

## **DELINEATING JURISDICTIONAL INDICATORS IN AIR-CARRIER LIABILITY SUITS IN NIGERIA: THE SIMPLE CONTRACT AND AVIATION CONTRACT PERPLEXITIES. \*\***

### **Abstract**

*Over the years, air transportation has assumed the status as a veritable means of transportation of passengers and goods in Nigeria. By virtue of some statutory and judicial authorities, it appears that this contractual relationship created between the air-carrier (Airline) and passengers/consignors appears to fall into two distinct categories viz- simple contract and aviation contract. This paper examines, attempts and provides a probable solution to the lingering jurisdictional perplexity faced by legal practitioners and their clients in determining which court to approach for redress for an alleged liability of an air-carrier. The paper adopted a doctrinal research methodology. It also identifies some vital elements which determines whether a contract of air carriage is a simple contract or an aviation so as to fall within the jurisdictional purview of the State High Court or the Federal High Court.*

**Keywords:** ‘Air Carrier’, ‘Aviation Contract’, ‘Simple Contract’, ‘Embarkation’, ‘Carriage’.

### **1.0 Introduction**

Under the Nigerian legal system, the State High Courts and the Federal High Courts are styled as courts of coordinate jurisdiction which implies that they are courts of the same hierarchy. As courts of coordinate jurisdiction, each lack the constitutional power to sit as an appellate Court in respect of a decision or order made by a fellow court of the same hierarchy. This is so because the presumption has always been that the decision of a superior court of record within jurisdiction is correct until the contrary is proven. Consequently, where the decision of a superior Court of record is a nullity, the only proper way of challenging such decision must be by an application before the court which tried the case or by an application to the appropriate appellate court.<sup>1</sup>

Another distinctive and unique feature of courts of coordinate jurisdiction is the classification of certain subject matters over which a particular court of coordinate jurisdiction may exercise power to adjudicate on to the exclusion of other courts. For instance under Section 251(1)(k),<sup>2</sup> the Federal High Courts in Nigeria have exclusive jurisdiction to entertain any matter pertaining to aviation and safety of aircraft. This original and exclusive jurisdiction of the Federal High Court to entertain matters related to aviation and safety of aircraft is buttressed by the provisions of Section 7 of the Federal High Court Act.<sup>3</sup>

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<sup>1</sup> See C C Ani, *Understanding Legal Concepts in Nigeria*, Volume I (Enugu: CIDJAP, 2020) P.135. See also *CBN v. SUN & Paddy Intl Group Nig Ltd & Ors* (2018) LPELR-44766 (CA).

<sup>2</sup> Constitution of the Federal Republic of Nigeria, 1999 (As Amended).

<sup>3</sup> Cap F12 Laws of the Federation of Nigeria, 2004.

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Also commenting on the exclusive and original jurisdiction of the Federal High Court to try matters related to aviation and safety of air craft, the Court of Appeal in *Aviation Logistics & Management Ltd v. United Bank For Africa Capital PLC*<sup>4</sup> echoed thus:

Happily, the scope, ambit and true interpretation of these provisions and the exclusive jurisdiction of the Federal High Court on all matters relating to and or on aviation and safety of aircraft have since been laid to rest in a plethora of judicial authorities.<sup>5</sup>

Despite the foregoing statutory and judicial endorsements of the exclusive and original jurisdiction of the Federal High Court to entertain aviation related matters, this jurisdictional power will come to a halt where the dispute before the Court relates to simple contract<sup>5</sup>, and in this case, the State High Courts will assume jurisdiction and this jurisdictional power exercised by the State High Courts is irrespective of the fact that the subject matter before the court pertains to aviation. Thus any aviation related matter which the crux of the issue before the court flows from a simple contract, the State High Court will have jurisdiction to entertain the matter to the exclusion of the Federal High Court.<sup>6</sup> Despite these clear and lucid laid down judicial and statutory authorities as to the limit each court can exercise its jurisdiction in respect of aviation flavoured matters, litigants and their legal representatives still wrangle over which court will have jurisdiction over aviation matters which involves liability of an air-carrier.

