DOCTRINE OF EXCLUSION AND LIMITATIONCLAUSES IN AN AGREEMENT: APPROACHFROM THE CONTRACT OF CARRIAGE BY AIR

Abstract

The cardinal principle of law of contract is that, right from the point of entering into an agreement, parties are and should be allowed to exercise their free will to bargain in any form of contract they wish to enter into. This is called doctrine of consensus ad idem. It is the consequence of this doctrine that gives life to the contractual elements thereby validates all the exclusionary and/or limiting clauses inserted in the agreement between the parties. Be that as it may, Air carrier and passenger(s) are allowed to insert any of the clauses provided they will act within the general principle of law of contract and the various international and domestic instruments guiding the contract of carriage by air. Adopting various interpretations of Montreal Convention 1999 by the Nigerian courts, the paper therefore explores how the doctrine of exclusion and limitation clauses are being applied to the contract of carriage by air and under what circumstances would the doctrine be jettisoned in the contract of carriage by air? The paper is doctrinal in nature; thereby gather information from both the primary and secondary sources of law. It finds that the general principle of exclusion and limitation clauses is applicable to the contract of carriage by air; however, the circumstances under which the clauses may be jettisoned are well and clearly stated in both the international convention and various domestic laws on carriage of passengers, goods and cargo. The paper concludes and recommends that the validity and enforceability of clause depend on the effectiveness of the doctrine of consensus ad idemby the parties as well as other terms of the in contractual agreement. However, the notice of the clauses should be made mandatory rather than its failure from the air carrier be treated as a mere irregularity. This will further sensitize the passengers as to the nature and consequence of the clause inserted into the air ticket.

Keywords: Exclusion, Limitation, Contract, Carriage by air, *consensus ad idem,*

1.0 Introduction

Parties who are ready to bind themselves contractually are duty bound to enter into a binding agreement which is enforceable in a court of competent jurisdiction. This obligation is legally referred to as contract.[312]The concept of *consensus adidem*portends that parties are at liberty to insert any legal clause including those that may limit or exclude their liabilities. While it is obvious that a party with superior bargaining power has the ability to insert the clauses into the contractual document, yet the law is not silent on the protections available to the other party who has less bargaining power.

The ability to insert a clause whereby a party will totally exclude his liability from the contractual obligation(s) is referred to as exclusion clause on one hand, while the process whereby the liability is reduced to a certain percentage is referring to as limitation clause. Thus before a contract is finally entered into, parties may limit certain obligations they would

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[312] G.H. Treitel, *The Law of Contract*(Sweet and Maxwell, London, 1979), p.1

haveexpected to perform.[313] A limitation clause practically limits the liability of the parties for certain breaches that may arise in the contract.[314]Both Exclusion and Limitation clauses are used interchangeably to mean the same thing, but in practical sense, they are two different concepts in that Exclusion clause absolutely exempts parties from liability.[315] Parties are at liberty to include the two concepts in a contractual agreement.[316] Example of this can be found in contract of carriage by air.

In a contract of carriage by air, carrier usually inserts these two concepts to limit certain liabilities and as well to totally exempt it from liabilities. The simple reason is that contract of carriage by air is a form of standard form of contract[317] wherein a party (air carrier) who has strong bargaining power is at liberty to dictate the terms of carriage while the other party(passenger) has option to consent to the terms or not even enter into the agreement at all.[318] This means that the concept of 'take it or leave it' is one of the conditionprecedentsthat must be strictly adhered to in a contract of carriage by air.
It should be noted that the concept of limitation clause is very important to air carriage, yet there are exceptions to their application, which are well defined and stated under the general principle of law of contract.[319]Therefore since a contract of carriage by air is a form of contract, this clause can be found in such a contract.[320] Contract of carriage by air can be defined as the one whereby 'one of the parties, the air carrier, commits itself to take persons or things, from one place to another by aircraft and by air and the other party pays a price thereof'.[321]It should be noted that the general principle of law of contract is equally applicable to this form of contract.`

The nature of clauses in thecontract of carriage by air is the same with that of the general principles of law of contract. By this, the effect of the clauses is practically to reduce or eliminate the liability of an earring party in the contract of carriage by air. Therefore, one of the condition precedents before the limitation clause becomes operative is that there must be a breach of contractual term.

