ABUAD Law Journal (ALJ)
Vol. 8, No. 1, 2020, Pages 53-74 https://doi.org/10.53982/alj.2020.0801.04-j
Published by College of Law, Afe Babalola University Law Journal,
College of Law, Afe Babalola University, Km 8.5, Afe Babalola Way,
P.M.B. 5454, Ado Ekiti, Ekiti State, Nigeria ISSN: *2971-7027*
www.abuad.edu.ng, abuadlawjournal@abuad.edu.ng

The Doctrine of Frustration and Force Majeure in the Face of Covid 19: Effects in Contracts of International Carriage

Okunowo Oladele O., *Jerry Danor and Alake A.A.*****

Abstract

Generally, parties to a contract are bound by the terms and conditions of the contract. However, the obligation on a contracting party to fulfill its part of the contract is subject to unforeseeable events that may render the contract incapable of performance. These unforeseeable events can operate to bring the contract to an end, as it is regarded in law as the doctrine of frustration. However, parties can insert force majeure clause in the contract in order to define the scope of events that can discharge parties from performance of the contract. Contracts generally have been impacted by the outbreak of the Covid 19 pandemic as many contracts have been impossible of performance due to the restriction on movements and lockdown worldwide. The aviation industry is never the least affected as the Covid 19 pandemic prevented airlines from operating and fulfilling contracts of carriage of goods and passengers from one country to another even when contracts have been entered before the pandemic. This paper seeks to address the impact of Covid 19 on contracts generally, the position of the law on contracts impacted by frustrating events such as Covid 19 and with particular focus on aviation contracts. That is our recommendation that parties should insert force majeure clauses in their agreement in other to clearly define events that would operate to frustrate the contract and for ease of interpretation.

Keywords: Frustration, force majeure, Contract, aviation.

1.0 INTRODUCTION

A contract is an agreement between two or more persons which is enforceable under the law. A contract is a promise enforceable by law. The promise may be to do something or to refrain from doing something. The making of a contract requires the mutual assent of two or more persons, one of them ordinarily making an offer and another accepting. If one of the parties fails to keep the promise, the other is entitled to legal redress. [1]

Sir William Anson defined contract as "A legally binding agreement between two or more persons by which rights are acquired by one or more to acts or forbearance on the parts of others"[2]According to the case of *Enemchukwu v. Okoye* [3]"A contract is an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." In the same vein, the case of *Orient Bank (Nig.) Plc v. Bilante Int'l Ltd*[4] defined contract thus "A contract is a legally enforceable agreement"

The outbreak of Covid 19 has created a great deal of frustration in the business domain as many contracts entered by parties (especially contracts of carriage of goods and passengers by air) became frustrated or incapable of performance.
The novel human coronavirus disease 2019 (COVID-19) was first reported in Wuhan, China, in 2019, and subsequently spread globally to become the fifth documented pandemic since the 1918 flu pandemic.[5]By September 2021, almost

* LLB, B.L, MILD, LL.M,(Lagos State University of Science and Technology, Ikorodu.)
** LL.B, B.L. (Legal Practitioner)
*** LLB, BL (Lagos State University of Science and Technology, Ikorodu)
[1]Authur Taylor Von Mehren, Harvard University, Author of the civil law system, <https://www.britannica.com/topic/contract-law>. accessed 22 august 2021
[2]All Answers ltd, 'Definition of Contract and An Explanation of Contract Elements' (Lawteacher.net, May 2022) <https://www.lawteacher.net/free-law-essays/contract-law/different-persons-definition-of-contract-contract-law-essay.php?vref=1> accessed 25 May 2022.
[3][2017] 6 NWLR (Pt. 1560) 37 at 55-56 CA.
[4][1997] 8 NWLR (Pt. 515) 37.
[5]Coronavirus. World Health Organization. Available at: https://www.who.int/health-topics/coronavirus#tab=tab_1 (*accessed on 25 May 2022*)

two years after COVID-19 was first identified, there had been more than 200 million confirmed cases and over 4.6 million lives lost to the disease.[6]
The outbreak of Covid 19 Virus prevented airlines from operation in the world. Many contracts entered by parties for the consignment of goods or carriage of passengers from one country to another were frustrated by the outbreak of the pandemic. One may wonder why after engaging an airline to consign goods from Nigeria to China, and after payment of frights and other expenses involved, such contract cannot be carried out due to an occurrence which is as a result of no fault of the carrier. This concept has no better explanation than force majeure. The contracts could not be performed due to no fault of either party. The fact of incapability of performance of these contracts is as a result of enforceable events that occurred after the contracts were entered. Such events as this (Covid 19) is known as force majeure.

