The Validity or otherwise of Forum Selection Clauses in Maritime Contracts

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INTRODUCTION

Dispute is an inevitable outcome of human interactions. In a bid to ensure proper resolution of commercial disputes, parties to a commercial contract anticipate these disputes and incorporate dispute resolution clauses in the contract. Maritime contracts like any other contracts have forum selection clauses (including arbitration clause) inserted in them stipulating the forum and or law that will govern the resolution of any dispute that may potentially arise out of the contract. The purpose of this is that where dispute arises, parties will have recourse to their selected forum.

In this article, forum selection clauses are two-pronged – (a) foreign jurisdiction clause, that is, selection of the court of a foreign country in the resolution of dispute; and (b) arbitration clause. These forum selection clauses may designate a particular country, court or tribunal as the forum.[1] This article therefore seeks to analyse the validity or otherwise of these forum selection clauses *vis a vis* maritime contracts in Nigeria.

FORUM SELECTION CLAUSES IN MARITIME CONTRACTS

Foreign jurisdiction and arbitration clauses are common in maritime contracts. However, these clauses have been typically challenged because of the adhesive nature of maritime contracts which are normally standard-form contracts where the terms and conditions are put forward by one party (with the greater contracting/bargaining power) while the other party is not given an opportunity to negotiate or amend those terms and conditions.[2] While foreign jurisdiction clause is inserted in maritime agreements to ensure that resolution of any dispute arising therefrom will be pursued only in the court of the country stipulated in the agreement, arbitration clause stipulates that in the event of dispute, parties will first attempt to resolve the dispute through arbitration before resorting to litigation.

One of the reasons responsible for this is that in a maritime contract, most international shipowners and seaborne carriers of goods typically prefer to select the court or tribunal of their home country as the venue for the resolution of potential dispute, rather than getting entangled in multiple lawsuits in different jurisdictions across the world. Besides, many of them do not trust the legal system in Africa, which is often perceived as inefficient. For example, a Chinese ship-owning company would typically prefer to select a maritime court in China – say the Shanghai Maritime Court of the Peoples Republic of China - as the dispute resolution forum and the laws of the Peoples Republic of China as the applicable law when contracting with a Nigerian charterer. Hence, the argument has been put forward as to whether these forum selection clauses are enforceable when inserted into a maritime agreement.

There are two sides to the argument. Some writers and practitioners believe that parties are bound by their agreement and as such, an agreement must be kept[3] while others believe that a contract that seeks to oust the jurisdiction of a court is invalid, null and void.

Various countries have adopted different approaches to handling forum selection clauses in maritime contracts, the most prominent of which is the test laid down in the UK in 1969 known as the "*Brandon Test*". In *St Eleftheria*[4], Justice Brandon laid down the Brandon Test (named after him) as follows:

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[1] Marilyn Raia, "Forum Selection Clauses in Maritime Contracts". Retrieved from https://www.bullivant.com/forum-selection-clauses/ on March 9, 2023

[2] Practical Law Definition of Standard Form Contract. Retrieved from https://uk.practicallaw.thomsonreuters.com/w-003-9194?transitionType=Default&contextData=(sc.Default) on March 9, 2023

[3] This is the doctrine of *pacta sunt servanda* which simply means agreement must be kept.

[4] (1969) 1 LI.L.REP. 237 A.

- In what country is the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts;
- Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects;
- With what country either party is connected and how closely;
- Whether the defendants genuinely desire trial in the foreign country or are only seeking procedural advantages; and
- Whether the plaintiff would be prejudiced by having to sue in the foreign court because they would:
  (a) be deprived of security for that claim;
  (b) be unable to enforce any judgment obtained;
  (c) be faced with a time-bar not applicable in England; or
  (d) for political, racial, religious or other reasons be unlikely to get a fair trial.

THE ADMIRALTY JURISDICTION OF THE FHC

Section 251(1)(g) of the 1999 Constitution provides that:

> "*251(1) Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other Court in civil causes and matters*
>
> *(g) any admiralty jurisdiction, including shipping and navigation on the River Niger or River Benue and their affluents and on such other inland waterway as may be designated by any enactment to be an international waterway, all Federal Ports, [including the constitution and powers of the Ports Authorities for Federal Ports] and carriage by sea.*"

See also *section 7(1)(d)* of the Federal High Court Act 1973 which vested the Federal High Court with similar jurisdiction.

