



TOPE ADEBAYO LP

# AIRLINES LIABILITY CAPS: EXPLORING ALTERNATIVE REMEDIES FOR PASSENGERS

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## INTRODUCTION

Air passengers and carriers/airlines are constantly involved in the thorny affair of breached rights and obligations and the consequential liabilities that result. Issues arise from missed or delayed flights, refunds, loss of baggage, and personal belongings, among other matters. What is manifest from the foregoing is that passengers are usually left in limbo and are unaware of their rights, particularly regarding items or belongings of significant value.

Air passengers have repeatedly experienced negligence in their contractual relationships with air carriers. This is almost always present in the daily flight statistics worldwide, with delayed flights or lost, damaged, or delayed baggage or cargo. For example, Société Internationale de Télécommunications Aéronautiques (SITA) global baggage statistics reported 36.1 million air passenger mishandled bags by air carriers worldwide in 2023 alone.<sup>1</sup>



Over the years, from the Warsaw Convention<sup>2</sup> to the Hague Protocol,<sup>3</sup> followed by the Convention for the Unification of Certain Rules for International Carriage by Air signed in Montreal (the Montreal Convention 1999 or the Convention),<sup>4</sup> several international treaties have been established by countries to curb these incidents by imposing measurable liability on carriers. The Montreal Convention of 1999 appears to be a saviour in addressing this problem because, unlike its predecessors, it places the liabilities firmly on the carrier and shifts the burden of proof from passengers to airlines. Additionally, it raises the compensation amount payable by carriers. The convention is so definitive that it tackles ordinary negligence in the relationship between carriers and their passengers or consignors. It outlines both liability and limitation of liability for this negligence.

The convention's liability limitation provision caps the extent of the carrier's financial liability for negligence in cases of lost, damaged, or delayed baggage. Why is there a limitation on the right of passengers or consignors to hold carriers liable? Is the limitation absolute? Are cargo owners with claims that exceed the specified responsibility limit still covered by the Convention, which appears to be a scale of justice that weighs sides to balance on equity, as evidenced by its provision for liability limitation? Are there other remedies available when the stated limit of liability does not cover the damage incurred by the passenger or consignor? These are questions that this article aims to answer.

<sup>[1]</sup> Société Internationale de Télécommunications Aéronautiques 2023 global baggage statistics - <<https://simpleflying.com/where-does-lost-luggage-go-answer/>> accessed on April 19, 2025

<sup>[2]</sup> Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929 (Warsaw Convention), ICAO Doc 7838, entered into force 13 February 1933.

<sup>[3]</sup> Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at The Hague on 28 September 1955 (Hague Protocol), ICAO Doc 7632, entered into force 1 August 1963.

<sup>[4]</sup> Convention for the Unification of Certain Rules for International Carriage by Air, signed at Montreal on 28 May 1999 (Montreal Convention), ICAO Doc 9740, entered into force 4 November 2003.

## CONCEPTUAL CLARIFICATION

An air carrier is an enterprise that provides transportation services by aircraft for remuneration or hire.<sup>5</sup> Air carriers undertake professional responsibility to convey passengers or cargo belonging to consignors by air from one destination to another. According to the Montreal Convention of 1999, an air carrier transports passengers or cargo from one party state to another state and not between states in the same country because the convention excludes local air carriage from the convention's scope.<sup>6</sup>

Air carriers are typically airlines that passengers fly with or that consignors use to register their cargo for transport from the departure point to the destination. The carriage may involve either passengers or cargo; in the case of passenger carriage, air carriers must transport not only people but also any baggage that the passengers may have, provided the content of the baggage is not contraband.

Most airlines specify weight and size restrictions for the baggage they accept from customers, which are factored into the flight costs. They charge an additional fee for any baggage that exceeds the specified size.

In the case of cargo carriage, the carrier enters into a contract with the consignor to deliver the cargo to a consignee without the consignor being present on the voyage. The only connection between the carrier and the consignor in this instance is the Airwaybill or receipt of consignment (similar to a bill of lading when the carriage of said consignment is by sea), which serves as prima facie evidence of the contract of carriage between the carrier and the consignor. Passengers are customers of air carriers under

Passengers are customers of air carriers under the contract of carriage, accessing the service by presenting the carrier's ticket. Passengers' checked luggage is what is referred to as baggage. Thus, baggage pertains to the carriage of passengers. In contrast, cargo relates to cargo carriage, where the cargo owner, the consignor, engages the carrier solely to transport their goods, referred to as cargo, to the consignee.



