

## COVID-19, EXTRAORDINARY CIRCUMSTANCES AND CANCELLATION OF FLIGHTS IN NIGERIA\*

### Abstract

There are certain factors which may affect the performance of a contract. Extraordinary Circumstances is a situation brought about by forces or conditions beyond the contemplation of the parties when contracting. Such occurrences are irregular, sudden and unavoidable. They are external and may be by way of public health emergency, public safety and security. In such circumstance, the party in breach may enjoy some reprieve particularly when it did not contribute to the situation. However, unlike frustration, force majeure, extraordinary circumstances inducing breach of contract of carriage by air does not confer absolute exemption on the carrier. He is still obligated to the passengers to refund the consideration (cost of air ticket), and where the situation so required further burdened to take care of the stranded passengers. This paper argues that Covid-19, though an example of extraordinary circumstances does not ipso facto trigger extraordinary circumstances. Whether or not, it can be pleaded to exempt the carrier from liability for cancellation of flight depend on the peculiar facts of each case.

**Keywords:** Covid-19, Extraordinary Circumstances, Delay and Cancellation of Flight

### 1. Concept of Extraordinary Circumstances

In elementary term, 'extraordinary' refers to something that is not normal, extreme, unusual or not ordinary. It could also mean surprising or remarkable; additional, not part of the regular pattern or routine.<sup>1</sup> On the other hands, 'circumstances' when used as a noun means a fact, occurrence or condition, especially when relating to an act or event.<sup>2</sup> Extraordinary could therefore connote something or negative.<sup>3</sup> 'Extraordinary circumstances' in aviation law is not completely the same with the general concept of *force majeure*.<sup>4</sup> To the extent that *force majeure* covers cases of Acts of God, it is similar to extraordinary circumstances. However, whereas both concepts contemplate an occurrence beyond the control of the parties (in default), the latter seems more applicable to the event instigated by superior force. Additionally, *force majeure* extricates liability completely as the injured party is without any form of remedy. Also important is that *force majeure* envisages conditions simply being beyond the actual control. In the sphere of aviation law however, the extraordinary circumstances must not only be unanticipated, and unpreventable at the time of the incidence, it must be shown that despite all efforts in place, (or though not place but even if in place), the occurrence was not preventable. Thus, where the laxity, incompetence, compromise or lack of foresight of the carrier led to the extraordinary circumstances which resulted in the cancellation of the flights, a defence of extraordinary circumstance will fail. The inherent concept of carrier's reasonable sagacity as contemplated in *force majeure* is inapplicable in evading liability for cancellation of flight under the guise of extraordinary circumstances. Again, the injured party in carriage by air, (in this case, the passenger) is still entitled to some level of protection.

*Force majeure* clauses<sup>5</sup> are generally advocated for inclusion in contracts agreements. Thus, the classes of events amounting to *force majeure* depend on the wordings of the clauses. Often listed as examples of *force majeure* are: strikes, terrorism, war, embargo, insurrections, and riots, natural disasters (Acts of God) including epidemics.<sup>6</sup>

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<sup>1</sup> Mairi Robinson (ed), *Chambers 21<sup>st</sup> Century Dictionary*, Chambers Harrap Publishers Ltd. 2004 at p.463.

<sup>2</sup> *Ibid* at p. 250.

<sup>3</sup> For instance, extraordinary performance or feat and extraordinary disaster.

<sup>4</sup> Garner's *Black's Law Dictionary* 10<sup>th</sup> edition, page 761 define *force majeure* as 'an event or effect that can be neither anticipated nor controlled; especially an unexpected event that prevents someone from doing or completing something that he or she had agreed or officially planned to do. The term includes both acts of nature...and acts of people...'. However, in English and Scots law, *force majeure* is a creature of contract and not of the general common law. It therefore differs from some other legal systems where *force majeure* is a general legal concept and where courts may declare that a particular event, such as a pandemic like Covid-19, is a *force majeure* event, see David Mallinson, 'Will Covid-19 Trigger a Force Majeure Clause?', *Girlings Solicitors*, 5<sup>th</sup> May, 2020 available at <https://www.girlings.com/latest/will-covid-19-trigger-force-majeure-clause> accessed 19<sup>th</sup> June, 2020.

<sup>5</sup> See Anurag Pandey, 'Understanding the Differences between Acts of God and Force Majeure', February 3<sup>rd</sup>, 2015, NALSAR University of Law, available at <https://www.lawctopus.com/academike/understanding-differences-act-god-force-majeure/> accessed 20<sup>th</sup> June, 2020.

<sup>6</sup> Amiso & Cairns, 'Covid-19 and Force Majeure Issues in Construction and Engineering Projects in the UAE and Beyond – Part 2', April, 2020 available at <https://www.trowers.com/insights/2020/april/covid-19-and-force-majeure-issues-in-construction-and-engineering-projects-in-the-uae---part-2>, accessed 19<sup>th</sup> June, 2020.