The primary legislation governing admiralty matters in Nigeria is the Admiralty Jurisdiction Act (the "**AJA**")[5]. Section 3 of the AJA provides thus:

> "*3. Subject to the provisions of this Act, the admiralty jurisdiction of the Court shall apply to -*
>
> *a. all ships, irrespective of the places of residence or domicile of their owners;*
>
> *b. all maritime claims, wherever arising.*"

The AJA defines the Court as the Federal High Court (the "**FHC**").[6] Section 19 of the AJA provides that the FHC shall exercise exclusive jurisdiction over any admiralty matter whether civil or criminal.

THE ATTITUDE OF NIGERIAN COURTS TO FORUM SELECTION CLAUSES IN MARITIME CONTRACTS *VIS A VIS* SECTION 20 OF THE AJA

Perhaps, the provision of the AJA which has generated much controversies *vis a vis* forum selection clause in maritime contracts is section 20 which stipulates that any agreement by any person or party

[5] Cap. A5, LFN, 2004.
[6] S. 24 of the AJA.

to any cause or action which seeks to oust the jurisdiction of the FHC over any admiralty matter shall be null and void, if:

> *(a) the place of performance, execution, delivery, act or default is or takes place in Nigeria; or*
> *(b) any of the parties resides or has resided in Nigeria; or*
> *(c) any payment under the agreement (implied or express) is made or is to be made in Nigeria; or*
> *(d) in any admiralty action or in the case of a maritime lien, the plaintiff submits to the jurisdiction of the Court and makes a declaration to that effect or the rem is within Nigeran jurisdiction; or*
> *(e) it is a case in which the Federal Government or the Government of a State of the Federation is involved and the Federal Government or Government of the State submits to the jurisdiction of the Court; or*
> *(f) there is a financial consideration accruing in, derived from, brought into or received in Nigeria in respect of any matter under the admiralty jurisdiction of the Court; or*
> *(g) under any convention, for the time being, in force to which Nigeria is a party, the national court of a contracting State is either mandated or has a discretion to assume jurisdiction; or*
> *(h) in the opinion of the Court, the cause, matter or action adjudicated upon in Nigeria*

Generally, where an action which is the subject of a foreign jurisdiction clause or an arbitration agreement is brought before a Nigerian court, the other party to the foreign jurisdiction or arbitration agreement may approach the court for stay of proceedings.[7] However, the decisions of the Nigerian courts in this respect have largely differ depending on the circumstances of each case. The Supreme Court of Nigeria in the case of *Sonnar (Nig.) Ltd & Anor. V. Partenreedri M.S. Nordwind Owners of the Ship M.V. Nordwind & Anor.*[8], refused a stay of proceedings in the Nigerian court because doing so would mean that the appellants would no longer be able to bring any action in the German court as the action would be too late to be brought in the German court. The court held thus:

> "*I think, with respect, what we have in this case transcends mere balance of convenience. It is a total loss of action by the plaintiffs, if effect is given herein to the principle of Pacta Servanda Sunt, having regard to the peculiar circumstances of this case. As it was observed in the course of the argument of this case by this court, justice could not be sewed in this case by holding the appellants to their pact of having the action taken only in the German court.*"

Relying on the *Nordwind case*, the Supreme Court in the more recent case of *Nika Fishing Co. Ltd. v. Lavina Corp.*[9] clearly gave teeth to foreign jurisdiction clause in a contract by holding that a clear jurisdiction clause in a maritime contract which expressly excludes the jurisdiction of Nigerian courts over disputes arising from the contract surpasses the admiralty jurisdiction of the FHC. The Supreme Court further held thus:

> "*Jurisdiction is a very hard matter of law and so cannot be subjected to particular feelings and sentiments of the court. Where a contract specifically provides for the*

[7] See sections 4 & 5 of the ACA.
[8] (1987) LPELR-3494(SC).
[9] (2008) 16 NWLR (Pt.1114) Pg.546, Paras. F-G.

> *venue of litigation, courts are bound to give teeth to the contract by so construing it, without ado. In the instant case, the issue of difficulty of assemblage of witnesses and the cost of litigation arising from the parties going to Argentina did not arise from the processes placed before the court but were mere expressions of sentiment.*"

Although the Supreme Court in the two cases analysed above arrived at different conclusions, it applied in both cases, the Brandon Test laid down in *The Eleftheria case.* However, the different circumstances of the two cases gave rise to the different conclusions reached. It is pertinent to note that section 20 of the AJA was not considered by the Supreme Court before reaching its decisions in the *Nordwind case* and the *Nika Fishing case.*

In the more recent case of *JFS Inv. Ltd. v. Brawal Line Ltd.*[10], the Supreme Court held that "*the Admiralty Jurisdiction Act 1991 has virtually removed the element of courts discretion in deciding whether or not to uphold a foreign jurisdictional clause*". In this case, the Court relied on Section 20 of the AJA to decide that the Court of Appeal took the right decision when it did not determine, going by clause 2 of the bill of lading, the effect and applicability of the law of the country of shipment (that is, Germany).