As has been widely discussed and analyzed, COVID-19 (or events and circumstances flowing from COVID-19) may, depending on the circumstances and the specific wording, provide force majeure relief to a party prevented (or hindered, impaired or adversely affected) from performing its obligations under a commercial contract. While force majeure provisions frequently do not carry any entitlement to additional monetary compensation (even though the contract may subsequently become more expensive to perform), commercial contracts often include a termination right where a force majeure event has subsisted for a prolonged continuous period of time or a series of force majeure events have occurred for an aggregate period of time.[7]

Frustration is a common law doctrine which recognizes that an event may occur through no fault of either party which makes it impossible to perform or radically changes the nature of any obligations under a contract. Even if there is no force majeure provision in a contract, a party may be relieved from the performance of certain contractual obligations if they can establish that the relevant contract has

[6] *ibid*
[7] Andrew Sears-Black, *Impact on commercial Contracts*, (https:/www.shearman.com/perspectives/2020/05/covid-19-impact-on-commercial-contracts) accessed 25 May 2022

been frustrated.[8]The doctrine generally operates to discharge the contract prospectively: meaning that the parties are discharged from performing future obligations when frustration occurs.Parties to a contract can insert force majeure clause in their contract. Force majeure refers to a clause that is included in contracts to remove liability for natural and unavoidable catastrophes that interrupt the expected course of events and prevent participants from fulfilling obligations.[9]

Force majeure is a French term that literally means "greater force."[10] It is related to the concept of an act of God, an event for which no party can be held accountable, such as a hurricane or a tornado. Force majeure also encompasses human actions such as armed conflict. Generally speaking, for events to constitute force majeure, they must be unforeseeable, external to the parties of the contract, and unavoidable. These concepts are defined and applied differently depending on the jurisdiction[11].

The concept of force majeure originated in French civil law and is an accepted standard in many jurisdictions that derive their legal systems from the Napoleonic Code. In common law systems, such as those of the United States and the United Kingdom, force majeure clauses are acceptable but must be more explicit about the events that would trigger the clause.[12]

It is worthy of note that a force majeure clause must be a product of the parties contract. In other words, it must be expressly stated in the contract otherwise parties cannot rely on it.

A force majeure clause in a contract usually specifically spells out the type of events or circumstances that the parties to the contract agree would constitute a force majeure occurrence and trigger the clause into effect.

Force majeure provisions do not always completely relieve contractual parties of all their obligations (thus, effectively rendering the contract void). For example,

[8]COVID-19: Doctrine of Frustration: Implications for Contracts in Australia <https://www.jdsupra.com/legalnews/covid-19-doctrine-of-frustration-47206/>

[9] Marshall Havgrave, https://www.investpedia.com/terms/f/forcemajeure.asp.
[10]*ibid*
[11]*ibid*
[12]*ibid*

if widespread civil unrest made it physically unsafe for a supplier to deliver goods as called for in a contract with a buyer, then the contract's force majeure clause might only relieve the supplier of the obligation to deliver goods according to the time schedule delineated in the contract.

They would still be expected to deliver the goods at some point, i.e., whenever the civil unrest subsided to a point where the delivery was reasonably possible and would not expose the supplier or their employees to extraordinary danger.

In carriage of goods and passengers by air, there could be circumstances that can hinder the airline from flying, such as weather, crises in the destination Country or government policies. In a situation where a contract has been caught up by force majeure event after parties have entered into a contract of carriage, what will be the approach of the court in the event that the aggrieved party goes to court?We shall look at the Montreal Convention as domesticated by the Civil Aviation Act[13] in other to appreciate the provision of the law in situation where contract of carriage of goods and passengers by air has been frustrated by event beyond the control of the parties as can be seen during the lockdown caused by the outbreak of Corona Virus pandemic.

This paper will therefore give aninsight on the general law of contract, discharge of contract by frustration, contract of carriage of goods and passengers by air and how theyare impacted by Covid 19.

CONTRACT DEFINED

Various Scholars have given different definitions of contract. Despite the different definitions, they are all pointed at same meaning, save for use of different words. Anson defined Contract as a branch of law which determines the circumstances in which a promise shall become legally binding on the person making it.[14]Yerokun defined a contract as a promise or set of promises, which the

[13] (Repeal and Re-enactment) Act 2006
[14] Review by M.P Furmston, *Anson's Law of Contract* (1960) (Vol. 23, No. 2 The Modern Law, available at <https://www.jstor.org/stable/1091456> last viewed on the 31st July 2021.