This jurisdictional melee flows from the inability to categorize which of the contract between a passenger and an air carrier amounts to an aviation contract or a simple contract. This confusion is compounded by the divergent holdings of the Nigerian appellate courts. A fold of the judgements is of the view that where a passenger merely purchases a ticket without actual carriage or boarding, it amounts to a simple contract and only the State High Court will have Jurisdiction over such matter.<sup>7</sup> Another fold of the judgment is of the strong view that where a return ticket is procured and one leg of the journey is completed, an aviation contract has been created which only the Federal High Court will have jurisdiction to entertain the matter.<sup>8</sup> Furthermore, where the wrong complained of occurred during the second leg of a journey and actual carriage or boarding did not take place such contract will still amount to an aviation contract and only the Federal High Court will have Jurisdiction over such matter.<sup>9</sup>

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<sup>4</sup> (2018) LPELR-44790 (CA).

<sup>5</sup> *Cameroon Airlines v Mike Otutuizu* (2011) LPELR 827; *Sudan Airway v Surajo Mohammed Abdullahi* (*supra*) at p. 156. *KLM Airlines v Kumzhi* (2004) 8 NWLR (*supra*) at pp.252-254; *Awawu Olulu Otoakhia v Aero Contractor Nigeria Limited v Keazor Esq* (2011)LPELR 1353 per Adekeye JSC; *Adekan v ECU- Line NV* (2006) 5 SC (Pt II) 32. *Ports & Cargo Handling Services Co Ltd & Ors v Migfo Nig Ltd* (2012) 18 NWLR (Pt 1333) 555.

<sup>5</sup> Simple contract is any contract other than a formal contract or contracts required to be under seal. See L.B Curzon, *Dictionary of Law* Fifth Edition (London: Financial Times Management, 1998). See also *Power Products Intl Ltd v Wema Bank* (2012) LPELR-7952 (CA). *Ascot Flowlines Ltd v. BV Integrated Projects Ltd* (2015) LPELR -25680 (CA).

<sup>6</sup> See *EL-Yadi Motors Ltd v. FRN* (2019) LPELR-47151 (CA). *Broadband Technologies v. Airtel* (2018) LPELR -46659 (CA). *Socio-political Research Development v. Ministry of FCT & Ors* (2018) LPELR-45768 (SC). *FUTA v. BMA Ventures (Nig) Ltd* (2018) LPELR-44429 (CA).

<sup>7</sup> See *Air France v. Majasan* (2017) LPELR-23319 (CA).

<sup>8</sup> See *KLM v. Idehen* (2017) LPELR-43575 (CA).

<sup>9</sup> See *Azeez v. Lufthansa German Airline* (2014) LPELR-22416 (CA); (2016) 2 NWLR (Pt.1496) 217. *Emirate Airline v. Ngonadi* (2013) LPELR-22053 (CA); (2014) 9 NWLR (Pt.1413) P.429. *Mekwunye v. Emirates Airlines* (2019) LPELR-46535 (SC). See also J., Anyebe, An Appraisal of the Jurisdiction of the Federal High Court in Aviation Matters,

[https://www.academia.edu/35903242/AN\\_APPRAISAL\\_OF\\_THE\\_JURISDICTION\\_OF\\_THE\\_FEDERAL\\_HI\\_GH\\_COURT\\_IN\\_AVIATION-MATTERS](https://www.academia.edu/35903242/AN_APPRAISAL_OF_THE_JURISDICTION_OF_THE_FEDERAL_HI_GH_COURT_IN_AVIATION-MATTERS).

In spite of these findings of the courts, these judgments have failed to give a clear description as to what actual carriage, embarkation or boarding entails and this has contributed to the perplexities experienced by clients and their legal representatives in deciding which court to approach in air carrier liability cases. This paper in the succeeding paragraphs while analyzing Nigerian judicial authorities in respect of the matter will attempt to decipher and delineate some jurisdictional indicators to enable clients and legal practitioners pinpoint the right court to approach.