SECTION 4 ACA VS. SECTION 20 AJA

Perhaps one area where there exists a bit of uncertainty in the decisions of Nigerian courts is the applicability of section 20 of the AJA *vis a vis* arbitration clause in maritime contracts. Although an arbitration clause is a species of forum selection clause, however, unlike foreign jurisdiction clause, it draws its legitimacy from a statute, that is, the Arbitration and Conciliation Act (the "**ACA**")[11] rather than the principle of *pacta sunt servanda*.

Sections 4 and 5 of the ACA provide that where parties have agreed to submit their dispute to arbitration as their preferred dispute resolution mechanism, the court may order stay of proceedings pending the determination by arbitration upon request by a party. The Court may grant an order for stay of proceeding if it is satisfied that there is no sufficient reason why the matter should not be referred to arbitration and the applicant is ready and willing to diligently prosecute the arbitration[12].

The question that arises from the combined reading of sections 4 and 5 of the ACA and section 20 of the AJA is whether, in light of section 20 of the AJA, the stay of proceedings empowered by the ACA amounts to an ouster of jurisdiction of the FHC in admiralty matters.

The Supreme Court addressed this question in *City Engineering Nigeria Ltd v. Federal Housing Authority*[13] where it stated thus:

> *As we have pointed out earlier, any agreement to submit a dispute to arbitration, such as the one referred to above, does not oust the jurisdiction of the Court. Therefore, either party to such an agreement may, before a submission to arbitration or an award is made, commence legal proceedings in respect of any claim or cause of action included in the submission (See HARRIS V. REYNOLDS (1845) 7 (2,1171). At common law, the court has no jurisdiction to stay such proceedings: Where, however, there is provision in the agreement, as in Exhibit 3, for submission to arbitration, the court has*

[10] (2010) 18 NWLR (Pt.1225) pg. 531 para. G.
[11] Cap A18, LFN 2004
[12] Section 5(2) of the ACA.
[13] (1997) LPELR-868(SC)

> *jurisdiction to stay proceedings by virtue of its powers under section 5 of the Arbitration Act.*

However, Nigerian courts have taken different views in their interpretation of this question as it relates to admiralty matters. The Court of Appeal in *MV Panormos Bay v. Olam Nig Plc*,[14] took the view that section 20 of the AJA constitutes a statutory limitation to the enforcement of an arbitration agreement contained in a maritime contract and therefore a court could declare an arbitration agreement null and void. The Court held thus:

> "*Indeed, the intention of the lawmakers as regards section 20 of the Admiralty Jurisdiction Decree is to derogate from the hitherto existing position found in section 4 of the Arbitration and Conciliation Act. In the instant case, since the object of the arbitration clause in the bill of lading is to oust the jurisdiction of Nigerian court to exercise its admiralty jurisdiction over the case, the said clause in null and void* "

One year before the decision in *M.V. Panormos Bay v. Olam Nig. Plc* (supra), the Supreme Court took a different stance in the case of *M. V. Lupex v. Nigeria Overseas Chartering and Shipping Ltd*[15] which bear similar facts with *MV Panormos* case. The Supreme Court held that so long as an arbitration clause is retained in a contract that is valid and the dispute is within the contemplation of the clause, the court ought to give due regard to the voluntary contract of the parties by enforcing the arbitration clause as agreed by them. In that case, the appellant requested the trial FHC to stay proceedings of the action filed by the respondent in view of the agreement the two parties entered in clause 7 of the Charterparty which refers any dispute to arbitration in London under English Law. The FHC refused the stay of proceedings and on appeal the Court of Appeal affirmed the decision of the FHC. On further appeal to the Supreme Court, the appeal was allowed and stay of proceedings was ordered. The apex court held among other things, that where parties have agreed to refer their dispute to arbitration in a contract, it behoves the court to lean towards ordering a stay of proceedings. The implication of this decision is that stay of proceedings could be granted pending reference to arbitration in a foreign country in deserving cases. It is important to note that section 20 of the AJA was not discussed in that case.