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[313]*Co-operative Development Bank Plc. v. MfonEkanem&Ors* (2008) 12 NWLR (Pt. 910) p. 420. See also E.E. Alobo, *Law of Contract,* 2ndEdition,(Princeton & Associate Publishing Co. Ltd, Lagos, 2016) *p. 125.*
[314] Open Edu, 'Exclusion clauses' Open.edu <http://www.open.edu/openlearn/society-politics-law/exclusion-clauses/content-section-1> Accessed on 22nd March, 2018.
[315] P.C Ananaba, *Esential Principles of Nigerian Law*, 2001, Chapter 4, p. 35-101, at 71, E.E. Alobo, *Law of Contract*, 2ndEdition,(Princeton & Associate Publishing Co. Ltd, Lagos, 2016), p.124, Bolaji Alabi, *Business Law in Nigeria,* Revised Edition, (Bolaji Alabi & Co., Yaba, Nigeria, 2010), p. 61. I. E. Sagay, *Nigerian Law of Contract*, 2nd edition, (Spectrum Books Limited, Ibadan, 2000), p. 159.
[316]Ibid.
[317]*Schroeder Music Publishing Co. Ltd. v Macaulay*[1974] All E.R. (pt. 616) at 624.
[318] E.E. Alobo , *Law of Contract, p.126.*
[319]I.E. Sagay, *Nigerian Law of Contract,* 2nd Edition,(Spectrum Books, Ibadan, 2000), p.159
[320]I.E. Sagay, *Nigerian Law of Contract* (Spectrum Books, Ibadan, 2000), p.159-160
[321] See Videla Escalada, *Aeronautical law,* Sijthoff & Noordhoff, USA, 1979, p.361. See also Ismail Adua Mustapha and Joana Kolo-Manma, Rights of Passengers in the Contract of Carriage by Air: A critical Approach under the Nigerian Civil Aviation Law, Vol. 6 (1), *Africa Nazarene University Law Journal*, 2018, p.2.

2.0 The Nature of Exclusion and Limitation Clauses

Exclusion and Limitation clauses are employed in the standard form of contracts.[322] Standard Form of Contract can be defined as a contract prepared by a party in a printed form stating all the conditions including the exclusion or limitation terms which the other party is to accept without negotiation.[323] It is submitted that the characteristics of this form of contract are: (1) It is usually in printed form prepared by a superior party; (2) all the conditions of contract are set out in the agreement; and (3) the other party has no negotiating power; that is he should enter into contract as it is or leave it. Example of contract of this nature is Contract of carriage by air wherein the receipt is incorporating the terms and conditions of carriage including the exclusion, exemption and limiting clauses are stated in the air ticket. It is therefore pertinent to state thatpassenger, absolutely, has nothing to add or remove from the clauses rather than to accept and fly with a chosen air line otherwise he will not travel. In this paper,this is referred to as the principle of take it or leave it.

While exclusion clause totally or wholly exonerates the party inserting it from liability or "shy away from his contractual liability thereby depriving the other party his remedy for the breach of the term in the contract",[324] the limitation clause is the one inserted into a contractual agreement to reduce the liability of the party who inserted it for the breach of the term in the contract.[325] The court is prepared to accept the validity of these clauses in so far they are incorporated in good faith and with the consent of the inferior party. Thus, the question therefore is: what is the status of clause(s) in a signed or unsigned document? This poser shall quickly be addressed seriatim.

2.1.0 Exclusion and Limitation Clauses in a Signed document.

To begin with, a person who signs a document, whether contractual or otherwise, is bound by it provided he is not induced into signing same by fraud[326]or duress[327] or misrepresentation[328].[329] This assertion finds support when an author states thus:

> One who signs a written document cannot complain if the other party reasonably relies on the signature as a manifestation of assent to the contents, or ascribes to words used in their reasonable meaning.[330]

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[322] E.E. Alobo, *Law of contract,* 2nd edition, (Princeton publishing Co. Ltd, Lagos, 2016), p. 125.
[323] Ibid.
[324] Ibid.
[325] Ibid.
[326]Fraud literally means ' the crime of cheating in order to get money or goods illegally' or 'something that is not good, useful as people claim it', see A.S Hornby, *Oxford Advanced Learner's Dictionary*, 7th edition, (Oxford University Press, Oxford New York, 2005), p. 592.
[327] Literally means "Coercion or force". It is technically defines as asserting a severe or grave threat into the personality or relatives or property of a party to the contract, thereby inducing such a party to enter into a contract. The effect therefore vitiates the doctrine of consensus ad idem which is the cardinal principle of contract. See E.E. Alobo, *Nigerian Law of Contract*, at pp.248-252.
[328]Misrepresentation is false statements of fact which is intended and actually induced another party enter into a contract. See *Cadbury Nigeria Plc v. R. Benkay Nigeria Ltd* (2013) LPELR-22259 (C.A).
[329] I.E Sagay, pp. 167-168.
[330] See Waddam S.M, The Law of Contract, Toronto: Canadian Law Book Inc., 2005.