## **2.0 Categories of Air Carrier liabilities**

### **2.1 Death and Injury of Passenger(s)**

An air carrier may be liable for damages resulting in death or injury of passengers. In furtherance to the foregoing statement, the Civil Aviation Act<sup>10</sup> provides that a carrier is liable for any damage sustained in case of death or bodily injury of a passenger upon the condition that such accident that caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.<sup>11</sup> To avoid the payment of an amount not exceeding 100,000 Special Drawing Rights (SDR)<sup>12</sup> as damages per passenger, the carrier must prove that their negligence did not cause the aircraft accident or show that the negligence of a third party created it.<sup>13</sup> However, in any case of aircraft accident resulting in death or injury of passengers, the carrier is expected to make an advance payment of at least US \$30,000 (Thirty Thousand Dollars) within 30 days from the date of such accident and such advance payment shall not constitute recognition of liability and may offset against any amount subsequently paid as damages by the carrier.<sup>14</sup>

### **2.2 Damage, Loss and Delay of Cargo or Baggage**

An air carrier is liable for any damage sustained in case of destruction or loss of or damage to checked baggage and that will be when the event that initiated the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the carrier's charge.<sup>15</sup> In the case of cargo, the carrier is liable for damages sustained in the event of the destruction or loss of, or damage to cargo upon the condition that the event which caused the damage so sustained took place during the carriage by air.<sup>16</sup> The carriage by air comprises the period during which the cargo was in the custody of the carrier.<sup>17</sup> The carrier is also liable for damage occasioned by delay in the carriage by air of passenger's baggage or cargo.<sup>18</sup> In the event of damage caused by delay, the liability of the carrier for each passenger is limited to 4,150 SDR. In the case of destruction, loss, damage or delay of baggage, the liability of the carrier is limited to 1000 SDR 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. In that case, the carrier will be liable to pay

<sup>10</sup>) Nigeria Civil Aviation Repeal and Re-enactment Act, 2006, Sched II Art 171.

<sup>11</sup> See *Harka Air Services (Nig) Ltd v. Keazor*, (2011) LPELR-1353 (SC); (2011) 13 NWLR (Pt 1264) 320.

<sup>12</sup> Special Drawing Rights is a kind of reserve of foreign exchange asset comprising of leading currencies globally and was created by the International Monetary Fund (IMF) in the year 1969. The currency value of Special Drawing Rights is determined by summing the values in US Dollars, based on the market exchange rates of a basket of major currencies (the US Dollars, Euro, Japanese Yen, Pound Sterling and the Chinese Renminbi/Yuan). The Special Drawing Rights (SDR) currency value is calculated daily (except on International Monetary Fund holiday or whenever they are closed for business). The valuation basket is reviewed and adjusted every five years.

<sup>13</sup> Sched II, Art 21(1).(n.11)

<sup>14</sup> *Ibid.* S 48 (3) (n.11). See also C.C Ani, *Understanding Legal Concepts in Nigeria*, Volume II (Enugu: CIDJAP, 2020) p.250.

<sup>15</sup> Civil Aviation Act, 2006, Sched II, Art 17(2).

<sup>16</sup> *Ibid.* Sched II, Art 18(1.)

<sup>17</sup> Civil Aviation Act, 2006. Sched II, Art 18(3).

<sup>18</sup> *Ibid.* Sched II, Art 19.

a sum not exceeding the declared sum, unless it proved that the sum is greater than the passenger's actual interest in delivery at destination.<sup>19</sup>

In the case of destruction, loss, damage or delay of a cargo, the carrier's liability is limited to a sum of 17 SDR 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.<sup>20</sup> In that case, the carrier will be liable to pay the sum not exceeding the declared sum, unless it proves that the sum is greater than the consignor's actual interest in delivery at destination.<sup>21</sup> In respect to liability as a result of damage caused by delay which is limited to 4,150 SDR and destruction, loss, damage, delay or destruction of baggage which is limited to 1,000 SDR, such limitation shall not apply if it is proven that the damage was as a result of an act or omission of the carrier, its servant or agent, done with intent to cause damage with knowledge that damage would probably result.<sup>22</sup>