law will enforce.[15] Contract is mainly concerned with relation between persons, which the law will recognize and enforce where one of parties fails to perform his part of the bargain. American Restatement (2nd) of the law of Contract 1978 defines it as '… a promise or set of promises for the breach of which the law gives a remedy or the performance of which the law in some way recognizes as a duty.' Okany defined "a Contract as an agreement in which is legally binding on the parties to it and which if broken may be enforced by action in court against defaulting parties"[16]. Also Okonkwo and Ilegun, defines Contract as an agreement which is legally binding on the parties to it and which if broken, may be enforced by an action in court against the defaulting party. Chitty, defined Contract as a promise or set of promises which law enforce [17]

From the above definitions, we note that the common relationship between all manners of contract is that there is an agreement between two or more parties which is enforceable in law.Every contract must be with the consensus ad idem of parties, that is the meeting of minds. It is the coming together of two minds with a common intention: if the terms of an agreement are vague or unambiguous, no binding contract will emerge from it. For there to be consensus ad idem, a contract must of necessity involve, at least, two parties to the contract, for it is unrealistic for a person to contract with himself.

All parties to a contract must have the capacity to contract. In modern legal systems, 'capacity' is the principal juridical mechanism by which individuals and entities are empowered to enter into legally binding agreements and, more generally, to arrange their affairs using the instruments of private law.[18] The legal

[15]Prof Y Olusegun and Prof. J Bokefun, *Law of Contract* 1 (2ndEdn National Open University 2008).

[16]Okany M.C, *Nigerian Commercial Law* (Revised Edn, African First Publishers 2009)
[17] Prof. Y Olusegun and Prof. J Bokefun, *Law of Contract 1*(2ndEdn National Open University 2008)
[18] Simon Deakins, 'Capacita': Contract Law and The Institutional Preconditions of a Market Economy(2006)CBR University of Cambridge Working Paper No. 325 https://core.ac.uk/download/pdf/7151443.pdf accessed 2nd June 2021.

concept of capacity is thereby the gateway to involvement in the operations of a market economy.[19]
From the foregoing, the absence of the requisite capacity to contract may truncate the enforcement of such contract.

In the same vein, the contract entered by parties must not be tainted by illegality, that is, the contract must be free from illegal activities. According to Zweigert and Kötz, 'every legal system must reserve the right to declare a contract void if it is legally or morally offensive'[20] where a contract is entered for the transportation of prohibited goods, such contract will be regarded as illegal and therefore void.[21] No court of law will enforce a void contract,by being a void contract, it means that the law does not recognize the contract ab initio (from the beginning).

A void contract is an act that the law holds to be no contract at all-- a nullity from the very beginning; conclusion of void contract does not change the position of "contractants." They can assume as if the contract was never formed. The defect making a contract void is incurable and has no binding effect and hence, unless a new and independent contact is re-entered, there will be no contractual relationship.

On the other hand, a contract can be a voidable contract. Voidable contract is binding until it is avoided (invalidated) by the option of the party whom the law protects. It is a contract,"... where one of the parties has power by manifestation of election to avoid the legal relations created by the contract "A voidable contract, thus, is a 'sick contract' that may be "cured or killed" depending upon the option that may be exercised by the victim of the defective agreement. In the

[19] Simon Deakins, 'Capacita': Contract Law and The Institutional Preconditions of a Market Economy(2006)CBR University of Cambridge Working Paper No. 325 https://core.ac.uk/download/pdf/7151443.pdf accessed 2nd June 2021.
[20] K Zweigert and H Kofz, Introduction to Comparative Law (3rd Revised edn 1998),pp 380-382.
[21] In an agreement for the carriage of goods by air, where a consignor engages the services of a carrier to convey cocaine from Nigeria to South Africa, where the airline fail to consign same to the destination, the consignee cannot have a legal right to approach the court as the agreement will be viewed as a void agreement. Scholars opine that void agreements cannot be regarded as a contract, but rather a mere agreement.

words of Planoil M, "Annullable acts live in a way under menace of death."[22] If the victim of the vice waives his right to avoid the contract and elects to ratify it, his power of avoidance extinguishes and the contract is deemed to have had no defect from the moment of election[23]

Finally, the basis of every commercial transaction between two or more parities is a contract that the law must scrutinize properly before giving effect to it. Where there is no enforceable contract, the issue of discharge by frustration, that is, force majeure cannot arise.

2.1 DISCHARGE OF CONTRACT.

Discharge of contract means termination of the contractual relationship between theparties. A contract is said to be discharged when it ceases to operate, i.e., when the rights and obligations created by it come to an end. The party's obligation in a contract can be discharged in any of the following ways[24]:

a. By performance of the contract
b. By mutual consent
c. By subsequent impossibility of performance (Frustration)
d. By operation of law
e. By lapse of time
f. By breach

For the purpose of this paper, we shall focus on discharge by subsequent impossibility of performance(Frustration). Many contracts entered before and during the period ofCovid 19 pandemic were discharged as a result of impossibility of performance occasioned by the outbreak of the pandemic.