In the light of the above, it is clear that a party who signs a contractual agreement that incorporates exclusion and/or limitation clause shall be bound by it unless he can prove that he was induced into signing by fraud or misrepresentation or mistake.[331] It should be noted that the fact that the signer failed to read the document before he signed would not constitute a defence.[332] In *Blomberg vs. Blackcomb skiing enterprises ltd*[333]*,* the British Columbia Supreme Court observed as follows:

> "I think that this plaintiff was well aware that the document he signed contained exclusion clause which limited his legal rights to sue, which he knew whether or not he actually read the document. With respect, his stand that he did not read it because he had no eyeglasses or that he did not understand the document is purely self-serving in my view. The plaintiff chose not to examine it or was careless or unconcerned about the nature of the document."[334]

It is submitted that the above judicial authorities suggest that a party shall be bound by the exclusion or limitation clause in a contractual document if he is negligent in reading or for not reading a document before he signs; and that the vitiating factors such as fraud, mistake and misrepresentation would be a valid defence to negate the effect of any of these clauses.

2.2.0 Exclusion and Limitation Clauses in an Unsigned document

Validity and enforceability of an unsigned document containing exclusion and/or limitation clause depend on whether the document is or not a contractual document. A document is referring to as a contractual only if it is known to the other party that such incorporates or contains the exclusion or limitation clause as distinct from voucher, receipt or ticket.[335] On the other hand, non-contractual documents, such as receipt, ticket to mention a few, are those the notice of exclusion and/or limitation must be brought to the attention of the other party otherwise the validity and enforceability will be discountenanced with.[336] Examples of unsigned contractual documents are air ticket issued to a passenger and Bill of lading issued to a shipper of goods.[337]

It submitted that the operation, validity and enforceability depend on the nature of the document. Is the document contractual or non-contractual in nature? Where it is contractual, the court must enforce the operation and validity of the clause, if however, the document is a non-contractual, the task before the person relying on same is to show that he has brought the clause to the attention of the other party otherwise it will be inoperative, invalid and unenforceable.
It is submitted that the air ticket is a contractual document incorporating exclusion and limitation clause.What therefore are the status exclusion and limitation clauses contained in air

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[331]*Good-speed v. Tyax Mountain Lake Resort Ltd* (2005) BCSC 1577, (2006) BCWLD 579. See also *Curtis v. Chemical Cleaning and Dyeing Co.* (1951) 1 KB 805, (1951) 1 All ER 631.
[332]*L'Estrange v. Grauco Ltd* (1934) 2 K.B 394 (C.A) 433, at 406-407.
[333] (1992) 64 (BCLR) 51.
[334] Ibid.
[335]E.E. Alobo, *Law of Contract*, at p. 127.
[336]Ibid.
[337] Parker v. South Eastern Railway Co. (1877) 2 CPD 416, at 422.

ticket as a contractual document issued to a passenger? This is paper analyses this poser in the next paragraph.

3.0.0 The Legality and Validity of Exclusion and Limitation Clauses in the Air Ticket Under the Contract of Carriage by Air.

Legality and validity of the exclusion and/or limitation clause(s) incorporated into the air ticket in a contract of carriage by air is determined by the air carrier's level of compliance to the provisions of the *Convention for the Unification of Certain Rules for International Carriage by Air*, 1999.[338]The Convention entered into force on the 4th November, 2003 as a result of the United State of America's ratification on the 60th day after it had been adopted by the international community.[339]Accordingly, sections 21 and 22 of the 1999 Convention laid down various forms of exclusion and limitation clauses that can be inserted in a contract of carriage by air. These shall be addressed in the next paragraph.

3.1.0 Exclusion and Limitation Clauses in cases of death or Passenger injury

The Montreal Convention, 1999 provides thus:

> 1. For damages arising under paragraph 1 of Article 17 not exceeding 100,000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.
> 2. 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 Special Drawing Rights 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."[340]

It is submitted that even though the Montreal Convention, 1999 does not mention the limit of liability in the cases of death or injury to passengers, a cursory looking and reading suggest that the Montreal Convention, 1999 is referring 100,000 Special Drawing Right as the limit of compensation, provided that the air carrier is not negligent in any way or that the negligence so caused was as a result of a third party's fault. Then, the air carrier would be able to rely on limitation clause.

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[338]*Convention for the Unification of Certain Rules for International Carriage by Air*, done at Montréal on 28 May 1999, opened for signature on the 28th May, 1999, reprinted in US Treaty Doc 106-45, 19999 WL 333292734. See also International Air Transport Association, The Liability Reporter, vol. 12, February, 2009 (Herein after referred to as "Montreal Convention of 1999").