## CONTRACTUAL RELATIONSHIP BETWEEN PARTIES

The contractual relationship between air carriers and passengers, or air carriers and consignors, is created by the flight ticket or the airway bill, as applicable. This contract establishes the rights, obligations, and liabilities of both parties, allowing the Montreal Convention to bind them. The relationship typically begins when a customer purchases a ticket or confirms a booking with the air carrier. At this point, the carrier agrees to transport the passenger or cargo under the terms specified in the ticket and relevant regulations. The

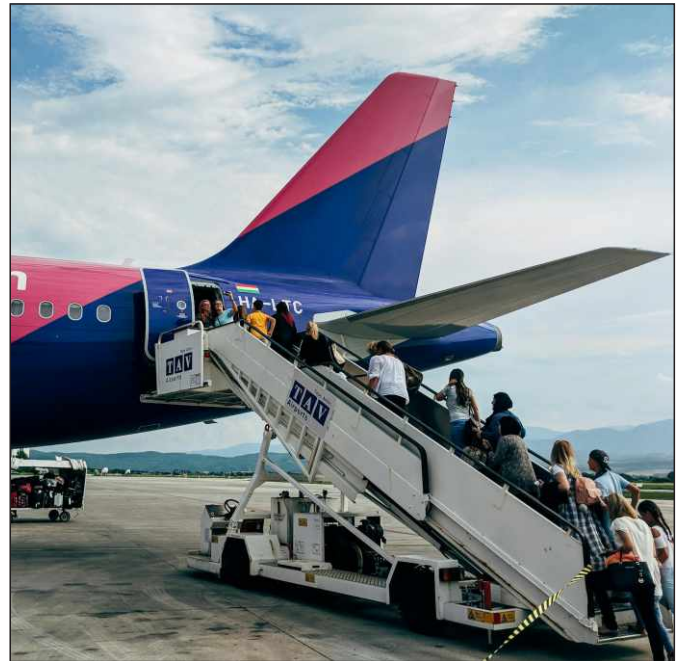
<sup>5</sup> Chapter 5.1 of ICAO manual on the regulation of international air transport (Doc 9626)

<sup>6</sup> Article 1.1 of the Montreal Convention 1999

obligations and liabilities from the contract and the Montreal Convention pass to the parties as soon as the contract is formed, and these obligations and liabilities last for the duration of the contract. The contract is discharged when the passenger safely disembarks at the destination or the cargo is delivered. However, certain circumstances, such as cancellations, delays, or breaches of contract by either party, may affect this timeline. In such instances, if the carrier is found liable or admits liability, the airline must fulfil the financial obligation accrued due to the breach of contract. This obligation continues until the passenger is adequately compensated; that is, the action for breach of contract extends the duration of the contract until the liability is settled.

### LIABILITIES OF AIR CARRIERS

The liabilities of international air carriers are entrenched in the Montreal Convention 1999. As earlier mentioned, Art 1.1 of the convention excludes local air carriage from the convention's scope. The Civil Aviation Act 2022 (the CAA or the Act) stipulates the liabilities of air carriers in Nigeria. Nonetheless, the liabilities stated in the Act are consistent with those provided in the convention because section 55 of the Act incorporates the Montreal Convention into Nigerian law. The section proclaims that the Convention shall have the force of law and apply to local carriage by air in Nigeria, irrespective of the aircraft's nationality, and shall govern the rights and liabilities of carriers, passengers and consignors.<sup>7</sup> Under the convention and the Act, the liabilities of a carrier arise from various circumstances, including the loss of life or personal injury to passengers while on board, as well as the loss, damage, or delay of baggage



belonging to those passengers during their journey. Additionally, carriers are responsible for damage to cargo belonging to consignors while it is in their care, before it is delivered to the consignee. Furthermore, carriers may also be liable for any damages incurred by passengers resulting from flight delay<sup>8</sup>

### LIMITATION OF LIABILITIES OF AIR CARRIERS

The liabilities of the air carrier in the Convention and the Act are limited to the extent payment is recoverable for breach of duty. In the case of death or injury of a passenger, **Article 17 of the Montreal Convention**, a carrier is responsible for any damage incurred due to a passenger's death or bodily injury, provided that the passenger was either on the aircraft or involved in embarking or disembarking when the incident occurred. This implies that even if the injury or death happens outside the aircraft, the air carrier is liable if it is proven that the incident causing the harm transpired on board.