Whereas some of the clauses in *force majeure* may provide for events resulting in late performance, others may recognize only events which actually prevents or hinder performance.<sup>7</sup> Thus, time or computation of time for the performance of a contract is often abated or suspended during the period caught by force majeure. On the contrary, air passengers' contracts with air carriers are generally based on standard clause agreement, where the passengers simply agree with the terms of carriage by the purchase of the air ticket.<sup>8</sup>

Extraordinary Circumstances resulting in delay and cancellation of flight in air law is similar to the doctrine of frustration in general contract law. Both constitute exceptions to the erstwhile common law doctrine of absolute contract as laid down in *Paradine vs. Jane*.<sup>9</sup> Viscount Simon<sup>10</sup> in recognizing the doctrine of frustration as first alluded to in *Taylor vs. Caldwell*<sup>11</sup> had defined frustration to mean 'the premature determination of an agreement between parties, lawfully entered into and in the course of operation at the time of its premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement'. The circumstances may be physical, legal or commercial impossibility.<sup>12</sup> Extraordinary circumstances cause by impossibility of performance or fundamental change of circumstances are all frustrating events capable of discharging the contract of carriage by air and limiting, or exculpating the liability of the carrier.<sup>13</sup> Just as in air law, the frustrating event must be unforeseeable and substantial.<sup>14</sup> They are however different to the extent that the doctrine of frustration is larger in scope than extraordinary circumstances. Personal incapacity,<sup>15</sup> for example, ill-health<sup>16</sup> of a crew member which may rightly be applicable in pleading frustration do not apply to extraordinary circumstances in carriage by air. Unlike the general case of frustration, carriers are also not discharge from obligation of carriage and compensation simply because the commercial benefit of the flight has been frustrated.<sup>17</sup> In air law, the extraordinary circumstances may just be momentary; not a total discharge. It may simply result in delay in the time of carriage or a cancellation.

## 2. General Liability of Air Carriers for Delay and Cancellation of flights

The basic principles of international air law include territorial sovereignty, national airspace and nationality of aircraft.<sup>18</sup> This means that the legal framework of carriage by air of passengers, baggage and goods is regulated by municipal and international norms, while the liability of the carrier for breach of contract of carriage by air is equally determine by these same laws as well as the terms of the contract.<sup>19</sup> The Convention for the Unification of Certain Rules Relating to International Carriage by Air, 1929 (Warsaw Convention), which provide for the liability of air carrier has no definition of the phrase 'extraordinary circumstances'. Nonetheless, it provides for exceptions to the liability of air carriers in the contract of carriage. Specifically, Article 19 provides that the carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods. The carrier is equally liable where the damage is caused by the willful misconduct of the carrier or his agent acting within the scope of his employment.<sup>20</sup> The delay causing damage may be as to the departure or arrival time of the flight or an actual cancellation of the flight by the carrier.<sup>21</sup> The phrases *despite all efforts made by the carrier* and

<sup>7</sup>See Faye Moore, 'Will Covid-19 Trigger a Force Majeure Clause?', 26<sup>th</sup> March, 2020 available at <https://www.pinsentmasons.com/out-law/guides/covid-19-force-majeure-clause> accessed 24th June, 2020.

<sup>8</sup> NCARs, 2015, s 19(6)1(ii); *Sturgeon v. Condor Flugdienst GmbH* [2009] EUECJ C-432/07; *Böck & Lepuschitz v Air France*, [2009] EUECJ C-402/07.

<sup>9</sup> (1558-1774) All E.R. 172.

<sup>10</sup> Viscount Simon in *Criklewood Property and Investment Trust Ltd. v Leighton's Investment Trust Ltd.* (1945) A.C. 221 at 228.

<sup>11</sup> (1861 - 73) All E.R. 24.

<sup>12</sup> See also, *Baily vs. De Crespigny* (1871) L.R. 6 Exch. 269; *Metropolitan Water Board vs. Dick, Kerr and Co.* (1918) A. C. 119; *Uzomah vs. Uzomah* (1965-66) N.M.L.R. 88.

<sup>13</sup> *N.B.C.I vs. Standard (Nig.) Eng. Co. Ltd.* (2006) LPELR-SC.252/2001.

<sup>14</sup> *Davis Contractors vs. Fareham UDC* [1956] AC 696.

<sup>15</sup> In contracts of personal service, if either party to the contract dies, or becomes ill or is called up for military service, or is imprisoned or incapacitated to the point of being unable to perform the contract, it shall be treated as supervening circumstances, M. C. Okany, *Nigerian Commercial Law*, African First Publishers Plc, 1992 at pp. 269-270.

<sup>16</sup> *Robinson vs. Davison* (1871) L.R. 6 Exch. 269. Cf. *Stubbs v. Holywell Ry Co.* (1867) L.R. 2 Exch. 269.

<sup>17</sup> Cf. *Joseph Constantine Steamship Line, Ltd. v Imperial Smelting Corporation, Ltd.* (1941) 2 All E.R. 165.