[339] Ismail Adua Mustapha and Joana Kolo-Manma, Rights of Passengers in the Contract of Carriage by Air: A critical Approach under the Nigerian Civil Aviation Law, Vol. 6 (1), Africa Nazarene University Law Journal, 2018, p.2.

[340] Montreal Convention, 1999, art. 21.

3.2.0 Exclusion and/or Limitation Clauses in cases of delay in carriage of Passengers

According to the Montreal Convention, 1999, the limits of damages awardable to the affected passengers are 4,150 Special Drawing Rights. In this respect, the Montreal Convention, 1999 provides:

> In case of damage caused by delay as a specified in Article 19 in the carriage of persons, the liability of the carrier for each passenger is limited to 4,150 Special Drawing Rights.[341]

It should be noted that the air carrier shall be totally excluded where it can prove that the damage occasioned was not caused by its negligence or that of its servant.[342]The Montreal Convention 1999 does not prescribe a strict liability[343] remedy for damages resulting from delay. A carrier is liable for damage to passengers, baggage, or cargo caused by delay, but the carrier is not liable for damage caused by delay if the carrier can show that she, her servants and agents took all reasonably necessary measures to avoid the damage or that such required measures were impossible to take. [344] Neither the Montreal Convention 1999[345] nor the earlier Warsaw Convention 1929[346] defines what delay is. It is submitted that the delay as envisaged under the Convention mustbe one that occurs in the carriage by air. This translates to mean the period after the contract of carriage has been concluded, when the flight ticket has been purchased, and before the conclusion of the carriage by air, when the aircraft gets to its destination.[347]Consequently, delay can happen when a passenger is denied carriage from the time stipulated in the air ticket without lawful justification. Thus, a flight delay is a modification of the guaranteed time or date of arrival or departure of the aircraft.

3.3.0 Limitation clauses in cases of destruction or Loss of Baggage or Cargo

The meaning or definition of the word "destruction" is surprisingly omitted in the Convention. However, the Black's Law dictionary defines the term as 'the act of destroying or demolishing; the ruining of something; harming that substantially detracts from the value of ...'.[348] Therefore, any act of air carrier, its agent or servant that demolishes or ruins or substantially reduces the value of a passenger's baggage or consignor's property could be regarded as destruction in the light of Montreal Convention 1999.

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[341] Montreal Convention, 1999, Art. 22(1)

[342] Ibid, Art. 19.

[343] A person is strictly liable for an intentional or unintentional act of a party knowing fully that what he brought into his/her property or land will cause damage to his neighbor. The rule is stated in the case of *Ryland v. Fletcher* UKHL 1, (1868) LR 3 HL 330.

[344]Ibid (Art. 19)

[345]*Convention for the Unification of Certain Rules for International Carriage by Air*, done at Montréal on 28 May 1999, opened for signature on the 28th May, 1999, reprinted in US Treaty Doc 106-45, 19999 WL 333292734. See also International Air Transport Association, The Liability Reporter, vol. 12, February, 2009 (Herein after referred to as "Montreal Convention of 1999").

[346]*Convention for the Unification of Certain Rules for International Carriage by Air*, done at Warsaw, signed on 12 October, 1929, effective on 13 February, 1933 (herein after referred to as "Warsaw Convention 1929"). See Showcross & Beaumont, *Air Law,* 4th Edition,(Butterworth, London, 1977.

[347]G.N. Tompkins, *Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States: From Warsaw 1929 to Montreal 1999* (Wolters Kluwer Law and Business, Austin, 2010), p.227

[348] SeeBryan A. Garner,ed.,Black's Law Dictionary, 8th edition, Thomson West Publishing Co, USA, 1999, p.479.

Consequently, the limit of liability in that respect as patently stated in the Convention 1999 is:
In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of 17 Special Drawing Rights per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so require. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the consignor's actual interest in delivery at destination."

> "In the carriage of baggage, the liability of the carrier in the case of destruction, loss,damage or delay is limited to a sum of 1000 Special Drawing Rights per kilogram for each passenger unless the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so require. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the consignor's actual interest in delivery at destination."[349]
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> "In the carriage of Cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of 17 Special Drawing Rights per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so require. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the consignor's actual interest in delivery at destination."[350]

It is submitted that the provisions of articles 22 (2) and (3) are similar in wording, character and purpose in that certain obligations are placed on the passenger and consignor before they can claim full value of their respected property. They are however different in their application, in that while article 22 (2) is strictly applicable to passenger's baggage, article 22(3) is applicable to consignment.

The above provisions of the Convention are in two folds: (1) Where the interest in the property is not declared; and (2) Where the interest in the baggage or consignment is declared and registered.