<sup>[7]</sup> Section 55 of the Civil Aviation Act 2022

<sup>[8]</sup> Art 17, 18 and 19 of the Montreal Convention 1999

In *Harka Air Serv. Nig. Ltd. v. Keazor*,<sup>9</sup> the Supreme Court held that to prove liability, the plaintiff must establish:  
 (a) the passenger was injured.  
 (b) that the injury resulted from the accident, which must have occurred on the aircraft or during the process of embarking or disembarking.

When a passenger suffers injury or dies during a flight, the Convention establishes a compensation limit of 151,880 Special Drawing Rights (SDR) (currency to be determined by party states) per individual, which the passenger or their legal representative can claim.<sup>10</sup> However, under the Civil Aviation Act of 2022, compensation for injury or death caused by an air carrier is limited to \$100,000 or its equivalent in Naira per passenger.<sup>11</sup>



For cargo carriage, the carrier's liability for loss, damage, destruction, or delay is restricted to 26 SDR per kilogram for international travel and \$20 or its equivalent in Naira for local travel. For baggage, liability for loss, damage, destruction, or delay is capped at 1,519 SDR per passenger for international travels and \$1000 or its equivalent in Naira for local travel and in cases where delays specifically lead to damage, this liability can rise to a maximum of 6,303 SDR per passenger for international travels and \$4150 or its equivalent in Naira for local travels.<sup>12</sup>

Under Article 25 of the Montreal Convention, these liability limits for international travel are reviewed every five years, with the latest update in 2024. Similarly, the liabilities for local travel in Nigeria are reviewed every seven years, with the most recent update being in 2022.<sup>13</sup>

**WHY IS THERE A LIMITATION ON PASSENGERS OR CONSIGNORS' RIGHTS TO HOLD CARRIERS LIABLE?**

The United Nations Conventions established the limitation of liability to create a balance between the rights of passengers and the need for a stable and predictable financial environment for airlines. This provision allows the parties involved to understand the potential damages for breaches by setting limits, restrictions, or caps on these damages. However, it is essential to note that a party will always bear the loss, regardless of these limitations. That is why the legislation excludes a party that causes harm through negligence from the right to limit their liability.<sup>14</sup>

<sup>[9]</sup> (2011) 13 NWLR (Pt. 1264) 320 @ P 345, paras. C-E)  
<sup>[10]</sup> ICAO “2024 Revised Limits of Liability under the Montreal Convention 1999” made subject to sections 21 and 25 of the Montreal Convention  
<sup>[11]</sup> Article 21(1) of the second schedule to the of Civil Aviation Act 2022  
<sup>[12]</sup> ICAO “2024 Revised Limits of Liability under the Montreal Convention 1999” made subject to sections 21 and 25 of the Montreal Convention and see also Article 22 of the second schedule to the Civil Aviation Act 2022  
<sup>[13]</sup> Article 24 of the second schedule to the of Civil Aviation Act 2022  
<sup>[14]</sup> <https://pbnlaw.com/contracts-101-limitation-of-liability-clauses> accessed on 23 April 2025

## IS THE CARRIER'S RIGHT TO LIMITATION OF LIABILITY ABSOLUTE?

It would be unfair, and the Convention would lose its aim of being a saviour, if the limitations were absolute; thankfully, this is where the court's interpretive power comes into play. As established in various case laws, certain factors grant passengers the right to challenge the air carrier's limitation of liability. The court stated in **Mekwunye v. Emirates Airlines**<sup>15</sup> that there will be no limitation of liability where it is proven that the carrier intended to cause harm or knew that damage was a probable cause of their actions. While the principle of limitation of liability is equitable in contract, a party would not be allowed to limit their liabilities where there is clear evidence of disability, mistake, or fraud.<sup>16</sup>

1. The Supreme Court in **Harka Air Serv. Nig. Ltd. v. Keazor**,<sup>17</sup> laid down that a passenger can challenge the limitation of liability on the following grounds:

- I. That the damage is caused by the wilful misconduct of the carrier or by such default on his part.
- ii. That the damage is caused by any agent of the carrier acting within the scope of his employment. The liability of a carrier in respect of damage suffered by a passenger would be unlimited if it is proven that the damage resulted from an act or omission of the carrier's servants or agents, and specifically done with the intent to cause damage or recklessly and with the knowledge that damage might probably occur, provided that at the time of the commission of the act or omission such servant or agent was acting within

the scope of its employment. This was the bone of contention in the case of *Emirate Airline v Aforka & Anor*, the court held that it is not enough for the claimant to show that the damage was occasioned by the negligence, recklessness or malicious intention but he must also show that the carrier had prior knowledge that damage would probably result.

iii. Ground of breach of a fundamental term<sup>18</sup>.

2. Another instance where the statutory quantum will not limit the carrier's liability is when a passenger/consignor makes a special declaration as to the value of the baggage or cargo in the care of the carrier. The passenger/consignor fills out a special declaration form and pays an extra fee for carriage as may be required by the carrier, by so doing the liability of the carrier is limited to the amount of value declared. Whether or not it exceeds the statutory quantum, the carrier is liable to pay the amount declared unless where the carrier successfully proves that the value declared is more than the actual value of the cargo.<sup>19</sup>

## WHAT HAPPENS WHEN THE DAMAGE EXCEEDS THE LIMITATION?

The limitation of liability was implemented to protect carriers from excessive liability that could jeopardize their financial stability and potentially lead to bankruptcy. While this limitation recognizes that the compensation offered may not fully cover actual losses, passengers who incur losses that exceed the established compensation caps still have access to remedies. This perspective acknowledges that

<sup>15</sup> (2019) 9 NWLR (Pt. 1677) 191

<sup>16</sup> *Abubakar v. Michelin Motor Services Ltd (No.1)* (2020) 12 NWLR (Pt. 1739) 555 @ (P 570, paras. D)

<sup>17</sup> *Supra* see footnote 13 @ Pp. 346, paras. C-F; 362, paras. E-G)

<sup>18</sup> *Supra* see footnote 19 @ Pp.227-228, paras. G-H; 228, paras. C-D)

<sup>19</sup> Article 22 of the Montreal Convention; see also Article 24 of the second schedule to the of Civil Aviation Act 2022

passengers are victims in these circumstances; no financial recompense can truly compensate for the loss of life or injuries resulting from a carrier's negligence. For instance, what recourse do consignors have if their goods exceed the liability limit of 26 SDR per kilogram? The law sets a maximum limit, which is not mandatory, allowing carriers to argue for lower payouts when passengers file claims. As a result, the law appears to safeguard wrongdoers, potentially encouraging carriers to persist in breaching their responsibilities.

Although the convention does not provide remedies for passengers whose losses surpass the carrier's liability, nothing in the laws prevents passengers from pursuing other forms of compensation. Recommended mechanisms are available to assist passengers and consignors when their losses surpass the recoverable amounts under the principle of limitation of liability.

**1. Action for Negligence:** For local flights in Nigeria, another argument is that the provision of article 21(2) of the second schedule to the Civil Aviation Act 2022 provides a limitation to carriers only when they can prove that the damage was not because of their negligence or that of their servants. The Act provides thus:

**“The carrier shall not be liable for damages arising under paragraph 1 of article 17 to the extent that they exceed for each passenger \$100,000 United States Dollars if the carrier proves that –**

**(a) Such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents: or**



**(b) Such damage was solely due to the negligence or other wrongful act or omission of a third party”**

Following the above, a Plaintiff can claim beyond compensation for damages, which the law provides, on the ground that the loss suffered was because of the carrier's negligence. The Plaintiff must establish this by leading credible evidence. The onus is on the airline to prove otherwise, since the burden of proof of liability arising from the contract of carriage is on the carrier.