<sup>18</sup> Paul Dempsey, 'The Chicago Convention as a Source of International Air Law', 2015, McGill University, available at [https://www.mcgill.ca/iasl/files/iasl/aspl\\_633-2015-dempsey\\_chicago\\_convention.pdf](https://www.mcgill.ca/iasl/files/iasl/aspl_633-2015-dempsey_chicago_convention.pdf) accessed 20th June, 2020. See also Article 37, Chicago Convention; Paul Dempsey, 'Blacklisting: The Conflict between National and International Aviation Safety Standards' 2008, McGill University available at [https://mcgill.ca/iasl/files/iasl/C10-Paul\\_Dempsey-Blacklisting.pdf](https://mcgill.ca/iasl/files/iasl/C10-Paul_Dempsey-Blacklisting.pdf) accessed 22<sup>nd</sup> June, 2020.

<sup>19</sup> Cf. Article 33, Warsaw Convention.

<sup>20</sup> *Ibid*, art.25.

<sup>21</sup> See 20(1) of the Warsaw Convention Articles 20(1); 20(2) and 21.

*impossible for him or them to take such measures* indicate situations beyond the control of the actual carrier. Such situations being extraordinary must not have been envisaged or capable of prevention. Thus, whereas the Warsaw Convention provided for circumstances excluding liability, there is no clear provision guiding or explaining what those situations are or should be. There is equally no standard to weigh the nature of the efforts made or expected to be made.

Another international legislation recognising the concept of extraordinary circumstances in carriage of passengers by air is the Convention for the Unification of Certain Rules for International Carriage by Air, 1999 (Montreal Convention). Articles 19 and 20 of the Montreal Convention do not adequately address the lacuna in the Warsaw Convention. They provide that the carrier shall not be liable for damage occasioned by delay if it proves that it, its servants or agents took all measures that could reasonably be required to avoid the damage or that it was impossible for them to take such measures.<sup>22</sup> Even though the Montreal Convention among other innovations provides for a higher regime of liability against the carrier, there is no difference between it and the provisions of the Warsaw Convention on the issue of liability for delay, including the exemptions to carrier's liability, one of which is extraordinary circumstances. At the regional level, Extraordinary circumstances as a ground of exclusion of carriers' liability for delay and cancelled flight is equally recognised in the European Community (EC). Regulation 261/2004<sup>23</sup> provides a minimum level of rights to air passengers in the event of being denied boarding, cancellations and long delays of flights. Article 5, EC Regulation 261/2004 provide that in case of cancellation of a flight the passengers concerned shall have the right to compensation by the operating air carrier in accordance with Article 7 thereof, except<sup>24</sup> the operating carrier can prove that the cancellation was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. As in Warsaw and Montreal Conventions, there is no definition of extraordinary circumstances in carriage by air in the substantive provisions of EC Regulation 261/2004. However, there is found in the recitals to the Regulation a description or explanation of what is extraordinary circumstances, and the effect of a successful plea thereof. Regulation 261/2004 provide that obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier<sup>25</sup>, including air traffic management decision.<sup>26</sup>

As can be gleaned from the above provisions, the EC Regulation 261/2004 originally envisaged only six instances where an air carrier may be exempted from liability for cancellation or delay of flight on ground of extraordinary circumstances. They are political instability; meteorological conditions; insecurity, sudden safety issue, strikes and air traffic decision affecting the operating carrier. Going by this, pandemic such as Covid-19 and other natural disasters are strictly speaking not considered as extraordinary circumstances. Undoubtedly, the occurrence amounting to extraordinary circumstances as contained in recitals 14 of Regulation 261/2004 are limited in scope. Although the recital used the word 'safety', which could broadly be interpreted to include protection from harm or injury, including health injury, the recital seems not to contemplate a situation where the cancellation of the flight is cause by government policy aim at curbing the spread of disease. Similarly, political instability as used in Recital 14 of the Regulation is not the same as public health emergency. Luckily, Courts decisions have since espoused a liberal approach to the concept of extraordinary circumstances to enable it achieve its essence. In the recent case of *Moens v. Ryanair Ltd*,<sup>27</sup> a flight operated by Ryanair was delayed by more than four hours due to fuel spillage on the runway at Treviso Airport (Venice), which caused the runway to be closed for over two hours and the claimant's flight to land over four hours late. The plaintiff sued the airline claiming compensation pursuant to article 5 of the EC Regulation No 261/2004. The airline denied liability claiming extraordinary circumstance. The European Court of Justice held that the presence of petrol on the runway, causing its closure, and hence the delayed flight, should be understood as an extraordinary circumstance likely to exempt the airline.<sup>28</sup> Ryanair's defence succeeded because it had no advance notice of the closure, and could not have foreseen, the closure

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<sup>22</sup> Article 19, Montreal Convention.

<sup>23</sup> Regulation (EC) 261/2004 of the European Parliament and of the Council dated 11 February 2004, which repealed (EEC) No 295/91 actually came into effect in 2005.