Where the interest in the baggage or consignment is not declared to the carrier, the operating and valid limitation clause as regard payment of compensation is 1000 Special Drawing Rights for the baggage while 17 Special Drawing Rights per kilogram to the victim consignor. Therefore, the consignor's or passenger's act of none declaration of interest and payment of supplementary sum for the purposes of registering the cargo or baggage involved will certainly exclude the carrier from paying full value of the baggage or consignment.

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[349] Montreal Convention 1999, art. 22 (2).
[350] Ibid, art. 22 (3).

It is submitted that one fundamental condition, according to a case law is that the carrier is liable for damage, destruction, or loss of cargo only if the cause of the damage occurred during the carriage by air. Thus, in the Nigerian case of *Emirate Airline v. Tochukwu Aforka & Anor*[351], the Court of Appealreiterates that the carriage by air consists of the period during which the cargo is in charge of the carrier.Thus, it does not matter whether the cargo is already in the air or not.

However, the limitation in respect of carriage of baggage will not apply if the carrier or its agents intended to cause loss or damage, or if the loss or damage was done recklessly with the knowledge that loss or damage could result.[352]This could be referred to as willful misconduct as provided for in article 25 (1) of the Warsaw Convention, 1929 which provides thus:

> The carrier shall not be entitled to exclude or limit his liability if the damage is caused by his willful misconduct.[353]

In *American airlines v. Ulen*[354], the court held that an act donewith the knowledge that it was likely to result in injury to apassenger constituted willful misconduct. Also in the case of *Horabin v. British Overseas Airways Corporation*[355], the court held:

> To be guilty of willful misconduct, the person concerned must appreciate that he is acting wrongfully, or is wrongfully omitting to act, and yet persists in so acting or omitting to act regardless of the consequences, or acts or omits to act with reckless indifference as to what the result may be.

The Nigerian Court of Appeal in *HARKA AIR SERVICES LIMITED v. KEAZOR*retreaters the above judicial position when the court maintains that an act that relates to proof of a conscious intent to do, or omit doing, an act from which harm to another results constitutes willful misconduct.[356]

3.4.0 Limitation clauses in cases of Delay of Baggage

While the term "delay" or what constitutes delay is not stated in the convention 1999, the paper shall adopt the definition or meaning ascribed to it in the Black's law dictionary and as well dissects case law to assess what constitutes delay as regard contract of carriage by air. Accordingly, the Black's Law Dictionary interprets "delay" to mean ' the act of postponing or slowing', an instance at which something is postponed or slowed'…[357] Therefore, delay in respect of contract of carriage by air can be defined as the carrier's act of postponing or slowing in the execution of contract of carriage by air. The form of delay in this regard includes but not limited to delay in carriage of passenger or baggage or consignment.

It is submitted that the limiting and/or excluding clause(s) in respect of delay in the carriage or delivery of passengers' baggage is so cleared in the Convention 1999 in that article 22 (2).

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[351][2014] LPELR-22686 (CA)
[352]Montreal Convention, 1999, art. 22(5).
[353] Warsaw Convention, 1929, art. 25.
[354][1949] 186 F. 2d 529, 533 D.C. Cir
[355][1952] 2 All ER 1006.
[356][2011] 2 CLRN 216
[357] See Bryan A. Garner,ed., Black's Law Dictionary, 8th edition, Thomson West Publishing Co, USA, 1999, p.458.

Therefore, the paper's discussion in the preceding sub-paragraph suffices. However, if the delay is "caused or contributed to by the negligence or wrongful act or omission" of the passenger, then the "air carrier shall be wholly or partly exonerated from its liability."[358] Also the carrier would be excluded from liability if it can prove that it does everything that could reasonably be done to prevent the delay, then the air carrier will not be held liable. The court refused to hold a carrier liable "where delay was caused by atechnical defect of the aircraft" in *Martel v. Air France.*[359]The carrier "had relied on the fact that according to the manufacturer's instructions for operation, the hydraulic equipment of an Airbus had to be checked only after 230 hours" of flight; however, the pumphad broken down at takeoff only after 179 hours.The court "considered this a case of force majeure" and held that since the carrier had taken all reasonable measures, it would not be found liable for the delay. Delay caused by external factors cannot give rise to liability on the part of the carrier.

It should however be noted that the burden of proving all reasonable measures to avoid delay is placed on the carrier otherwise it shall not be able to invoke the exclusion and/or limiting clause(s) in the contract of carriage by air. It is submitted that the reason why the burden is on the carrier is that, it is the carrier who is relying on the clauses to either exonerate or limit itself of the liability that follows from the delay.