**2. Action Against Responsible Parties:** When cargo losses occur, it's important to remember that other parties may share the blame. This could include agents or servants of the carrier, like baggage handlers or warehouse personnel, who may have contributed to the loss. Additionally, if the initial carrier has subcontracted to another carrier, you may also have grounds to pursue claims against them. Identifying all potentially responsible parties can broaden your avenues for recovering losses.<sup>20</sup>

<sup>[20]</sup> <https://www.clydeco.com/en/insights-archive/2020/10/think-recoveries-identifying-recovery-targets-suin> accessed on 22 April 2025

**3. Insurance Claim:** If the consignor has secured air cargo insurance, it becomes a vital resource for recouping losses rather than claiming compensation directly from the carrier. The insurance company can pursue the carrier on behalf of the consignor to recover the incurred loss. This approach allows the consignor to receive compensation from both the insurance and the carrier, as the insurance company seeks reimbursement from the airline. It is important to avoid double compensation, which could occur if the consignor claims reimbursement from the carrier first and then seeks additional compensation from the insurance company for an uncovered loss. The insurance policy should specify what is covered, so it is important to review the terms carefully and file a claim promptly to ensure that insured losses are reimbursed.<sup>21</sup>

**4. Negotiation:** Before provoking other measures, the Passenger can enter a negotiation arrangement with the carrier, weighing the value of negotiation and coming to a mitigated point with the carrier



to be paid a fair amount of money enough to cover or almost cover the cost of lost cargo or fair enough not to leave the carrier bankrupt. Open dialogue can often lead to mutually agreeable outcomes, saving both time and resources.<sup>22</sup>

**5. Seek relief for cost of litigation:** The law provides that: “The limits prescribed in Article 21 and in this Article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff, including interest...”<sup>23</sup> Hence, in addition to the compensation awarded to Plaintiff by the court, the plaintiffs can seek additional relief for the cost and expenses of litigation to mitigate any excess loss that might have been suffered.

**6. Higher limitation Clause:** This last mechanism is more of a preventive measure than a cure, and it is initiated at the contract drafting stage. Parties can, by contract, agree to exceed their liability irrespective of the statutory liability quantum.<sup>24</sup> The law allows parties to agree on a higher limit of liability mutually, so they need to clarify these details during the contract negotiation phase. Each party should carefully assess the value of their interests in the agreement and establish a liability limit that adequately protects everyone involved in the event of an accident. This proactive approach can help prevent disputes later on.

<sup>[21]</sup> <https://www.shiprocket.in/blog/air-cargo-insurance/> accessed on 22 April 2025

<sup>[22]</sup> <https://recoupex.com/cargo-claims-negotiation-strategies-which-leads-to-recovery> accessed on 22 April 2025

<sup>[23]</sup> Article 22(6) of the Montreal Convention

<sup>[24]</sup> Article 25 of the Montreal Convention

## COURT WITH JURISDICTION

Pursuing a claim of this nature, particularly claims exceeding the liability caps as provided in the Convention, will require approaching the relevant court with jurisdiction. A court's jurisdiction to hear a matter is the lifeblood of any suit; failing which, any proceedings conducted without jurisdiction will be rendered null. See **Madukolu v. Nkemdilim**.<sup>25</sup>

Section 251(1)(k) of the Constitution of Nigeria vests exclusive jurisdiction over aviation matters in the Federal High Court. However, it's important to highlight that this exclusive jurisdiction does not encompass issues related to simple contracts.<sup>26</sup>

When determining which court has jurisdiction over an aviation matter, two key factors should be considered: First, whether the dispute involves simple contracts, often when an air ticket has been purchased but the actual carriage has not yet occurred. Second, whether the dispute pertains to a carriage by air, meaning when the actual carriage has occurred.<sup>27</sup> The Court of Appeal in **Delta Airlines v. Josef & Anor**<sup>28</sup> held that "A person is actually in a contract of carriage when he has been carried by the aircraft. There is no carriage when all that has happened is a passenger being checked in at the checking in counter... the passenger must have embarked on the aircraft, anything less will not bring the action within the jurisdiction of the Federal High Court."

An issue is classified as an aviation matter only when the claim arises from an incident on board the aircraft. Consequently, actions related to liability for loss of life, personal injury, or loss of

baggage or cargo fall under the jurisdiction of the Federal High Court. In contrast, claims for delays are typically considered outside the realm of aviation matters and fall within the jurisdiction of the State High Court.