<sup>24</sup> *Ibid*, Article 5(1)c and 5(3).

<sup>25</sup> Regulation 261/2004, Clause 14 of the Recital, Official Journal of the European Union, 17:2:2004.

<sup>26</sup> *Ibid*, Clause 15.

<sup>27</sup> C-159/18, delivered 26<sup>th</sup> June, 2019.

<sup>28</sup> V. Augros 'The Notion of Extraordinary Circumstances: Further Precisions under Aviation Law' in Travel Law News (2019) available at <http://va-avocat.fr/the-notion-of-extraordinary-circumstances-further-precisions-under-aviation-law/> accessed 14<sup>th</sup> June, 2020.

decision. Therefore, it was not in a position to take preventative measures, nor to disobey the instructions of the airport authorities.<sup>29</sup>

Similarly, where extraordinary circumstances are caused by natural disaster, the court would go beyond the narrow provision of Clauses 14-15 and Article 5(3) of the Regulation 261/2004 to determine the effect of the occurrence on the operation of the flight. In *McDonagh v. Ryanair Ltd.*<sup>30</sup> there was ash disruption caused by Icelandic volcano Eyjafjallajökull in April 2010, and the subsequent closure of the airspace above several EU States. The Plaintiff's flight from Faro to Dublin, scheduled for April 17, 2010, was consequently cancelled and she could only return to Dublin on April 24. While she was stranded in Faro for a week and awaiting a flight to Dublin, Ryanair did not provide her with care contrary to Article 9,<sup>31</sup> EC Regulation 261/2004. The issue in contention depended essentially on the interpretation given to Article 5 of Regulation No. 261/2004, which recognized extraordinary circumstances as exemptions to carrier's liability to passengers in the event of delay and cancelled flight. The CJEU held that the ash disruption leading to closure of airports was rightly a case of extraordinary circumstance, but however disagreed with the carrier's argument that it owes no obligation of care to the passenger while the disruption lasted. The case had been criticised for failing to give some consideration towards protecting the interests of airlines in the face of such interruptions to business.<sup>32</sup> The basis of the criticisms is that it was, without any doubt, a situation of *force majeure* since it was unforeseeable, unavoidable, and not the result of airlines' actions. With respect to the criticisms, the import of the decision was based on the peculiarity of the case. The passenger was already at Faro for departure before the closure of the airport, and according to the facts of the case stranded to the knowledge of the carrier. At the time the McDonagh was technically a passenger of the carrier, and was not supposed to be abandoned to her fate. The carrier was not held liable to pay compensation for damages for delay/cancellation of the flight because the defense of extraordinary circumstances arising from the volcanic eruption was rightly upheld; however, it was held liable for failure to provide care to a stranded passenger.<sup>33</sup>

In Nigeria, section 19(7)<sup>34</sup> provides that an operating airline shall not be obliged to pay compensation for cancellation if it can prove that the cancellation was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. The term 'Extra Ordinary Circumstances' is defined in Nigeria as any mechanical, technical, operational, climatic, socio-political or any other conditions beyond the actual control of the party involved.<sup>35</sup> Simply put, where a flight is cancelled due to mechanical, technical, operational, climatic, socio-political or any other conditions beyond the actual control of the party involved, the passengers affected by the cancellation shall not be entitled to compensation from the operating carrier. Clearly, the definition in the Nigeria's regulation is more encompassing than that of the European Union. Another special feature of the Regulation in Nigeria is the phrase '*or any other conditions*', which accommodates the unpredictability and limitlessness of factors that could constitute extraordinary circumstances. It gives room to the court to liberally determine the defence on the peculiarity of each case. Hence such factors as pandemic, including Covid-19 can safely be subsumed under the definition of extraordinary circumstances in Nigeria, either as a socio-political condition or under the umbrella of any other condition.<sup>36</sup>

Nonetheless, the definition of 'extraordinary circumstances' in the NCARs, 2015 is somewhat vague and capable of being exploited or abuse by the air carrier. First, not all mechanical, operational or operational conditions beyond the actual control of the carrier is extraordinary. For any of these to be considered extraordinary, they must be unpredictable, unavoidable, external and in fact abnormal. Furthermore, what is extraordinary should

<sup>29</sup> See Cameron, *et al Aviation: 'extraordinary circumstances' within the Flight Passenger Rights Regulation - no use crying over spilled fuel and runway closures* available at <https://www.lexology.com/library/detail.aspx?g=9e9b1abc-88d6-40f8-8605-9e4edddd59d1> accessed 20<sup>th</sup> June, 2020. See also the Germanwing's Case, C-501/17.

<sup>30</sup> Case C-12/11, (Jan. 31, 2013).

<sup>31</sup> Article 9 deals with the right of air passengers to be cared for by operating carrier.