Furthermore, it is not a defence for an airline to raise issues such as "technical failure," "bad weather," "crew problems"or"cleaning" as reasons for delay without pleading and proofdetails of the delay beyond balance of probability. This is practically demonstrated by giving evidence that it has taken all reasonable measures toprevent the delay,otherwise the carrier would not be able to invoke any of the clauses.[360]To give rise to carrier liability, the delay must last for a certain length of time.[361]

4.0.0 THE EFFECT OF EXCLUSION AND LIMITATION CLAUSES

Exclusion and limitation clauses are reliable defences open to a party that is air carrier who incorporated them into the contract of carriage by air. For all purposes and intent, the consequence of exclusion clause is to completely bar airline passenger from claiming damages from the party who relies on it on one hand, limitation clause reduce the damages awardable to a victim of the circumstances in a contractual relationship on the other hand. This position is succinctly replicated in the case of *Emirates Airline v Uzoaku Kenechukwu Ngonadi*[362]where the court stated thus:

> The purport of a limitation of liability clause is to permit contracting parties to reduce or eliminate the potential for

[358] The Nigerian Civil Aviation Act, 2006, Sched. III, art. 20.
[359][1984] RFDA Courdáppel (CA) Aix-en-Provence
[360] In several cases, the National Board for Consumer Complaints in Sweden has referred to "technical failure" without being specific in details, as a basis for liability of the carrier, because the burden of proof lies on it in accordance with chapter 9, section 20 of the Swedish Aviation Act.
[361] O A Adediran., 'Current Regulation of Air Carriers's Liability and Compensation Issues in Domestic Air Carriage in Nigeria' (2106) 81(1-31) JALC
[362] [2014] All FWLR 1603 133

direct, consequential, special, incidental and indirect damages, should there be a breach of contract.[363]

4.1.0. Exceptions to the applicability of Exclusion or Limitation clause in a contract of carriage by air

It is a trite principle of law that to every general rule there is always exceptions. Therefore, there are exceptions to the concept of limitation clauses in a contract of carriage by air. These exceptions are basically provided under the general principle of law of contract as well as under the Montreal Convention, 1999 and the Nigerian Civil Aviation Act, 2006. These exceptions shall quickly be examined:

4.1.1. Breach of Fundamental term in a contract of carriage by Air

A term is said to be fundamental when it possesses the characteristics of being underlies the contract itself. Thus, failure to perform or comply with it renders the contract rescinded by the party who failed to perform it. It is therefore a term which spells out the purpose of the contract. The term has been judicially defines as 'something which underlies the whole contract so that if not complied with, the performance becomes totally different from which the contract contemplates'.[364] Consequentially, the breach of Fundamental term is greater in effect than the condition. While the breach of fundamental term implies that the contract is rescinded by the party who fails to perform such term, thus no contract at all, the breach of condition implies that there was a contract but certain terms have been ignored by a party to the party.

Furthermore, in case of condition, a victim has option to either treat the contract as repudiated and claim damages or treat it as warranty thereby proceed with the contract and claim compensation, while the injured party has no option in case of breach of fundamental term than to claim damages for failure of the other party to perform the term which underlies the contract. Thus, in *Mekwunye v. Emirate Airlines*[365]. In that case, a passenger bought air ticket from the Emirate Airline which was confirmed thrice. On the day fixed for the performance of the contract, the airlines denied the passenger boarding and subsequently cancelled the ticket without just cause. The airlines neither provide alternative airline or accommodation nor refund the air fare. The passenger had to purchase another ticket from American Airline which was more expensive and longer route than the Emirate Airlines. In fact, the passenger was stranded for two days without explanation and apology thereby underwent serious stress and embarrassment. The passenger institutes an action before the Federal High Court Ikeja, Lagos for breach of fundamental term of carriage. The action succeeded,but no general damages was awarded. On appeal, the Court of Appeal upheld the decision of the lower court and award general damages and refund of ticket fare. On appeal to the Supreme Court, it was concluded that failure of the airlines to airlift the passenger as agreed in the air ticket is a breach of fundamental term. Thus, the airlines cannot rely on the exclusion or limitation clause in Article 9.3.1 of Emirate Condition of Carriage, 2006 contained in the air ticket to escape or limit its

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[363] Ibid at 1633

[364] Delving J. in the case of Smeaton Hanscomb & Co Ltd v. Sassoon I Setty Son & Co (No. 1) [1953] 1 W.L.R 1468 t 1484. See also I.E Sagay at p. 137.

[365] [2019] 9 NWLR (PT. 1677) 191 or (2019) LPELR-46553 (SC). See also *Cameroon Airlines v. Otutuizu supra*

liability. There the action of the air carrier amounts to complete repudiation of its contract with the passenger by the breach of fundamental term.