### **2.3 Delayed or Denied Boarding and Cancellation of Flight**

The Montreal Convention and the Civil Aviation Act,<sup>23</sup> did not provide for cases of denied boarding or flight cancellation, but these situations are contemplated by the Consumer Protection Regulations (CPR).<sup>24</sup> Generally, causes of delay are related to one or more of the following factors: weather, aircraft maintenance, aircraft connections, air traffic congestion, or security. Air carriers must deal with these tangible and intangible obstacles every day.<sup>25</sup> A flight delay is when an airline flight takes off and/or lands later than the scheduled time. In the event of a delay, the airline is expected to provide refreshments, drinks and a means of communication or a refund of the cost of essential calls. When an operating air carrier reasonably expects a flight to be delayed beyond its scheduled time of departure, it shall provide the passengers the assistance specified below:

- (i) Between two hours and four hours, refreshments, free telephone calls and E-mails.<sup>26</sup>
- (ii) More than four hours, meal, telephone calls and E-mails.<sup>27</sup>
- (iii) Where the reasonably expected time of departure is at least six hours after the time of departure previously announced, an

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<sup>19</sup> *Ibid.* Sched II, Art 22(2).

<sup>20</sup> See *South African Airways v. Prosoft Technologies*, (2016) LPELR-40573 (CA).

<sup>21</sup> *Ibid.* Sched II, Art 22(3). See also *Emirates Airline v. Aforika*, (2014) LPELR-22686 (CA); (2015) 9 NWLR (Pt 1463) 80. It is pertinent to mention that as at 28<sup>th</sup> December, 2009, the current liability of a carrier in respect of loss, destruction, damage or delay of a cargo as revised by ICAO has been increased from 17 SDR to 22 SDR. In case of death or bodily damage it has been increased from 100,000 SDR to 128,821 SDR. In case of damage caused by delay, it has been increased from 4,150 SDR to 5,346 SDR and in the loss, damage, destruction or delay of baggage, the current limit is 1288 SDR as against 1000 SDR.

<sup>22</sup> Civil Aviation Act, 2006, Sched II, Art 22(5). See also *British Airways v Ayotebi*, (2014) LPELR-23120 (SC); (2014) 3 NWLR (PT 1424) 253; (2015) All FWLR (Pt 766) 442. See also C.C Ani (n. 15). P.251

<sup>23</sup> *Supra* (n.16)

<sup>24</sup> O Adediran Current Regulation of Air Carriers Liability and Compensation Issues in Domestic Air Carriage in Nigeria' *Journal of Air Law and Commerce* (2016) 81(1) p. 10.

<sup>25</sup> J W Lee, J C Wheeler, 'Air Carrier Liability for Delay: A Plea to Return to International Uniformity'. *Journal of Air Law and Commerce* (2012) 77(1), P. 1. See also A. Mustapha 'An Appraisal of Air Passenger Protection Laws for Delay of Flight in Nigeria'. *International Journal of Social Science and Humanity* (2017) 7(1), p. 47. See also, C S Nwakoby, A E Chukwujekwu 'Impact of Consumer Protection Law in Aviation Industry in Nigeria'. *International Journal of Comparative Law and Legal Philosophy* (2020) 2(1), p. 43.

<sup>26</sup> Reg. 19.6.2.1, Nigeria Civil Aviation Authority Regulations 2015, Part 19.

<sup>27</sup> *Ibid.*

accommodation shall be provided coupled with a means of transportation from the airport to the accommodation (hotel or any other).<sup>28</sup>

For purposes of cancellation of flight in respect of domestic flight, the passengers are entitled to refreshments, meal, hotel accommodation and transportation to the hotel accommodation unless they were informed of the cancellation at least twenty-four hours before the scheduled time of departure. In respect of International Flight, the passengers are entitled to the same as in domestic flight unless:

a. They were informed of the cancellation at least seven days before the scheduled time of departure.<sup>29</sup>

b. They are informed of the cancellation between three and seven days before the scheduled time of departure and are offered re-routing allowing them to depart not more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival.<sup>30</sup>

c. They are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing allowing them to depart not more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.<sup>31</sup>