2.2 DISCHARGE OF CONTRACT BY FRUSTRATION

Frustration of contract is a defence available to a defendant who would otherwise be liable for breach of contract for non-performance of contractual obligations

[22]Planiol M, '*Treatise on Civil Law* ' (1939) 12 edn, Vol. 1 part 1(translated by Lonisiana State Law Institute) at 218
[23]MizanNadew, '*Void Agreement and Voidable Contracts: The Need to Elucidate Ambiguities of Their Effects'* (2008) Mizan Law Review Vol. 2 No. 1 <https://opendocs.ids.ac.uk/opendocs/bitstream>last viewed on the 2nd June 2021
[24]I . S Adhowaimi, Frustration of performance of Contract: A Comparative and Analytical Study in Islamic Law and English Law (Brunel University School of Law, 2013)

but for the occurrence of a fundamental event that makes it impracticable or impossible to perform the contract. This defence is not readily available to all defendants in an action for breach of contract, and the existence of a frustrating event on its own does not avail the defendant[25]

Frustration of Contract has been defined by the apex court in Nigeria to mean a premature determination of an agreement between parties lawfully entered into, owing to the occurrence of an intervening event, or change of circumstances so fundamental as to be regarded by law both as striking to the root of the agreement and entirely beyond what was contemplated by the parties when they entered into the agreement[26]

A contract is thus frustrated where, after its conclusion, events occur which make performance of the contract impossible, illegal, or something radically different from that which was in contemplation of the parties at the time they entered it. In other words, where the performance of the contract is dependent on the continued existence of a state of affairs, the destruction or disappearance of the state of affairs without the default of either of the parties will discharge them from the contract. The courts have restricted the doctrine of frustration to:

a. Situations where the supervening event destroys a fundamental assumption on which parties had contracted on; and
b. Where force majeure clauses are drafted into the contract.[27]

The underlisted situations or events have been held by the courts at one time or the other to constitute frustrating events:

a. Subsequent legal changes or statutory impossibility.
b. An outbreak of war.
c. Destruction of the subject matter of the contract or literal impossibility.

[25]Jackson,Etti and Edu, *'Frustration of Contract in Nigeria'* (2020)available at <www.jacksonettiandedu.com>last seen on the 3rd June 2021.

[26]Mazin Engineering Limited v. Tower Aluminium (Nigeria) Ltd (1993) 5 NWLR (pt. 295) Pg. 526.See also.A.G Cross Rivers State V. AG of the Federation and Anor (2012) LPELR-9335 (SC);NBCI V. Standard (Nig) Eng. Co. Ltd (2002) 1 NWLR pt. 768 Pg. 104;Gold Link Insurance Company Limited V. Petroleum (Special) Trust Fund (2008) LPELR-4211 (CA) Pg. 9-10; Addax Petroleum Development Nigeria Limited v. Loycy Investment Company Limited &anor (2017) LPELR-42522 (CA).

[27] Diamond Bank Limited v. Prince Alfred AmobiUgochukwu (2007) LPELR-8093 (CA)

d.Governmentacquisition of the subject matter of contract.
e.The cancellation by an unexpected event. E.g., the death or permanent incapacitation by ill health or imprisonment of a party to a contract for personal service[28]

The doctrine of frustration applies to all types of contracts and has been successfully applied in cases involving, for example, contracts for[29]:

a. employment;
b. building contracts;
c. charter parties;
d. carriage of goods;
e. sale of goods;
f. leases of land; and
g. Sale of land.

Application of the doctrine to contracts for Sale and Purchase, or Lease of Land is rare as often risk is allocated in the terms of the agreement.The Supreme Court was faced for the first time in deciding whether frustration of contract is applicable to lease agreements in the case of Araka v. Monier Construction Co (Nigeria) Ltd[30]The Court then went on to deal with whether the contractual doctrine of frustration applies to a lease of land given the nature of a lease which creates an estate as well as a reversionary interest in the land in favour of a lessor and held thus:

> "We think that it may tantamount to injustice to deny a tenant the benefit of frustration in cases where, owing to circumstance of an intervening event or change of circumstances so fundamental as to be regarded by the law as striking at the root of the agreement, it has become

[28]A.G Cross Rivers State v. AG of the Federation and anor (2012) LPELR-9335 (SC);Nwaolisah v. Nwabufoh(2011) LPELR-2115 (SC); Jacob v. Afaha(2012) LPELR-7854 (CA); Weco Engineering and Construction Company Limited v. Dufan Nigeria Limited &anor (2019) LPELR-47211 (CA).
[29]I . S Adhowaimi, *Frustration of performance of Contract: A Comparative and Analytical Study in Islamic Law and English Law* (Thesis for the degree of Doctor of Law, Brunel University School of Law, 2013)
[30] (1978) LPELR-531 (SC)

> impossible for the tenant to enjoy the fruits of his lease and at the same time to expect him on account of the abstract estate concept to honour his obligations under the lease."