Although the *M.V. Lupex case* is a Supreme Court decision and came one year earlier than the *M.V. Panormos case* which is a Court of Appeal decision, the Court of Appeal in *M.V. Panormos case* was not called upon to, and did not in fact, consider the Supreme Court decision in *M.V. Lupex case* before arriving at its decision on the issue. However, the Court of Appeal in its much later decision in *Onward Ent. Ltd. v. M.V. Matrix*[16] relied on and followed the *M.V. Lupex case* to uphold an arbitration clause in a maritime contract notwithstanding section 20 of the AJA. The Court of Appeal held thus:

> "*Where parties have agreed to refer their dispute to arbitration in a contract, it behoves the court to lean towards ordering a stay of proceedings. Thus, stay of proceedings could be granted pending reference to arbitration in a foreign country in deserving cases [M.V. Lupex v. N.O.C. & S. Ltd. (2003) 15 NWLR (Pt.844) 469 referred to and followed.]*"

One would have thought that the *Onward Ent. Ltd. case* has laid the issue to rest until another decision of the Court of Appeal surfaced in 2021 titled *Fugro Sub Sea LLC v. Petrolog Limited*[17]. This case reversed to and held the same view as the *M.V. Panormos case.* The respondent commenced the suit

[14] (2004) 5 NWLR [pt. 865] 1
[15] (2003) 15 NWLR [Pt 844] 469
[16] (2010) 2 NWLR (Pt.1179) Pg.556, Paras. C-D
[17] (2021) LPELR-53133(CA).

at the FHC against the appellant for the settlement of debt to which the respondent claimed it was entitled. The respondent's claim arose from two agreements between the appellant and the respondent, *viz*- Memorandum of Agreement dated March 22, 2015 and BIMCO Charterparty Agreement dated October 11, 2015. Because of the appellant's refusal to meet its financial obligations to the respondent under the two agreements, the respondent instituted the suit under the undefended list procedure of the FHC. The appellant, rather than file a notice of intention to defend in accordance with the rules of the trial court, merely filed a conditional memorandum of appearance and thereafter filed a motion on notice seeking an order of stay of proceedings and/or an order striking out the suit for lack of jurisdiction among other reliefs. The trial court dismissed the appellant's motion on notice and noting that the appellant had failed to deliver any notice of intention to defend the action, entered judgment in favour of the respondent wherein all the reliefs sought by the respondent were granted.

Aggrieved by the said ruling and judgment of the trial court, the appellant lodged an appeal at the Court of Appeal. The Court of Appeal unanimously agreed with the decision of the trial court and held that despite the arbitration clauses found in clauses 12 and 34 of the two agreements respectively, the agreement between the parties was an admiralty contract and that the arbitration clauses relied on by the appellant were null and void on the ground that they cannot purport to oust the jurisdiction of the court, in the face of unambiguous constitutional and statutory provisions. The Court of Appeal concluded as follows:

> "*By these clear provisions, admiralty contract falls within the purview of the Act. From the facts leading to this appeal, the contract between the parties was an admiralty contract. In Lignes Aeriennes Congolaises v. Air Atlantic (Nig) Ltd (2005) LPELR-5808(CA), this Court, per Garba, J.C.A. (now J.S.C.) on Section 20 Admiralty Jurisdiction Act said, at page 20: "The words in the section being simple, clear and even laconic should be given their ordinary, literal and grammatical meaning… The ordinary and literal meaning of the words is that any agreement entered into or made by any person, whether a party to any cause, matter or action, or not which seeks to oust the jurisdiction of the Court shall be null and void, if it relates to admiralty matter and falls into any of the categories set out in the section""*

The import of the above decision of the Court of Appeal is that an arbitration clause in an admiralty agreement is null and void *ab initio* in that such clause operates as an ouster of the jurisdiction of the FHC in the face of constitutional and statutory provisions clothing the FHC with admiralty jurisdiction.[18]

OUR POSITION

The inclusion in an agreement to submit a dispute to the court of a foreign country or to arbitration does not generate the heat of ouster of jurisdiction of the Nigerian court. Firstly, the applicant seeking a stay of proceedings based on a foreign jurisdiction clause does not by so doing seek to strike out or dismiss the suit, but merely asks for a stay until the parties' agreement is carried out. We are not of the opinion that this amounts to an ouster of the court's jurisdiction. This is more so as where it becomes unrealistic to litigate the said dispute in the foreign court as agreed, parties have the liberty to return to the Nigerian court and continue the stayed proceedings. See *The Eleftheria* (supra).