It is submitted that the judgment in that case is commendable in that a party cannot renege from what he promised to do the consequence of which the other party has suffered damage, but still want to benefit from the breach. Therefore, although, either of the clauses is a good defence, it is available where the agreement/term underlining the contract is fully performed.

4.1.2. No Notice

It is required that applicability of the Convention must be brought to the notice of the passenger before contract of carriage is performed. For all intent and purposes, the Convention states that the passenger shall be given written notice to the effect that where the Convention is applicable, it governs and may limit the liability of carriers in respect of death or injury and for destruction or loss of, or damage to, baggage, and for delay.[366] While the duty of the carrier is clearly spelt out with regard to notice on one hand, the Convention made a U-turn and treats non compliance as a mere irregularity that will not invalidate the contract of carriage between the carrier and passenger on the other hand.
It is submitted that this is a clear departure from the general principle of law of contract relating to exclusion and limitation clauses wherein failure to give adequate notice of the clauses will invalidate the clauses, thus invalid no matter how they are brilliantly couched. It is further submitted that the reason for the departure is not fetch from the fact that international contract of carriage is governed by the 1999 Montreal Convention and that the air ticket is classified as contractual document. Therefore the general principle of law of contract on limitation and/or exclusion clauses shall give way for the provision of Convention.

4.1.3. Wilful Misconduct

The term wilful misconduct is neither defined in the Convention nor in the Nigerian Civil Aviation Act. However, Oxford Advance Learner's Dictionary interprets the word 'Wilful' as ' of a bad or harmful action done deliberately,...'[367] or 'continuing to do what you want even after you have been told to stop or a deliberate damage' or when you know what you are doing is wrong'[368]. Furthermore, The Lexicon Webster Dictionary, written in American Spelling 'willful' interprets it to mean 'governed by one's own will without yielding to reason' or 'headstrong' or 'intentionally' or exceptionally stubborn'.[369]Black's Law Dictionary interprets the word to mean 'voluntary and intentional, but not necessarily malicious'.[370]According to Rolin, 'wilful or willful', when used in a crime, means 'only intentionally or purposely as

[366] Article 3(4) of the Montreal Convention 1999.
[367] See A.S Hornby, Oxford Advance Learner's Dictionary, 7th Edition, Oxford University Press, New York, 2003, p. 1684.
[368] See Longman Dictionary of Contemporary English, Third Edition, Pearson Education Limited, Edinburgh, 2000, p. 1638.
[369] See Mario Pei, The Lexicon Webster Dictionary, Vol. II, Delair Publishing Company, Inc., 1981, 1139.
[370] B.A Garner, Black's Law Dictionary, Eight Edition, Thomson West, United State of America, 2004, p. 1630.

distinguished from accidentally or negligently and does not require any actual impropriety;...[371] It is submitted that the term 'wilful' can be interpreted to mean voluntary, and/or intentional exercise of one's conscience or intention without internal or external influence.

The other term that goes together with 'wilful' in the Convention which needs operational definition is 'misconduct'. Thus, the term misconduct is interpreted in the Oxford Advance Learner's Dictionary to mean 'unacceptable behaviour, especially by a professional person' on one hand,[372] the Longman Dictionary of Contemporary English interprets it as 'bad or dishonest behaviour by someone in a position of authority or trust.'[373] A further interpretation or meaning of the term has been given to connote 'immoral conduct' or 'wrong or bad conduct' or 'misbehaviour' or 'mis management especially by a government official or military personnel'.[374] Black's Law Dictionary interprets it to mean 'dereliction of duty, unlawful or improper behaviour'[375].A well articulated meaning of the term was espoused in the Nigerian case of*Harka air services limited v. Keazor*whereHis Lordship, Rhodes-Vivour thus:

> Willful misconduct is a deliberate wrong act by a pilot, airline staff or its agent which gives rise to a claim for damages by passengers. When staff of an airline act with reckless indifference. Such unacceptable behaviour especially by a professional person amounts to willful misconduct.[376]

A careful perusal of the above definition reveals that any deliberate or intentional act to cause harm or damage to the passenger, or luggage or cargo and baggage will amount to willful misconduct. Therefore, a willful misconduct on the part of carrier, whether from its servant or agent who is acting within the scope of its employment will automatically bar the employer/carrier from raising the defence of limitation and/or exclusion clause. This position is hinged on the provision of the Convention which states as follows:

> The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment.[377]

This exception gained judicial backing in the case of *Cameroon airlines v Mr. Mike otutuizu*.[378] In that case, the court held that the carrier committed wilful misconduct, thus the respondent