<sup>32</sup> V Correia, 'Air Passengers' Rights, 'Extraordinary Circumstances,' and General Principles of EU Law: Some Comments After the McDonagh Case' Issues in Aviation Law and Policy [Vol. 13:2]; R. Abeyratne, 'Responsibility and Liability Aspects of the Icelandic Volcanic Eruption', 35*AIR & SPACE L.* 281, 292(2010)

<sup>33</sup> See European Commission, Commission Notice, Brussels, 10.6.2016 C(2016) 3502 final 'Interpretative Guidelines on Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and on Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council', p. 19.

<sup>34</sup> Nigeria Civil Aviation Regulations, 2015(NCARs).

<sup>35</sup> *Ibid.*, s.19(1)17.

<sup>36</sup> This is because the use of mechanical, technical and operational conditions in the definition is not in tandem with the settled principle of carriage by air law that technical, operational or mechanical factors occasioning delay or cancellation are generally not treated as extraordinary circumstances, cf, *Friederike Wallentin-Hermann v Alitalia Linee Aeree Italiane SPA* C-549/07 decided 22<sup>nd</sup> December 2008.

generally be something external to the aircraft and the operation. Public health emergencies affecting the safety of crew members, passengers, airport closure, meteorological issues, sudden medical illness or death of crew member or passenger on board, bird strikes to the aircraft causing damage to the aircraft which requires compulsory immediate checks and possible repairs, discovery of defects in the manufacturing of the aircraft, unexpected flight safety shortcoming, strikes by air traffic control personnel or management,<sup>37</sup> natural disaster, terrorism or sabotage may constitute extraordinary circumstances. Conversely, absence of proper flight documentation, inadequate rest hours of crew members, technical issues arising from airline inappropriate maintenance culture are some of the circumstances which cannot be said to be extraordinary. As argued above, to amount to extraordinary circumstances, the incident has to be unpredictable, unavoidable and external. A thing could be unpredictable but yet avoidable. Similarly, something may be unpredictable and unavoidable but within the control of the airline. Secondly, the emphasis of actual control in the NCARs definition precludes the notion of unpredictability. Actual physical control of a vehicle envisages a situation where the carrier must be physically in possession of the aircraft and have the capability to operate the aircraft whether or not the aircraft is actually being operated.<sup>38</sup> It could thus be argued that actual control is physical control, and the opposite of constructive control. In aviation practice, aircraft could be leased out with or without crew (dry and wet lease). As such, the owner of the aircraft may not be the actual carrier. The use of *actual* in the definition of extraordinary circumstances in Nigeria presupposes that the carrier who possibly is unable to perform the contract of carriage may be excused from liability due to crisis between it and the owner. He may for instance claim that the owner did not release the crew members early (in wet lease) or the owner unreasonably detained the aircraft. It is submitted that such defence should not suffice for extraordinary circumstances, based on the concept of actual control. It will not be a defence for the carrier who is unable to sort out its challenges with the owner or the management to plea lack of actual control.<sup>39</sup>

Another challenge with the NCARs definition of extraordinary circumstances *vis a vis* the right of the passenger affected by the ensuing cancellation is the absent of clarity. As can be seen in section 19(7)(3) NCARs, 2015, there is no clarity whether the passenger is entitled to reimbursement in the event of extraordinary circumstances leading to cancellation of flight. In a strict sense, the exemption appears too generic with only reference to compensation. Nonetheless, where the flight is cancelled due to extraordinary circumstance, the carrier is obligated to refund the cost of the flight ticket to the passengers in addition to care.<sup>40</sup>

### 3. Covid-19 and Extraordinary Circumstances Occasioning Cancellation of Flights

Does the outbreak of coronavirus otherwise called Covid-19 constitute extraordinary circumstances in carriage by air? Can operating carriers who contrary to existing agreement failed or were unable to transport passengers by air during the Covid-19 period plea the defence of extraordinary circumstances to be exempted from payment of compensation? Is it Covid-19 itself that constitute the extraordinary situation or the ban on air travels or the closure of airports? On March, 11<sup>th</sup>, 2020, the World Health Organization (WHO) declared the novel coronavirus disease a pandemic.<sup>41</sup> Among the pervasive economic disruption,<sup>42</sup> the commercial aviation industry has been hit hard by the unprecedented travel restrictions imposed by governments around the globe. Most airports around the world are presently closed either partially or fully. Before the outbreak of Covid-19, which later became a pandemic, there were subsisting contracts of carriage between various operating carriers and prospective passengers (customers), as the nature of air transportation allow for the booking of flight ahead of time. Such bookings which could be domestic or international flight continued to be valid, binding and enforceable even as the Covid-19 disease surges<sup>43</sup> on. In other words, the mere outbreak of Covid-19 did not automatically operate as a discharge of the contract of carriage until:

- i. It became a public health issue.
- ii. The various governments around the world decided to close their borders against air transportation, and
- iii. Most governments decided to close their airports, either partially or completely.

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<sup>37</sup> For instance, compensation cannot be claimed from the British Airways if the journey was affected by extraordinary circumstances such as air traffic control decisions, political instability, adverse weather conditions or security risks.