From the above dictum, suffice it to say that the doctrine of frustration of contract applies to all contracts provided that the performance of the contract has been rendered impracticable or impossible as a result of a fundamental intervening change or event striking at the root of the contract and entirely beyond the contemplation of the parties.

3.0 HISTORY OF COVID 19.

The coronavirus disease 19 (COVID-19) is a highly transmittable and pathogenic viral infection caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), which emerged in Wuhan, China and spread around the world.[31] Genomic analysis revealed that SARS-CoV-2 is phylogenetically related to severe acute respiratory syndrome-like (SARS-like) bat viruses, therefore bats could be the possible primary reservoir. The intermediate source of origin and transfer to humans is not known, however, the rapid human to human transfer has been confirmed widely. [32]

Recently at the end of 2019, Wuhan an emerging business hub of China experienced an outbreak of a novel coronavirus that killed more than eighteen hundred and infected over seventy thousand individuals within the first fifty days of the epidemic. This virus was reported to be a member of the β group of coronaviruses. The novel virus was named as Wuhan coronavirus or 2019 novel coronavirus (2019-nCov) by the Chinese researchers. [33] In the history, SRAS-CoV (2003) infected 8098 individuals with mortality rate of 9%, across 26 contries in the world, on the other hand, novel corona virus (2019) infected

---

[31]M Shereen, S Khani, A Kazmi, N Bashir and R Siddigue 'COVID-19 infection: Origin, transmission, and characteristics of human coronaviruses' J Adv Res (2020) vol. 24 https:www.ncbi.nih.gmd.article/pmc71136101 accessed on 1st June 2022.

[32] ibid
[33] ibid

120,000 individuals with mortality rate of 2.9%, across 109 countries, till date of this writing. It shows that the transmission rate of SARS-CoV-2 is higher than SRAS-CoV and the reason could be genetic recombination event at S protein in the RBD region of SARS-CoV-2 may have enhanced its transmission ability. In this review article, we discuss the origination of human coronaviruses briefly. We further discuss the associated infectiousness and biological features of SARS and MERS with a special focus on COVID-19.[34]

Recently, by the end of 2019, WHO was informed by the Chinese government about several cases of pneumonia with unfamiliar etiology. On 12 January 2020, the National Health Commission of China released further details about the epidemic, suggested viral pneumonia. From the sequence-based analysis of isolates from the patients, the virus was identified as a novel coronavirus. Moreover, the genetic sequence was also provided for the diagnosis of viral infection. Initially, it was suggested that the patients infected with Wuhan coronavirus induced pneumonia in China may have visited the seafood market where live animals were sold or may have used infected animals or birds as a source of food. However, further investigations revealed that some individuals contracted the infection even with no record of visiting the seafood market. These observations indicated a human to the human spreading capability of this virus, which was subsequently reported in more than 100 countries in the world. The human to the human spreading of the virus occurs due to close contact with an infected person, exposed to coughing, sneezing, respiratory droplets or aerosols. [35]

The relevant questions and consideration to determine whether the outbreak of Covid 19 will affect contracts entered before and during the period of the pandemic are as follows:

a. Is performance of the contractual obligations delayed as a result of the lockdown imposed by the governments of the nation?
b. Having booked airlines for travel and consignment of goods to various parts of the world before the various countries shot down their airports,

[34] ibid
[35] Ibid.

are the airlines liable to be held liable for breach of contract? What remedy are available to the parties, having paid for tickets and for consignment of goods.

c. Are parties able to resume the contracted relationship in substantially the same manner once lockdown or restriction on international travel is eased?
d. Can the parties find an alternative means of carrying out the obligations in the contract?

3.1 THE EFFECT OF FRUSTRATION ON A CONTRACT

There three implications of a contract discharged by frustration. Firstly, a contract that is discharged on the ground of frustration is brought to an end automatically by operation of law, irrespective of the wishes of the parties. This was the decision of the Supreme Court in the case of A.G Cross Rivers State V. AG of the Federation and Anor.[36]This decision was basedon the judgment of the International Court of Justice on the cessation of Bakassi and the Cross River estuary to Cameroon, which consequently made Cross Rive State a non-littoral state and thus no longer entitled to be paid derivation revenue. The Court held thus:

> "This, unfortunately, is now the fate of the agreements between the parties which have been automatically terminated by the implementation of the judgment of the ICJ. The Court cannot close its eyes to this existing situation and declare that the plaintiff should continue to enjoy the benefits and privileges of a littoral state when it is no longer one by subsequent legal changes."