When passengers are informed of cancellation, an explanation shall be given concerning possible alternative transport.<sup>32</sup> An operating airline shall not be obliged to pay compensation for cancellation if it can prove the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.<sup>33</sup> The burden of proof concerning any question as to whether and when the passenger has been informed of the cancellation shall rest with the airline.<sup>34</sup>

### 3.0 Determining the Adjudication Venue

An action for damages must be brought in the territory of one of the State parties, either before the court of the domicile of the carrier or of its principal place of business or where it has a place of business through which the contract has been made or before the court at the place of destination. In respect of damage resulting from death or injury of a passenger, an action may be instituted in any of the aforementioned venues and in addition in the territory of a State party in which at the time of the accident, the passenger has his or her principal and permanent residence.<sup>35</sup>

#### 3.1 The Simple Contract Argument

Where the action is being instituted in Nigeria, it appears that from the provisions of Section 251 (k),<sup>36</sup> and S 7 of the Federal High Court Act, the Federal High Court has exclusive jurisdiction in matters

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.* Reg. 19.7.1 (III).

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.* Reg. 19.7.2.

<sup>33</sup> *Ibid.* Reg. 19.7.3.

<sup>34</sup> *Ibid.* Reg. 19.7.4.

<sup>35</sup> Civil Aviation Act, 2006, Sched II, Art 33. See also C.C Ani (n.15). P.241.

<sup>36</sup> Constitution of the Federal Republic of Nigeria 1999 (As Amended).

pertaining to aviation and safety of aircraft. However, this jurisdictional power as had been stated earlier in the introductory part of this paper cannot be exercised by the Federal High Court if the said contract is a simple contract.

This customary principle of law informed the decision of the trial Court in *Air France v. Majasan*.<sup>37</sup> In that case, the respondent who intended to travel to France bought a ticket from the Appellant but when her application for visa was turned down she returned the unused ticket which was collected by the appellant without making a refund. The respondent instituted an action at the Ikeja High Court of Lagos State. The suit was challenged for being instituted at a wrong venue. The respondent's defence was that the case before the court was one of simple contract of sale of air ticket and of money received by the appellant and as such was within the jurisdiction of the State High Court. The court assuming jurisdiction, ruled that the matter was one of simple contract of refund of purchased air ticket. The appellant aggrieved, lodged an appeal which was allowed and the ruling of the lower court was set aside. The Court of Appeal had to consider whether the contract entered into between the appellant and the respondent and which forms the subject matter qualifies as an aviation contract or a simple contract. The Court was swayed by the argument of the Appellant that the contract was an aviation contract and not a simple contract and according to appellant the ticket issued to the respondent contained the terms and conditions that governs the aviation contract. These were the words of the Court:

I agree with learned counsel for the appellant that the airline ticket purchased by the respondent from the appellant was a document made pursuant to a contract for international carriage by air, which was an aviation contract. It was not a simple contract, neither was what had transpired between the parties simply money had and received. For emphasis, it was an aviation contract. The refund of an unused air ticket must be within the terms and conditions of the said aviation contract as governed by law, including these domesticated international conventions and instruments. The term 'No show' as raised by the Appellant, is a term used in aviation contract parlance. The conditions which must exist to activate 'No show', particularly as regards international carriage by air, must be determined by the international conventions. The parties therefore did not just have a simple contract, nor was there a case of money had and received. By virtue of a combination of the provisions of S 7(1)(k) of the Federal High Court Act, and of S 251(1)(k) of the 1999 Constitution of the Federal Republic of Nigeria, as amended, the Court with jurisdiction to entertain complaints over a contract falling under aviation matters is the Federal High Court. The lower court therefore, by virtue of these extant laws, had no jurisdiction to entertain any dispute arising from an aviation contract, which is guided by international conventions. The challenge of the Appellant to the jurisdiction of the lower Court is therefore upheld.<sup>38</sup>

This paper in the face of the prevailing facts of the foregoing case is in agreement with the trial court but at variance with the finding of the Court of Appeal on the basis that all that was in issue was a request for refund for an unused ticket. It is without contention that at the point the request for refund

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<sup>37</sup> *Supra.* (n.8).