<sup>38</sup> <https://definitions.uslegal.com>physicalcontrol> accessed 20<sup>th</sup> June, 2020.

<sup>39</sup> See *Krüseman and Others*, Case 195/17.

<sup>40</sup> See *McDonagh's Case C-12/11*, *ibid*.

<sup>41</sup> <https://time.com/5791661/who-coronavirus-pandemic-declaration/>; <https://www.who.int/covid-19> accessed 22<sup>nd</sup> June, 2020.

<sup>42</sup> See IATA, 'COVID-19 Puts over Half of 2020 Passenger Revenues at Risk', available at <https://www.iata.org/en/pressroom/pr/2020-04-14-01/> accessed 29<sup>th</sup> June, 2020.

<sup>43</sup> See IATA, 'COVID-19 Puts over Half of 2020 Passenger Revenues at Risk', available at <https://www.iata.org/en/pressroom/pr/2020-04-14-01/> accessed 29<sup>th</sup> June, 2020.

In Nigeria, all commercial flight into, within or out of the country has been suspended since late March, 2020 as a preventive measure to curb the spread of covid-19.<sup>44</sup> The results of the above made it either difficult for the operating carriers to perform the contract of carriage in the way and manner as agreed or made it impossible to perform same at all. Undoubtedly, these measures which inhibit the operating carriers from performing the contract of carriage as agreed are external, same having been made by the government whom the carriers have no control. To this extent, the measures imposed by the governments are extraordinary factors which may justify the delay or cancellation of the flight by the operating carriers. Nonetheless, pleading Covid-19 as extraordinary circumstances is not absolute; it does not apply automatically to all contracts of carriage by air within the period of the outbreak. Its applicability depends on the circumstances of each case. For instance:

- i. When was the contract of carriage made?
- ii. When was it supposed to be performed?
- iii. Where is the place of performance? (departure and arrival airports)
- iv. What was the nature of restriction in the place of performance?
- v. Was the restriction in the place of performance foreseeable at the time of the contract?
- vi. Was it possible for the operating carrier to offer re-routing before the restriction became effective?
- vii. Was it possible for the operating carrier to properly cancel the flight?
- viii. Was there a notice of cancellation of the flight, and was the cancellation in compliance with the applicable aviation regulation?
- ix. Was the passenger aware of the restriction? Did he take any step to mitigate his loss?
- x. What was the nature of the flight cancelled? Domestic, international, connecting flight?

Increasingly restrictive travel bans have necessitated the widespread cancellation of flights. Both in NCARs, Part 19 and the under the EC Regulation 261/2004 airlines are obligated to provide passengers with reimbursement or re-routing, along with care/assistance, in the event of the cancellation of flights which fall within the scope of the regulation. In an attempt to find solution to the impact of Covid-19 on air transportation *vis a vis* cancellation of flights, the European Commission on the 18<sup>th</sup> of March, 2020 issued Interpretative Guidelines on EU Passenger Rights Regulations in the context of the developing situation with Covid-19<sup>45</sup> to the effect that Covid-19 amount to extraordinary circumstances capable of exonerating carriers from liability for cancellation of flight. Consequently, the understanding in the European Union is that air passengers are not entitle to compensation where their flight is cancelled due to the outbreak of Covid-19. Nonetheless, passengers whose flights are cancelled are still expected to be refunded the cost of their tickets.<sup>46</sup> Additionally, passengers may still be entitled to be cared for<sup>47</sup> by the carrier. The case is not different in the United States of America as passengers are entitling to reimbursement of their flight ticket, where their flight is cancelled due to Covid-19. Specifically, the United States Department of Transportation in April, 2020<sup>48</sup> issued an Enforcement Notice clarifying, in the context of the 2019 Novel Coronavirus (Covid-19) public health emergency, that United States and foreign airlines remain obligated to provide a prompt refund to passengers for flights to, within, or from the United States when the carrier cancels the passenger's scheduled flight or makes a significant schedule change and the passenger chooses not to accept the alternative offered by the carrier. The obligation of airlines to provide refunds, including the ticket

<sup>44</sup><https://ncaa.gov.ng/documents/advisory-circulars/covid-19-advisory/update-on-clarification-on-flight-restriction-into-nigeria-due-to-covid-19-pandemic/> accessed 28<sup>th</sup> June, 2020. See also, Address by H.E. Muhammadu Buhari, President of the Federal Republic of Nigeria on the Covid-19 pandemic Sunday 29<sup>th</sup> March, 2020 available at <https://www.premiumtimesng.com/coronavirus/384753-what-buhari-said-about-covid-19-movement-restriction-in-lagos-ogun-abuja-full-text.html> accessed 12<sup>th</sup> June, 2020.

<sup>45</sup> European Commission, Commission Notice 18<sup>th</sup> March, 2020, 'Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with Covid-19' available at [https://ec.europa.eu/transport/themes/passengers/news/2020-03-18-covid-19-guidance-eu-passenger-rights\\_en](https://ec.europa.eu/transport/themes/passengers/news/2020-03-18-covid-19-guidance-eu-passenger-rights_en) accessed 29<sup>th</sup> June, 2020.

