however] so clear where the [aircraft is leased with crew, who remain under the control and direction of the owner]."

The court, which was well aware of the maritime origin of charterparties,[74] maintained that the hull charterer assumes the burden of the owner in so far as damage caused to passengers is concerned. The court also seemed to be of the opinion that the question who assumes liability for damages on passengers in non-demise charters situations is determined based on the particular facts of the case and the terms of the charterparty agreement. Crucially, it paid a particular regard for the question "who has control and power over the aircraft?" After interpreting the various terms of the charter, the court finally concluded that Ethiopian Airlines had the control and power over the aircraft and therefore was liable under the Commercial Code.[75]

A more or less similar test is employed elsewhere.[76] Although some common law courts[77] may hold the lessor liable notwithstanding the fact that

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[74] The court mentioned: "አብዛኛዉን ጊዜ በመርከብ ክፍል የተፈጸመዉ ቻርተር ፓርቲ ከአንዳንድ ጥቃቅን ነገሮች በስተቀር ለአየር በረራውም ጉዞ የሚውል ደንብ ነው።"

[75] It would have been more interesting had the court held that Ethiopian Airlines was not the carrier. Crucially, one would wonder what the court could have concluded had the air charter between Ethiopian Airlines and Coronado Petroleum Corporation was either "bare hull" or time charter. Had it been a time charter, the petroleum corporation would have theoretically been the carrier. Yet, this could still pose its own problem as there was hardly any carriage contract between the company and the passengers of the crashed Douglas C-47A plane. Similarly, the law on carriage would not have applied if the charterparty involved had been "bare hull". In such cases, personal injury claims against Coronado Petroleum Corporation would be based on laws other than the law on carriage by air. Admittedly, the identity of the charterer might affect the outcome. If Coronado was instead an airline company and if the lease agreement it had with Ethiopian Airlines was either time or hull charter, it would have likely been the carrier as regards the injured and dead passengers.

[76] Matte, *supra* note 20, at §§ 82-85.

[77] See, e.g., *Mertens supra* note 43.

the aircraft is the responsibility of the lessee, it is generally agreed that "control and direction" is the determining factor in allocating liability to either the lessor or the lessee. According to Nicolas Matte, the charterer may be the carrier depending on "the facts of the case."[78] With regard to passengers and consignors, the charterer will be regarded the carrier so long as he retains control and direction over the hired aircraft and its crew.[79] Otherwise, the lessor in an air charter remains to be the carrier should the crew and pilots remain his servants.[80]

With the advent of the new Civil Aviation Proclamation which extends the scope of application of the Warsaw Convention to carriage performed by "any" carrier, the Ethiopian law on the liability of the actual carrier looks set for another development. It has already been argued that the phrase "any air carrier" under Article 69 refers to both contracting and actual carriers. Apparently, Ethiopian courts would now out rightly reject arguments that actual carriers need not be subject to the rules of Warsaw Convention in the absence of any direct contractual relationship with the passengers and/or consignors. Therefore, it is likely that the lessor of an aircraft will still be liable under the Warsaw Convention whenever it assumes the responsibility of controlling and directing the chartered aircraft.[81]

In sum, the application of Warsaw Convention or the Commercial Code to charter flights depends on the types of charterparties involved. The law on carriage by air does not govern the relations between the lessor and lessee in

[78] Matte, *supra* note 20, at § 82;

[79] *Id*. Note that there is no problem in characterising a charterer, who "both contracts and performs the carriage by using leased aircraft," as a carrier for the purpose of the Warsaw Convention. Put in other words, bare hull and time charterers may easily be identified as carriers in their relations with passengers and consignors. Yet, in voyage charters, one would have to carefully identify who, between the owner and charterer, would assume liability as a carrier under the Warsaw Convention.

[80] This was the case in *Negist Mekonnen et al v Ethiopian Airlines, Inc et al* where the owner of the aircraft in a voyage charter was held liable as a carrier for it maintained control over the aircraft and its crew.

[81] Article 69, Civil Aviation Proclamation, does not guarantee the application of the Ethiopian law on carriage to a lessor (owner of the aircraft) unless it maintains direct contractual relationship with passengers and consignees. It does only allow the application of the law on air carriage to "any carrier" including the actual carrier. Consequently, we have to first establish the lessor [instead of the lessee] is the actual carrier before applying Warsaw Convention. A level of carefulness in establishing whether the lessor or the lessee is the actual carrier is therefore still needed notwithstanding Article 69 of the Civil Aviation Proclamation.

bare hull or time charters. Yet, the law on carriage by air *may* apply as regards the relations between the charterer and the lessor in voyage charterparty situations. In the meantime, liability for passengers, luggage and goods carried is assumed by either the owner of the aircraft or the charterer depending on who exercises control or direction under the charter agreement. Accordingly, the actual carrier may assume liability under the Ethiopian law of air carriage. And, this had practically been the case even before the coming into force of the Civil Aviation Proclamation.