Secondly, the question of breach of contract will not arise as none of the parties can be held responsible for the occurrence of the frustrating event or circumstances.[37]However, where breach of contract occurs before the frustrating event, then the frustrating event cannot be relied on.[38]In the case of Nospecto Oil

[36]George I.U Obayuwana V. Governor, Bendel State &anor(1982) LPELR-2160 (SC); Sunday Odum V. NwoyeChibueze (2015) LPELR-40895 (CA)
[37]OnuigboV.Azubuike (2013) LPELR-22796(CA).
[38]Augustine Asibe&Ors.V. Owerri Municipal Local Government (2012) LPELR-9820 (CA).

& Gas Limited V, Kenney &ors[39],the appellant argued that the action of the inter-governmental agency leading to the seizure of its licence, the freezing of its account, etc., were frustrating events that made it incapable of meeting its obligations to its investors. The court after an examination of the pleadings and depositions of parties held as follows:

> "The pertinent question is whether the frustration doctrine avails the appellant. It can only be of assistance to the appellant if the frustration occurred before its obligation under the contract became due. In the instant appeal as borne out by the pleadings and depositions, the frustrating event occurred on 4/12/2007 when the appellant's account was frozen by Investments and Securities Tribunal vide a motion ex parte. By the appellant's deemed admission, the respondent's refunds became due before December 2007. In such a situation as decided in the case of Chandler V. Webster (supra) relied upon by the appellant,in so far as the contract obligation has fallen due before the frustrating event, each party must fulfill its obligation under the contract".

A third effect of frustration of contract is where sums of money have been paid and received by a party for the performance of an obligation which has failed or has been rendered impossible.The law frowns on unjust enrichment, and it is trite law that where money has been paid and received by a contracting party for a consideration that has failed, the money ought tobe returned.[40]A complete failure of consideration occurs where one of the contracting parties fails to receive the benefit of valuable consideration, which springs from the root and is the essence of the contract.[41]However, where the contract has been partly performed, or payment and performance were agreed in milestones, then the money to be returned will be based on the value of the unperformed obligation.[42]

[39](2014) LPELR-23628 (CA)
[40]Onuigbo V. Azubuike (Supra); UBA Plc V. BTL Industries Ltd (2006) LPELR-3404 (SC).
[41]AkinadeV. Nigerian Law School Lagos Campus Staff Co-Operative Thrift & Credit Society Limited (2015) LPELR-41705 (CA); Osayemeh V. NDIC &anor (2009) LPELR-8846 (CA)
[42]Jackson,Etti and Edu, *'Frustration of Contract in Nigeria'* (2020) available at <www.jacksonettiandedu.com>last viewed on the 3rd June 2021.

It is safe to conclude by stating that having considered the questions proffered above, contracts entered before and during the Covid 19 pandemic which were delayed or incapable of performance as a result of restrictions or lockdown imposed by the government of various nations of the world have been frustrated by the outbreak of Covid 19 since the pandemic can be regarded as event which rendered such contract impossible of performance. In the same vein, the imposition of lockdown by the government is unforeseeable, as an act of government operates as a frustration to a contract. All monies paid for ticket which passengers could not travel because of lockdown are entitled to be refunded as that forms part of the implications of a frustrated contract.

3.2 FORCE MAJEURE

Force Majeure has been described by the Court of Appeal in *Globe Spinning Mills Nigeria Plc v. Reliance Textile Industries Limited*[43] to be a common clause in contracts which provides that one or both parties can cancel a contract or be excused from either part or complete performance of the contract on the occurrence ofcertain specified events or events beyond the control of the parties.

The force majeure clause has the same effect as frustration of contract, save for the opportunity it provides to parties to contractually control the effect of the occurrence of the force majeure event. The force majeure events are the frustrating events listed by the parties that can affect the performance of the obligations in the contract. The force majeure clause would thus usually provide for the occurrence of certain frustrating events, the duration of the force majeure event, notice for triggering force majeure, and the effect on the contract, such as suspension on performance of obligations and/or the option to terminate the contract. The force majeure clause may also exclude certain obligations from being affected by the frustrating event.[44]

[43](2017) LPELR-41433(CA)
[44]Jackson,Etti and Edu, *'Frustration of Contract in Nigeria'* (2020) available at <www.jacksonettiandedu.com>last viewed on the 3rd June 2021.