In a fast-growing commercial world, parties should be allowed as much as possible to regulate their commercial relationships including where to settle their disputes as this is the only way international

[18] Specifically, section 251(1)(g) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and sections 1 and 20 of the AJA.

commerce can thrive. Shipping being an international business involving interconnection among nations, it is foolhardy to tie down a foreign shipping company to the Nigerian courts only because the plaintiff is a Nigerian. This in our opinion is inimical to Nigeria's international business image and may negatively affect our foreign direct investment. Nigeria being largely a cargo nation, may lose relevance in international shipping should our courts adopt the much rigid approach of bringing down shipping companies to Nigeria to litigate before Nigerian courts. Apparently, these shipping companies have vessels traversing various jurisdictions across the world and it would be practically difficult to begin to appear before the courts of each jurisdiction to settle disputes arising out of a contract of carriage or a charterparty agreement; hence, the need for a jurisdiction clause in the bill of lading or charterparty agreement. As will be explained *anon* in more details, section 10 of the AJA allows for stay of proceedings pending determination by a court of a foreign country.

Secondly, the inclusion in an agreement to submit a dispute to arbitration does not amount to ouster of jurisdiction of the court. It merely postpones the right of either of the contracting parties to resort to litigation in court whenever the other contracting party elects to submit the dispute under their contract to arbitration.[19] Therefore, the decision in *M.V. Panormos case* and *Fugro Sub Sea LLC case* to the effect that an arbitration agreement in a contract would deny the Nigerian court of jurisdiction and that section 20 of the AJA is a statutory limitation to the enforcement of the arbitration agreement is, with respect, perverse. This is because the Court of Appeal in both cases failed to consider section 10 of the AJA which provides that the FHC may, where it appears to it that admiralty proceedings commenced before it should be stayed or dismissed on the ground that the claim concerned ought to be determined by arbitration (whether in Nigeria or elsewhere) or by a court of a foreign country, order that the proceedings be stayed on certain conditions specified therein.[20]

The implication of section 10 of the AJA is that stay of proceedings may be ordered by the FHC in deserving cases in favour of arbitration (whether in Nigeria or a foreign country) or proceedings in a foreign country. Section 10 even preserves the admiralty jurisdiction of the FHC in the sense that where the claim is being pursued by arbitration in local or foreign country or by a court of a foreign country, the FHC may still exercise its admiralty jurisdiction by imposing conditions such as that equivalent security be provided for the satisfaction of any award or judgment that may be made in the arbitration or in the proceedings in the court of a foreign country[21].

In addition, the fact that admiralty matters are *sui generis* is instructive. Most admiralty cases require the making of interim orders as are appropriate in relation to the ship or other property for the purpose of either preserving the ship or other property or the rights of a party or of a person interested in the ship or other property.[22] Interestingly, only the FHC is imbued with the power to arrest a ship within Nigeria's territorial jurisdiction. An arbitration tribunal (whether in Nigeria or elsewhere) does not have such power. Similarly, where the ship or other property is within Nigeria's territorial jurisdiction, the court of a foreign country does not have power to arrest it. Thus, notwithstanding that the admiralty suit is being prosecuted by arbitration in a foreign country or in the court of a foreign country, the jurisdiction of the FHC may still be activated for the purpose of securing the arrest and preservation of the ship or other property pending determination of the suit in the foreign country.

[19] See *Onward Ent. Ltd. M.V. Matrix* (supra).
[20] That is on condition that the arrest and detention of the ship or property shall stay or satisfactory security for their release be given as security for the satisfaction of any award or judgment that may be made in the arbitration or in a proceeding in the court of the foreign country.
[21] See section 10(2)(b) of the AJA.
[22] See section 10(3) of the AJA.

The intention of section 20 of the AJA of making any clause in any agreement void which oust the jurisdiction of the FHC therefore relates to clauses that completely remove the opportunity of approaching the FHC. The intendment of the draftsman of that section, particularly when read in concert with section 10 of the same Act, is to ensure that parties are not prevented from approaching the FHC when they desire. Therefore, the courts ought to honour the method of dispute resolution that was voluntarily inserted in the parties' agreement in view of the doctrine of *pacta sunt servanda* and sections 4 and 5 of the ACA. Where these methods fail, parties may then revert to the FHC.

CONCLUSION

The provision of section 20 of the AJA should never be read in isolation. A combined reading of the section with section 10 clearly explicates the intention of the draftsman. The hallmark of any contractual relationship (maritime inclusive) is the willingness and intent of contracting parties to be bound by the terms of their contract. It is thus the duty of the Court to give effect to those terms lawfully and voluntarily agreed to and not make its own contract for the parties. It is only where these terms are illegal that the Court can and should interfere.

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