3.2 Code Sharing Arrangements

From the foregoing, it is clear that courts in various jurisdictions have struggled to determine whether Warsaw Convention applies to charterers. After the advent of code-sharing, similar pester has surfaced vis-à-vis operators of code-shared flights.[82] In this section, the liability problem in code-shared flight is discussed in light of the Ethiopian law on air carriage.
Code sharing is the practice of airlines to share designator codes. The practice dates back to the 1980s when travel agents started using Global Distribution Systems, GDSs.[83] Code-sharing allows airlines entering into code share agreements to market or operate another carrier's flights reservations.[84] The incentives for code sharing includes enhancing efficiency (generating additional air traffic with reduced cost), widening customer reach and, of course, establishing a dominant market power in the increasingly competitive and expensive air business.[85]

Within the context of the law of air carriage, code-shared flights involving marketing (contracting) carrier and operating (actual) carrier poses some queries regarding who the carrier would be. Of course, airlines, who maintain code share agreements with other carriers, expressly undertake responsibility "for the entirety of the Code Share journey" notwithstanding the

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[82] On this point see generally Tiwari & Chik, *supra* note 34; Conti, *supra* note 49.

[83] Gleave, S., *Competition Impact if Airline Code-share Agreements*, A Report Prepared for European Commission Directorate General for Competition, 2007, at § 3.2 [hereinafter Gleave].

[84] Tiwari & Chik, *supra* note 34, p. 298; Oum, T. & e*t al,* 'The Effects of Airline Codesharing Agreements on Firm Conduct and International Air Fares', *Journal of Transport Economics and Policy*, Vol. 30, 1996, p. 188 [hereinafter Oum].

[85] Gleave, *supra* note 83, §§ 3.9 – 3.13; Oum,, *supra* note 84, p. 188.

code-shared flight is actually operated by another carrier.[86] Nonetheless, such undertakings cannot satisfy a passenger who wants to know whether he can proceed against the actual carrier. Similarly, the actual carrier may want to know whether he can rely on the law of air carriage when proceeded against by passengers, shippers and consignees.

Operators of code-shared flight are deemed carriers for the purpose of the 1961 Guadalajara Convention and the 1999 Montreal Convention.[87] In Ethiopia, where code-sharing has been practiced for a while now,[88] neither the Guadalajara Convention nor the Montreal Convention is applicable. This situation leaves us with two important questions. Would Ethiopian law allow claims against the actual carrier in a code-share arrangement? Conversely, would the operator of code-shared flight rely on the Ethiopian law on carriage by air?

As in the case of air charter, the answer is to be sought from the word "carrier" under Article 17 *et seq*. As seen earlier, Ethiopian and foreign courts have not taken the undefined term lightly.[89] Though one cannot rule out judicial resolve in denying the application of Warsaw Convention to operators of code-shared flights, authorities from both civil law and common law jurisdictions suggest that "any carrier may be considered a proper defendant under the Convention, even though it is not a party to the contract with the passenger/consignor".[90] Even more, Article 69 of the Civil Aviation Proclamation has now settled any uncertainty by subjecting "any carrier" to the Ethiopian law on carriage by air. As the law stands now, claims may therefore be brought against operators of code-shared flights: the corollary of this is that the Warsaw Convention's liability limitations[91] and defences[92] extend to operating/actual carriers.

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[86] See, e.g., Conditions of Contract at <http://www.ethiopianairlines.com/en/travel/policies/contract.aspx>.
[87] Banino, *supra* note 33, p. 26.
[88] Ethiopian Airlines has code share agreements with 12 international air carriers; and the airline is negotiating additional agreements; see <http://www.ethiopianairlines.com/en/corporate/default.aspx#codeshare>.
[89] See *supra* notes 42-51 and the accompanying texts.
[90] One such authority is *Negist Mekonnen et al v Ethiopian Airlines, Inc et al* where the actual carrier is held liable despite that fact that it did not maintain direct contractual relationship with the passengers; see also Conti, *supra* note 49, p. 15.
[91] Article 22, Warsaw Convention.
[92] See, e.g., *ibid*, Article 20.

Concluding Remarks

In the law of air carriage, the liability of the actual air carrier has traditionally been unclear. Courts in various jurisdictions including Ethiopia have struggled to determine who, between the lessor and the lessee would be the carrier concerning passenger/consignor claims under the law of carriage by air. Similarly, the status of other actual carriers (e.g. operators of code-shared flights) under the Warsaw Convention has caused some trouble. Eventually, the uncertainties have been settled by "embracing both the actual and contracting carrier under the same juridical regime" such as the 1961 Guadalajara Convention.

In Ethiopia, where the Guadalajara Convention is not applicable, Article 69 of the Civil Aviation Proclamation brings "any carrier" (presumably including the contracting and actual carrier) under the scope of the law of carriage by air. Thus, claims under the law of carriage by air can now be had against operators of chartered, code-shared and interchanged flights. Also, actual carriers may rely on the defences and limits to their liability under the law of carriage by air.

Finally, charterers may not claim against owners of aircraft under the law of carriage by air unless the agreement constitutes a voyage charter.