Upon the occurrence of a force majeure event, contracting parties must comply with the conditions provided in the force majeure clause before invoking force majeure such as the requisite notice period and compliance with the duration of the force majeure event; otherwise, such a party may be liable in an action for breach of contract. In *Globe Spinning Mills Nigeria Plc v. Reliance Textile Industries Limited*[45], the appellant entered into a sale and purchase agreement and agreed to supply to the respondent cotton yarn not less than 250 metric tonnes per month. The respondent agreed to take a minimum of 220 metric tonnes per month for a three-year period. During the contractual period, the appellant served the respondent a notice declaring force majeure in clause 28 of the agreement. The declaration was based on the failure of the government to curb illegal importation of textile fabrics and the resultant loss of market, and frequent and unpredictable interruptions in gas supply. The Court agreed with the decision of the arbitrators that the eventualities listed by the appellants did not constitute force majeure as they are vicissitudes of trading in Nigeria. The Court held that there was no force majeure in line with clause 28 of the agreement as one cannot do business in Nigeria and not put into consideration the endemic issues of epileptic electricity, fluctuation of the price of diesel and gas, and the porosity of our land borders. The Court further held that the respondents were not provided with 48 hours' notice as required in the force majeure clause neither did they furnish such relevant information as is available concerning the events as required in the force majeure clause.[46]

In the absence of a force majeure clause in a contract, or a contract entered by any other means other than in writing, the occurrence of an event which truly prevents a party from performing an obligation in a contract will be a defence in any action for breach of contract under the general doctrine of frustration. The advantage of having a force majeure clause in a contract is that it gives contracting parties some level of control upon the occurrence of a frustrating event but does not make it any less of a defence for breach of contract where it is not provided for.[47]

[45] (2017) LPELR-41433(CA)
[46] *ibid*
[47] *ibid*

The insertion of force majeure clause in a contract entered before or during the Covid 19 pandemic will make for ease of reference as the contracts of the parties will be construed accordingly.

3.3 EFFECT OF COVID – 19 ON CONTRACTS OF INTERNATIONAL CARRIAGE BY AIR.

The aviation industry was one of the worst hit during the period of the Covid 19 pandemic. For the primary time in world history, about 90% of the world's citizens are restricted from travelling, either to return home or to destinations of choice either for business trip or tourisms. Without a doubt, the foremost affected in travel and tourism is that the aviation industry.[48] An estimated 25 million aviation jobs and 100 million travel and tourism jobs across the world are in danger.[49] That is not all; the growth recorded in the industry in the past would potentially be lost across the world as a result of Covid 19.[50] This aspect of this paper covers international carriage of both passengers and goods.

International carriage is defined as any carriage in which the place of departure and the place of destination are situated either in the territories of two High Contracting Parties or in the territory of a single High Contracting Party if there isan agreed stopping place within the territory of another state, even if that state is not a High Contracting Party[51]

The Convention for the Unification of Certain Rules Relating to International Carriage by Air (Montreal 1999) in Article 1, defined International Carriage as:

> "For the purposes of this Convention, the expression international carriage means any carriage in which, according to agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States

[48] L.B Curzon, *principles of Mercantile Law* (Collier Macmillian Publishing Co. Inc, New York 1980)

[49] ibid

[50] P Siyan, E Adegoriola and O. Agunbiade, 'Impact of Covid -19 on the Aviation Industry in Nigeria' (2020) IJTSRD Vol. 4 Issue 5, www.ijtrsd.com accessed on 3rd June 2021.

[51] L.B Curzon, *principles of Mercantile Law* (Collier Macmillian Publishing Co. Inc, New York 1980)

> Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention"

One important recent development in the field of international transport law was the entry into force, on 4 November 2003, of the Convention for the Unification of Certain Rules Relating to International Carriage by Air,[52] the Montreal Convention 1999. A degree of international uniformity of laws governing transportation by air had been achieved as early as in 1929, when the Warsaw Convention[53]was adopted. However, a number of subsequent amendments to that Convention had led to an increasingly complex international legal framework with different international legal instruments co-existing with one another. The Montreal Convention 1999 represents the most modern international convention in the field. It consolidates the various earlier legal instruments known as the "Warsaw-system conventions" into a single text and provides the basis for genuine uniformity of laws governing transportation by air.

However, although the Convention has already attracted 70 Contracting States, it continues, for the foreseeable future, to co-exist at the international level with the earlier Warsaw-system conventions. As a result, the international legal framework for carriage by air remains complex. Even for States which have adopted the Montreal Convention 1999, the Warsaw-system conventions may be applicable in relation to trade with some or most of their trading partners. Thus, effective national implementation - and application - of the various international air law conventions remains a necessity. For traders, the complex international legal framework and consequent lack of transparency of regulation makes it

[52] Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Montreal on 28 May 1999
[53] Convention for the Unification of Certain Rules relating to International Carriage by Air, Signed at Warsaw on 12 October 1929

difficult to identify the substantive rules applicable to a given contract or claim, thus increasing legal costs.[54]