<sup>46</sup> The EU had since rejected calls by carriers to relax EU rules and allow an EU-wide waiver of refund obligations due to Covid-19. See Strauss & Abnett, 'Airlines Must Refund Flights Cancelled Because Of Coronavirus: EU', April 8<sup>th</sup> 2020 available at <https://www.reuters.com/article/us-health-coronavirus-eu-transport/airlines-must-refund-flights-cancelled-because-of-coronavirus-eu-idUSKCN21Q2L2> accessed 28<sup>th</sup> June, 2020.

<sup>47</sup> The right of the air passengers to be cared for in the event of delay or cancellation of flight is recognized in Article 9 of Regulation 261/2004. In Nigeria it is provided for in NCARs, 2015, s.(19)(10) to mean 'where reference to care is made in this section, passengers shall be offered free of charge : (i) refreshments such as water, soft drinks, confectioneries / snacks ; (ii) a meal ; (iii) hotel accommodation ; (iv) transport between the airport and place of accommodation (hotel or other accommodation). 19.10.2 In addition to section 19.10.1, passengers shall be offered free of charge, two telephone calls, SMS or emails.

<sup>48</sup> See Washington Post, Friday April 3, 2020 'U.S. Department of Transportation Issues Enforcement Notice Clarifying Air Carrier Refund Requirements, Given the Impact of COVID-19' available at <https://www.transportation.gov/briefing-room/enforcement-notice-regarding-refunds-carriers-given-unprecedented-impact-covid-19> accessed 30<sup>th</sup> June, 2020.

price and any optional fee charged for services a passenger is unable to use, does not cease when the flight disruptions are outside of the carrier's control (e.g., a result of government restrictions).

In Nigeria, there is no specific guideline at the moment addressing the fate of passengers whose flights are or were cancelled due to the Covid-19 pandemic. However, it is submitted that the outbreak of Covid-19 and the eventual suspension of all commercial flights in, within and out of Nigeria is clearly a case outside the control of the carriers, and can rightly be subsumed in the context of any other condition as captured in the definition of extraordinary circumstances under section 19(1)17, NCARs, 2015. Covid-19 pandemic is not a mechanical, climatic or operational condition. It is socio-political and fully represent the omnibus *any other condition* in the definition. It follows that Covid-19 could be successfully pleaded as a justification for the cancellation of flight, with the concomitant effect of exempting the carrier from liability in compensation. This is a general proposition. But was the ban on air travels in Nigeria due to Covid-19 not predictable or foreseeable to a reasonable carrier? The answer depends on the peculiarity of each case which could be clarified through answers to the questions formulated above. It is submitted that although the authority now seems settled that air carriers may not be liable to pay compensation when the contract of carriage is cancelled due to the closure of airport, there is still a caveat. Where the air carrier was aware of the closure of the airport or had cause to know of an impending closure, it should not be allowed escape liability for compensation if its flight is cancelled due to the eventual closure of the airport. Conversely information or confirmation of information on free passage and the state of the airport is an obligation of the carrier. This is apposite because it is inherent in the operation of carriage by air for the carrier to seek and obtain relevant information as to the route of carriage.<sup>49</sup> Thus unless the closure of the airport is sudden and unanticipated the carrier should not be allowed to plea extraordinary circumstances as defense to liability for cancellation of flight. Thus, where a passenger (in rebutting the carrier's defence) can show that a particular airline had opportunity of cancelling the flight within the window provided in section 19(7)(1) iii and iv, (that is to say, 24 hours for domestic flight, 14 days or 7days or even 3days via re-routing for international flight), but failed to do, it may be liable to pay compensation. In other words, airlines even in the face of Covid-19 had opportunity to lawfully cancel the carriage within the NCARs regulation. This was possible especially, when the proscription of flight did not take immediate effect. So, where the operating carrier fails to do so, it cannot be heard to simply rely on Covid-19 as extraordinary circumstances. Similarly, where a carrier in spite of the knowledge of the ban on commercial flights misrepresented<sup>50</sup> to the passenger that it could operate into or out of the country within the period, and the representation failed, the carrier would not be allowed to plea extraordinary circumstances for failure to carry the passenger as agreed. Again, where the carrier claimed to have necessary approvals from the Nigerian Government to operate its flight within the period of Covid-19, and such representation was relied upon in the course of contract, a subsequent plea of extraordinary circumstances would not avail the carrier. Therefore, carriers hoping to rely on Covid-19 as a defence to action for cancellation of flight must convincingly show the nexus between the extraordinary circumstances (Covid-19) and the cancellation. The carriers must also show that the cancellation was unavoidable even if all reasonable steps were taken. This is the case because the burden of proving extraordinary circumstances is on the carrier.<sup>51</sup> In any case where flight had been cancelled due to Covid-19, carrier may choose to offer re-routing to passengers or offer voucher<sup>52</sup> which we would enable the passenger still travel with the same airline on the same ticket but on a different day, perhaps after the extraordinary circumstances (lockdowns or ban) have been lifted. The carriers stand to benefit more from offering a choice of re-routing or voucher.<sup>53</sup> Nonetheless, offering re-routing or vouchers must not in any way replace or oust the right of the passenger to demand for reimbursement (refund) of air ticket. The right to reimbursement is immediate, where the passenger opts for it. The passenger does not need to await the suspension of the extraordinary circumstances before activating the right to reimbursement.<sup>54</sup> Whilst passengers may additionally be entitled to