However, if a return ticket is purchased and only one leg of the journey has been completed, with a delay occurring during the second leg, the nature of the contract shifts from a simple contract to an aviation contract. In such cases, the Federal High Court will assert exclusive jurisdiction to resolve any disputes arising from the situation.<sup>29</sup>

## CONCLUSION

In this paper, the liability caps have been examined in accordance with the Montreal Convention, which was incorporated into the Civil Aviation Act. This is particularly relevant when losses incurred by passengers exceed these caps. However, in light of several decisions by Nigerian courts, the liability caps do not exhaust the remedies available to passengers for losses exceeding these limits, if the nature of the losses falls within the recognized legal exceptions for which such claims can be made.

Passengers and consignors are therefore encouraged to engage their lawyers in taking proactive measures to simplify the resolution of issues as they arise. Although the Montreal Convention imposes caps on air carriers' liabilities, these limits are not absolute. The Convention leaves room for exceptions and remedies where carriers engage in wilful misconduct or gross negligence, thus safeguarding the rights of passengers and consignors.

<sup>[25]</sup> (1962) 2 SCNLR 341

<sup>[26]</sup> *Ascot Flowlines Ltd v. BV Integrated Projects Ltd* (2015) LPELR -25680 (CA)

<sup>[27]</sup> Ekenobi ThankGod Chinonso "RIGHTS OF AIR PASSENGERS IN NIGERIA: AN APPRAISAL OF CARRIER LIABILITIES AND JURISDICTIONAL INDICATORS.

<sup>[28]</sup> (2019) LCN/13862(CA) p. 17-18, paras. 17-18.

<sup>[29]</sup> *KLM Royal Dutch Airlines v. Idehen* (2017) LPELR-43575 (CA). 56 @ p. 36-37, paras. C-B.

Beyond statutory thresholds, legal and equitable remedies like negotiation, insurance recoveries, action against responsible parties etc preserve access to just compensation for passengers/consignors' excess claims. Ultimately, the Convention seeks to create a balance between operational stability for carriers and substantive justice for claimants, ensuring that liability limitations do not become instruments of impunity.

### POLICY RECOMMENDATION

Under the Montreal Convention, liability limits are reviewed every five years, while the Civil Aviation Act provides for a seven-year review cycle. Although these frameworks consider inflation and the exchange rate fluctuations of the SDR currency basket at each review, the reality is that inflation and economic shifts occur continually, not on fixed schedules. As such, there is often a significant gap between the liability cap and current economic conditions in the years between reviews. This results in a situation where, despite the intention of fairness, the prescribed compensation may fall short of meeting real time financial needs. To address this gap, it is recommended that liability limits be reviewed more frequently, utilizing the replacement value method to accurately assess and maintain the purchasing power of the original 100,000 SDR benchmark for death and personal injury liability in 1999, which was approximately \$135,784 USD<sup>30</sup> and also across other liabilities quantum.

Imagine a business owner who insures their store inventory for \$100,000 USD in 1999. At that time, this amount is enough to cover the value of their stock, which could be sold for \$150,000 USD. The insurance policy is reviewed

every five years to adjust for economic changes. However, over those five years, inflation and rising costs make it more expensive to replace the inventory. By the time the business owner reviews their insurance, the cost to restock is now \$200,000, but the insurance policy still only covers \$100,000. In this case, even though the insurance was meant to provide fair coverage, it's no longer enough because of the changes in prices during the five-year gap. Similarly, under the Montreal Convention, if liability limits are only reviewed every five years, they may not keep up with inflation and economic changes, leaving compensation insufficient. Value depreciation is an inevitable part of today's economy, with money's value changing frequently—sometimes even every quarter. So, relying on a five-year review period for quantum limits does not align with the constant economic changes we experience today.

In conclusion, while the intention behind limiting the liability policy is to provide economic stability to airlines, thereby preventing them from going into debt due to excessive liabilities, this reasoning becomes untenable when ticket prices rise as frequently as they do. If airlines can adjust ticket prices to reflect inflation as often as it occurs without waiting five years, then liability limitations should also be reviewed more frequently, ideally, on an annual basis. By using the replacement value method, the liability limits can be recalibrated more often to maintain their purchasing power, ensuring that compensation remains adequate in line with real-time economic conditions. Regular reviews would help bridge the gap between the liability cap and inflationary changes, making the system more responsive and equitable for passengers.

<sup>30</sup> <https://www.imf.org/external/pubs/ft/survey/sup0998/11.htm>

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