The growing proportion of high-value, time sensitive products traversing national boundaries by air creates increased opportunities for trade and economic development. High-tech manufacturers and other time critical shippers are locating at sites around or accessible to major airports; this provides a significant impetus for substantial investment in airport regions and the respective nations as a whole. Since jobs in time critical industries tend to be higher paying than country averages, they raise the income levels of the population, as well. For developing countries, including in particular landlocked developing countries, the potential development opportunities associated with air carriage are considerable. Air transport contributes to improved living standards in many developing countries by expanding opportunities to participate in the global economy. It is particularly important for landlocked and developing island countries, and for countries whose main exports are high value goods or perishables.[55]

The Montreal Convention has been domesticated in Nigeria by virtue of the Civil Aviation Act[56] the Act in Section 48 provides thus:

> (1) The provisions contained in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Montreal on 28th May, 1999 set forth in Schedule II of this Act and as amended from time to time, shall from the commencement of this Act have force of law and apply to international carriage by air to and from Nigeria, in relation to any carriage by air to which those rules apply, irrespective of the nationality of the aircraft performing the carriage, and shall, subject to the provisions of this Act, govern the rights and liabilities of carriers, passengers, consignors, consignees and other persons.

[54]Report by the UNCTAD Secretariat 'Carriage of goods by Air: Guide to The International Legal Framework' (2006) UNCTAD/SDTE/TLB/2006/1 Accessed on 3rd June 2021.
[55]*ibid*
[56]The Civil Aviation (repeal and re-enactment) Act 2006. S. 48 in Schedule II to the Act incorporated the provisions of the Montreal Convention to the Act.

(2) The provisions contained in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Montreal on 28th May, 1999 as has been modified and set out in Schedule III of this Act and as amended from time to time, shall from commencement of this Act have force of law and apply to non-international carriage by air within Nigeria, irrespective of the nationality of the aircraft performing the carriage, and shall, subject to the provisions of this Act, govern the rights and liabilities of carriers, passengers, consignors, consignees and other persons.

From the above provision, the Convention is applicable to both international carriage and domestic carriage irrespective of the nationality of the aircraft.

4.0 DOCTRINE OF FRUSTRATION IN CONTRACTS OF INTERNATIONAL CARRIAGEAIR

The Montreal Convention as domesticated under the Civil Aviation Act[57] recognizes certain defenses available to an air carrier in the case of damage, loss or delay. We are to note that our focus in this paper is in the area of delay and not damage or loss, except for damage or loss caused by delay to consign parcel occasioned by the Covid 19 lockdown or restriction. For instance, where a carrier has been contracted to consign a perishable goods to a destination Country a day before the government of the destination country locked down, if the delay in delivery caused the parcel to damage, then the doctrine of frustration or the defence of act of a government authority can avail the carrier.

From the beginning of commercial air transportation, delay is a highly relative and subjective concept depending on many factors, including culture and circumstance. Early aviation scholars emphasized that time is a fact or that should always be taken into account when dealing with commercial aviation.[58]Generally, causes of delays are related to one or more of the following factors: weather, aircraft maintenance, aircraft connections, air traffic

[57]S. 48, Schedule II of the Act.
[58]Jae Woon Lee et al.,Air Carrier Liability for Delay: A Plea to Return to International Uniformity, 77J. Air L. & Com.43 (2012)<https://scholar.smu.edu/jalc/vol77/iss1/1>

congestion, or security.[59] Air carriers must deal with these tangible and intangible obstacles every day. Many among the causes of delay may be a subject of force majeure clause. This is because such causes of delay are foreseeable, and parties ought to make provisions in their contract in other to escape liability.

Article 19 of the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention) provides thus:

> "The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures"

Ordinarily, delay in air carriage is a wrong that can occasion award of damages against the carriage. However, the convention recognizes certain defenses that can avail the carrier from liability. Among other defences, the carrier is not liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that was impossible for it or them to take such measures under Article 19 of Act of public authority as we all experienced during the Covid 19 pandemic where the government of various Nations declared lockdown which prevented airlines from operating made the various airlines to delay scheduled flights from various parts of the World except for carriage of essential commodities.

5.0 CONCLUSION

Generally, frustration of contracts cuts across all aspect of contracts including international carriage by air. Contracts entered into by parties can be impossible of performance due to circumstances beyond the control of either party. The global Covid 19 pandemic which led to lockdown and restrictions by government of virtually all Countries on international carriage of goods and passengers by air except for essential commodities is a typical example of frustration in contracts. Many contracts entered into by parties including contracts of employment were

[59] *ibid*

rendered incapable of performance due to the restrictions on movement of goods and services across the world. Even where the agreement of parties fail to include force majeure clause, the Covid19 pandemic still operated to discharge many contracts as such it became impossible to hold a defaulting party in breach of contract.