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[371] See Rolin M.P and Ronald N.B, Criminal Law, 3rd edition, 1982, pp.875-876; See also B.A Garner, Black's Law Dictionary, Eight Edition, Thomson West, United State of America, 2004, p. 1630.
[372] See A.S Hornby, Oxford Advance Learner's Dictionary, 7th Edition, Oxford University Press, New York, 2003, p. 938.
[373] See Longman Dictionary of Contemporary English, Third Edition, Pearson Education Limited, Edinburgh, 2000, p. 916.
[374] See Mario Pei, The Lexicon Webster Dictionary, Vol. I, Delair Publishing Company, Inc., 1981, p. 610.
[375]See B.A Garner, Black's Law Dictionary, Eight Edition, Thomson West, United State of America, 2004, p. 1019.
[376]*Harka Air Services Limited v. Keazor* (Supra)
[377] Montreal Convention of 1999, Chapter III, (Art. 22(5))
[378][2011] 2 KLR (Pt. 291) 373

was entitled to more damages than the limit set in Article 25 in the Warsaw Convention now Article 22 (1) and (2) in the Montreal Convention 1999**.**Also, in the case of *Oshevire v. British Caledonia airways ltd*., the court held that where a parcel containing valuable cargo is stolen by one or more employees of the carrier, the plaintiff would be entitled to more damages than the limit in Article 22, since the carrier had committed wilful misconduct, as long as it is done within the scope of their employment.[379]

It is submitted that the following are deducible from both the provision of the Convention and case law on wilful misconduct: (1) The act of commission or omission must have been committed; (2) The commission or omission must be wilful; (3) The wilful misconduct must have been committed within the scope of employment of the carrier's servant or agent; and (4) The wilful act must cause damage to the passenger. These conditions are two sides of the same coin that cannot be separated that is all must be proved to shift the burden on the air carrier.

5.0.0. Conclusion and Recommendations

It is obvious that a party who has more bargaining power may insert limitation and/or exclusion clauses into the contract of carriage by air as envisaged under the 1999 Convention on carriage of passenger by air. The effect of their agreement as stated in the Convention is to give more bargaining power to the air carrier by way of inserting the clauses limiting or excluding damages from damage arisen from the contract of carriage by air. That is why a passenger has option to either agree or leave the contract, because the Montreal Convention will absolutely govern the contract of international carriage by air, thus its provisions are binding on the parties. To bring efficacy to the contract of carriage by air, the Convention provides certain limit of compensation in case of death, injury, delay and loss of baggage or cargo. The extent of application of the provisions limiting or excluding liability of carrier is determined on the basis of how fundamental is the breach of provision of the Convention thereby causing damage to the passenger and as well how intentional is the act of the carrier through its servant or agent that result in damage to the passenger. These are the exceptions to the doctrine of exclusion and limitation clauses in the contract of carriage by air. The case law clearly substantiates these exceptions.

While notice of the clauses is merely less important in a contract of carriage by air, its consequence is more damaging than what a passenger can imaging. By the general principle of law of contract relating to exclusion and limitation clauses, failure to give notice or draw the attention of a party to the contract to it negates the effectiveness of the clauses no matter how perfectly drafted or inserted into the contractual agreement. This can be linked to the principle of acceptance in ignorance of offer the consequence of which there will be no contract because the soul of contract, *consensus adi dem* is defeated. It is suggested that the general principle of law of contract on compulsory notice of exclusion or limitation clause be made to apply. This will prevent aircarrier who may want to take advantage of her superior bargaining power to escape liability.

[379] [1990] 7 NWLR 507

Willful misconduct is another exception to applicability of the exclusion and limitation clauses as stated in the Convention and national legislation (Nigerian Civil Aviation Act, 2006) among others. However, the civil aviation legislation has left the meaning of the term willful misconduct to respective members of the Convention. This renders respective members to interpret the term in accordance with the local circumstances. It is submitted that what may be willful misconduct in Nigeria may be a negligent conduct in another country. It is submitted that the term should be clearly defined in relation to contract of carriage by air.

The paper therefore recommends that the Convention be amended to include mandatory notice of the exemption and/or limitation clauses to air carrier passengers'. Since it is the air carrier that has power to insert same into the contract due to its strong bargaining power, the right of the passengers' should be protected too by not treating the none-notice as a mere irregularity the consequence of which in most cases is on the passengers'. Also, passengers need to be sensitized on the nature and consequence of the clauses. This is due to the fact most Nigerians are literate-illiterates when it comes to entering into contractual relation of carriage by air. Thus, technicality areas of the contract such as this issue of exclusion and limitation clauses need to be clearly explained to the passengers.