<sup>38</sup> *Supra.* (n.8) at p.18-19, *Paras D-E, Per Otisi JCA.* See also *Otakhia v. Aero Contractors Nigeria Ltd.* (2014) LPELR-23319 (CA).

of the return ticket was made, neither the first leg of the journey had been completed nor was there any form of boarding, embarkation or actual carriage.<sup>39</sup> All that transpired between the respondent and the appellant are incidences of a simple contract and only the State High Court has jurisdiction to entertain same. For the contract to amount to an aviation contract, there must be an element of carriage, boarding or embarkation. In the instant case the said ticket is a return ticket and since none of the legs of the journey have been completed or was there any form of carriage, boarding or embarkation during the first leg, it is submitted that the contract was a simple contract and the right litigation venue is the State High Court.

### 3.2 The Aviation Contract Argument

On the strength of some judicial decisions, it can be said that an aviation contract is created when there is carriage, where boarding has been completed and/or where there has been an embarkation. In addition, where the said ticket is a return ticket and the first leg has been completed, an aviation contract would be created notwithstanding that the alleged wrong happened during the second leg that is devoid of any form of carriage, boarding or embarkation. In *Delta Airline v. Josef & Anor.*,<sup>40</sup> the 1<sup>st</sup> Respondent being a minor suing through his next friend was prevented from boarding the Appellant's airline on his return trip from Atlanta to Lagos on the premise that the ticket purchased for the 1<sup>st</sup> Respondent was bought with a stolen credit voucher. The action against the appellant instituted at the High Court of Lagos State was challenged for being instituted in a wrong venue. The Court dismissed the preliminary objection which was the reason for the appeal. Although, the appeal was allowed, it is of the essence that we look at some remarks made by the Court and the line of reasoning adopted by the Court in arriving at its decision. The Court had to put into consideration the fact that the ticket was a return ticket and for the fact that the first leg has been completed, the Court held that an aviation contract was created. Thus in cases of return tickets it should be treated as one contract and in a situation where the first leg had been completed, such a contract is an aviation contract which must be entertained by the Federal High Court only.<sup>41</sup>

Conversely, where the ticket even though is a return ticket but there had been no embarkation by the passenger nor had the first leg of the journey been completed, it is to be deemed as one bereft of any form of carriage and in this case, the contract is merely a simple contract and not an aviation contract. Thus, the State High Court and not the Federal High Court has jurisdiction. In the same vein, if a passenger merely buys a ticket without actual carriage, such a contract cannot according to the Nigerian Appellate Court's decision in *Josef's* case be an aviation contract to enable the Federal High Court assume jurisdiction. The Court of Appeal in *Josef's* case in this regard penned thus:

A person is actually in a contract of carriage when he has been carried by the aircraft. There is no carriage when all that has happened is a passenger

<sup>39</sup>See *KLM Royal Dutch Airline v. Idehen*, *Supra* (n.9) where the Court of Appeal at p. 36-37, *paras.* C-B, *Per Obaseki-Adejumo, JCA* held thus: where as in the instant case, a passenger purchases a return ticket and the first leg of the carriage had taken place, before dispute arose as to the return of the journey. It will clearly be a manifest misapprehension of the position of the law to say that the contract between the parties is a mere simple contract. Far from it! The twin nature of the obligations arising under contract vis-a-vis the dispute which arose from the second leg of the contract of carriage evidently brings this case within the exclusive jurisdiction of the Federal High Court with the applicability of the Montreal Convention and Civil Aviation Act. See also *KLM Royal Dutch Airline v. Aloma* (2017) LPELR-42588 (SC); (2018) 1 NWLR (Pt. 1601) 473; (2018) ALL FWLR (Pt. 938) 1777. *KLM Royal Dutch Airline v. Taher* (2014) 3 NWLR (Pt. 1393) 137. *Azeez v. Lufthansa German Airline*, *Supra* (n.10).