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<sup>49</sup> This is at the core of International Air Transport Association (IATA) objectives.

<sup>50</sup> NCARs, 2015, s.19(19)(2) prohibits misrepresentation. It is further provided in s.19(19)(5) 'No airline shall display deceitful departure time at its counter'

<sup>51</sup> NCARs, s (19)(7)(4) on burden of proof on the carrier.

<sup>52</sup> As the moment, British Airways, Virgin Atlantic and other airlines are offering vouchers, rebooking or re-routing to their passengers whose flights schedule have been affected/cancelled due to the Covid-19 outbreak. See <https://flywith.virginatlantic.com/gb/en/news/coronavirus/cancelled-flight.html>; <https://www.britishairways.com/engb/inflight/incident/coronavirus/latest-information> accessed 20th June, 2020.

<sup>53</sup> For instance, Graham McGrath reported that Aer Lingus Airlines had issued 250,000 vouchers and refunds to customers due to cancellations of their flights occasioned by the outbreak of Covid-19. See Graham McGrath, 29<sup>th</sup> June, 2020, 'Aer Lingus process 250,000 COVID-19 flight refunds as cancellations ongoing' available at <https://extra.ie/2020/06/29/news/irish-news/aer-lingus-flight-refunds> accessed 30th June, 2020.

<sup>54</sup> See Michelle Baran, April 7, 2020 'Airlines Told They Must Issue Refunds for Coronavirus Cancellations' available at <https://www.afar.com/magazine/airlines-have-to-pay-refunds-for-their-covid-19-cancellations-dot-says> accessed 28<sup>th</sup> June, 2020.

right of compensation including the right to further compensation<sup>55</sup> against the carrier for Covid-19 related cancellation of flight, the law is still trite that parties have a duty to mitigate their loss. A passenger who instead of embracing an opportunity to return home or take steps to ameliorate his inconveniences opts to lodge in a hotel unreasonably believing the Covid-19 lockdown on airports would soon be over cannot be heard to demand refund from the carrier for incidental loss outside reimbursement.

#### **4. Conclusion**

This paper has answered the question whether Covid-19 can rightly be considered as extraordinary circumstances for the purposes of justifying the delay and cancellation of passengers' flight. The paper also clarified that where a successful plea of extraordinary circumstances is upheld in claims for compensation arising from damages for cancellation of flight, the operating carrier shall be exonerated from liability to pay compensation. However, the liability of the carrier to reimburse or refund the cost of the air ticket of the passenger is not obliterated. The passenger is still entitled to be refunded his or her air ticket despite the cancellation having been induced by Covid-19. It is also clear from our discussion that where the circumstances warrant, the operating carrier will additionally be obligated to take care of the passenger during the period of the cancellation. As an alternate to seeking reimbursement of cost of flight ticket, the passenger may accept to be re-routed to his destination or return to the point of arrival where continuing with the flight becomes useless to him or her.<sup>56</sup> We have noted quite importantly that the mere outbreak of Covid-19 does not suffice to activate a defence of extraordinary circumstances. The operating carrier has a burden to show a link between the particular delay or cancellation and the ban on air travel or closure of airport as the case might be. This linkage can best be understood by providing answers to the ten questions formulated in this work. The principle of equity and contract require parties whose contract has been breached to take steps to mitigate their loss. Passengers are therefore advice to reschedule their travel plans in a manner to minimize their loss, example by returning home or seeking alternative means of travel when it is highly probable that their flight will suffer delay or cancellation. For the operating carriers, it is recommended that they can actually cancel the flight within the regulatory regime of their route notwithstanding the impact of Covid-19. Flights can be cancelled within 24 hours to 7days depending on the nature of the flight. Rather than hope for the best in the face of the Covid-19 triggered uncertainty, carriers can quickly notify their customers of cancellation. In such way, the issue of compensation with the accompanying burden of proving extraordinary circumstances would have been legally obviated.

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<sup>55</sup> NCARs, 2015, s.19(13) recognize the right of air passengers to seek further compensation, in the event the compensation provided in the regulation is grossly inadequate in the peculiar circumstances of the case.

<sup>56</sup> EU Regulation 261/2004 provides for the right to reimbursement and rerouting. In Nigeria, the same right is provided in NCARs, 2015, s.19 (9).