<sup>40</sup> (2019) LPELR-46921 (CA).

<sup>41</sup> C C Ani (n.15) P.244.

being checked in at the checking in counter. After that, if he has luggage, the luggage is taken in at the counter. At that stage, the luggage is now under the custody of the airline. Should there be a breach of contract as it relates to the luggage, the airline will be liable even if the luggage has not been taken into the aircraft that is not the same with the passenger at the check in counter, whatever breaches will be seen as a breach of simple contract having nothing to do with aviation or aircraft. After checking in, anything can still happen between then and the time of embarking. The flight can be delayed or cancelled. The passenger can as well change his mind. If any of these happen and there is a breach the matter can be properly determined in the State High Court and not the Federal High Court as carriage by air has not taken place to bring the matter under the provisions of S 251(I)(K) of the 1999 Constitution of the Federal Republic of Nigeria, the passenger must have embarked on the aircraft, anything less will not bring the action within the jurisdiction of the Federal High Court.<sup>42</sup>

#### **4.0 Identifying the Jurisdictional Indicators**

The following can be distilled from the foregoing statement of the Court of Appeal in *Josef's* case:

- (i) Where the ticket is a return ticket and the passenger has completed the first leg such a contract is an aviation contract and only the Federal High Court has jurisdiction.<sup>43</sup>
- (ii) Where the ticket is a return ticket but no form of carriage had occurred (The passenger merely bought the ticket or was in the checking in process to board for the first leg) such a contract is a simple contract and only the State High Court has jurisdiction.
- (iii) Where the ticket is a return ticket and there is a case of delay or denial of boarding during the second leg of the journey the contract is an aviation contract and only the Federal High Court has jurisdiction.
- (iv) Where the ticket is a return ticket and there was delay or denial of boarding before carriage in the first leg of the journey could take place such an action can only be instituted at the State High Court as it is a simple contract.
- (v) Where it is a one-way ticket and there was no form of carriage, the contract is a simple contract which only the State High Court has jurisdiction.<sup>44</sup>
- (vi) Where the ticket is a one-way ticket and there was delay or denial of boarding before embarkation such a contract is also a simple contract and the proper venue is the State High Court.

On the strength of the decision of the Court, it can be submitted that the indicators include the type of ticket (Whether a return or a one-way ticket) and whether carriage/embarkation has taken place.<sup>45</sup> A fastidious look at the foregoing outlined jurisdictional indicators contained in this paper will reveal that while carriage is employed as a yardstick in (ii), (iv) and (v), embarkation was used as a measure in (vi). Are both terms the same and can they be used interchangeably? This use of two different terms (carriage and embarkation) may be attributed to the absence of a clear cut definition or description of

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<sup>42</sup> *Ibid.* at p. 17-18, paras. 17-18, *Per Tobi Ebi Owei, JCA.*

<sup>43</sup> See E Ohiri 'A Review of The Jurisdiction of Nigerian Courts in Matters Involving Carriage of Passengers By Air'. <<https://grfdalleyandpartners.com/2019/03/29/review-jurisdiction-courts-matters-involving-carriage-passengers-air/>>. Accessed on 20<sup>th</sup> April 2021 at 5:36 PM.

<sup>44</sup> See *Air France v. Majasan, Supra* (n.8).

<sup>45</sup> C C Ani (n. 15). P.245.

what carriage or embarkation entails. At some point in the judgment, it appeared that the yardstick for the determination of which Court should have jurisdiction is carriage while in another part of the judgment reference was made to embarkation as the determinant factor. A proper appreciation of these perceived inconsistencies will require the reproduction of the statement of the Court:

To qualify as an aviation matter, the contract must lead to carriage in an aircraft. This means that the passenger or good must have been carried in the aircraft.... It must have gone beyond checking in at the counter and the passenger must have embarked on the journey by entering the aircraft. It is at this stage, that anything done to the passenger which is a breach of the contract will be an aviation matter for which it is only the Federal High Court that has jurisdiction. Any breach of any contract which is done before the actual carriage of the passenger by way of embarkment into the aircraft will amount to simple breach of contract. Any breach of any contract which is done before the actual carriage of the passenger by way of embarkment into the aircraft will amount to simple breach of contract which the State High Court has jurisdiction. A person is actually in a contract of carriage when he has been carried by the aircraft. There is no carriage when all that has happened is a passenger being checked in at the checking in counter. (Emphasis supplied)

In yet another part of the *Josef's* judgment, the Court stated thus:

To bring the matter under the provision of S 251 (I)(k) of the 1999 Constitution of the Federal Republic of Nigeria, the passenger must have embarked on the aircraft. Anything less, will not bring the action within the jurisdiction of the Federal High Court.

It then appears that the words 'carriage' and 'embarkation' can both be used as determinant factors in ascertaining which Court will have jurisdiction. Thus, 'embarkation' is one of the determinant factors in ascertaining whether the State High Court or the Federal High Court will have jurisdiction over a resultant breach. Embarkation is defined in the Part 19 of the Nigeria Civil Aviation Authority Regulations as the boarding of an aircraft for the purpose of commencing a flight. If embarkation is employed as the determinant factor then all activities which amounts to breach that happened before embarkation with the exception of cases of return tickets where the first leg has been completed, will be an action for the State High Court,<sup>46</sup> and if the breach happened during embarkation or after it has occurred, it is a matter for determination by the Federal High Court. It is also pertinent to point out that from the *Josef and Idehen's* judgment, that any breach concerning delay, cancelled flight or denial of boarding in respect of passengers or their baggage with the exception of cases of return tickets where the first leg had been completed will be a matter for the State High Court and this is so because delay of flights and cancellation of flights normally happens before embarkation or actual carriage.<sup>47</sup>

## 5.0 Conclusion

This work has revealed that the jurisdictional rift between the State High Court and the Federal High Court as it pertains to suits involving the liability of an air carrier is an upshot of the different denotations ascribed to some jurisdictional indicators like carriage and embarkation by the Nigerian appellate

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<sup>46</sup> See *KLM Royal Dutch Airlines v. Taher Supra* (n.39); where the court held that since the Respondent had not boarded the aircraft when the harm complained off took place and since embarkation had not started, the carriage by aircraft had not begun and therefore, it is completely outside the parameter of carriage by air. Thus, if the Respondent had embarked on the aircraft or boarded same that is where the Federal High Court would have come in. See also C C Ani (n.15). p.248-249.

<sup>47</sup> *Ibid.*

courts. This paper in this regard appraised and reviewed the import of these jurisdictional indicators in line with the decisions of the appellate court. The paper in its appraisal brought to light the fact that although the statutory meaning of these terms may appear hazy, however, one mutual feature of majority of the judgments is that for the contract to amount to an aviation contract, boarding of the passengers must have started or completed.

## **6.0 Recommendations**

Taking into consideration the foregoing concluding statements, it is recommended as follows:

- (i) That a statutory and clear cut definition of terms should be provided for easy ascertainment of the meaning and ingredients of some jurisdictional indicators like carriage and embarkation.
- (ii) That until a clear cut and harmonized determinant factor is chosen (i.e. whether actual carriage which involves any form of movement by the aircraft or embarkation which entails complete boarding), it will be tidier for the purpose of forecast or prediction to adopt the line of reasoning of the trial Court in the case of *Air France v. Majasan*,<sup>48</sup> where it was held that the purchase of ticket and the request for a refund for the unused ticket amounted to a simple contract and any other breach that occurs after the purchase of the ticket amounts to breach of the aviation contract.
- (iii) That where it is a return ticket and one leg of the journey has been completed, any other breach occurring thereafter is a breach of an aviation contract which only the Federal High Court should exercise jurisdiction.
- (iv) That where the ticket is a return ticket and there is a case of delay or denial of boarding during the second leg of the journey the contract is an aviation contract and only the Federal High Court should exercise jurisdiction.

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<sup>48</sup> See *KLM Royal Dutch Airlines v. Taher, Supra* (n.39)