Fountain University Law Journal (FULAJ) (2024) 1(2) 154-172
A Publication of College of Law, Fountain University, Osogbo, Nigeria
https://fountainjournals.com/index.php/FULAJ/index

INTERNATIONAL CONTRACTUAL OBLIGATIONS AND THE LIMITS OF PARTIES' AUTONOMY IN THEIR CHOICE OF JURISDICTION AND APPLICABLE LAW

By

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Abstract
The courts in Nigeria recognises the freedom of parties to contract, which is hinged on the principle of party autonomy. It presupposes that parties to an international contract are at liberty choose the law to govern their contract, and also select the forum or jurisdiction where any dispute that arises from the contract will be adjudicated. Parties are also at liberty to submit their dispute to arbitration and also chose the applicable law to the substance of the dispute. The question that readily comes to mind therefore, is whether the choice of the party in that context, is sacrosanct or without qualification. Based on a doctrinal research approach, it was observed that the autonomy of parties to so do, is not without qualification. Statutory and case law have streamlined the enforceability of such choices in certain circumstances. The choice of the parties in that regard, must not only be reasonable, but made *bona fide*. It must also not contravene mandatory laws or public policy in Nigeria.

Keywords: **International Contract, Contractual obligations, Disputes, Jurisdiction of courts and Forum Selection**

1.0 INTRODUCTION

There is no international tribunal for resolving international or transnational commercial disputes and none seems likely to be created in the near future.[1] International commercial disputes are basically conducted in national courts[2]. At the core of such disputes are contractual obligations that has an international dimension. It often throws up a situation where the parties to the transaction are resident in different countries, or the place of performance is required is in another country, different from the one in which the underlying contract was concluded. The problems that arise in

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[1] C. Buhring- uhle, *Arbitration and Mediation International Business* (2nd ed, Kluwer law international Netherland, 2006) 26
[2] Ibid

such situations, is the determination of the appropriate countries to institute proceeding and the relevant law applicable to the transaction.[3]

Disputes arising from international commercial transactions usually arise out of international contracts. Businessmen the world over, usually enter into legally binding agreements between parties who are based in different countries. In appropriate cases, domestic courts through their national conflicts of law regime have the primary responsibility to localise a legal relationship which touches upon more than one state within a specific legal order and legal system.[4] National conflict of law rules is the bases upon which a national court assumes jurisdiction over such disputes, apply its domestic laws, foreign law or international law as the case may be, and enforce judgment handed down by foreign courts outside its jurisdiction.
However, it is often times practically impossible to accurately contemplate the applicable law to a transnational transaction, in terms of potential litigation.[5] On the issue of jurisdiction for instance, there is no uniform international standard by which national courts assert jurisdiction over transnational cases because the rules adopted vary from country to country. Different countries assume jurisdiction on different ground such as, residence or corporate headquarters of the defendant, nationality of the plaintiff, or the occurrence of the liability creating event among others. The different bases of jurisdiction and different interpretation of the different bases of jurisdiction, which inevitably arises in such circumstance, may lead to uncertainty in the outcome of litigation. It also encourages multiple lawsuits in different jurisdiction, as a defendant may decide to institute a counter- suit in another country or forum.[6]

However, the principle of party autonomy which is now, an entrenched principle of private international law recognises the entitlement of parties to exercise their 'freedom of contract' to choose the applicable law that shall determine the existence and validity of their rights and obligations arising from the contract.[7] It also encompasses the right to choose the forum which any dispute that may arise from the contract would be adjudicated. Thus, it is now common place for parties to an international contract to specify the law of a particular country as the governing law for their transaction in a bid to minimise legal risk, in the quest for certainty and predictability. The practice has been generally accepted in international business.

Choice of law clauses coupled with forum selection or choice of jurisdiction clauses have been observed to be almost indispensable precondition necessary for achieving orderliness required in international

[3] C A Whytock; 'Conflict of Laws, Global Governance, and Transnational Legal Order' *UC Irvine Journal of International, Transnational, and Comparative Law (2016)* 117, also available online at <http://scholarship.law.edu/ucijil/vol.1/iss1/6> accessed on 19-12-19

[4]Conflicts of law govern multijurisdictional legal problem that arises in the context of transnational disputes. It is essentially procedural in nature and deals with questions relating to the adjudicatory jurisdiction of domestic courts, the law applicable to the substance and the recognition and enforcement of foreign judgment within the territory of municipal courts.

[5] (n. 1)12

[6] Ibid

[7] Jan Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law* (Hart Publishing, Oxford, 2010) 271

business. The parties may also decide to opt for arbitration as the means for settling any dispute that arises from such contract, or even deliberately "internationalise" the contract by not only choosing a foreign jurisdiction as the seat of the arbitration, but also opting for a foreign system of law or international law to govern the substance of the dispute, which would have ordinarily been subject to the jurisdiction and laws of the domestic forum.

In practice however, the mere inclusion of a choice of forum clause in the parties' contract is not a guarantee that the court of the chosen forum will readily accept jurisdiction in the circumstance. The court of the chosen forum may decline jurisdiction on the basis of the doctrine of *forum non conveniens*[8] or on other similar grounds. The forum court with original jurisdiction may also refuse to accede to the choice of forum by the parties to the dispute and assert its jurisdiction, as courts jealously guards their jurisdiction the world over.

When it comes to the issue of the applicable law to the substance of the dispute, the existence of several competing applicable substantive laws is another great source of uncertainty, even where parties have expressly stipulated their choice of applicable law, one cannot predict the outcome when a domestic court has to apply foreign law.[9]Similarly, in the absent of specific choice of law clause, domestic courts usually would have recourse to their own conflict of law rules to determine the applicable law; a process fraught with methodological complexities because of the multi-jurisdictional connections with several legal system that may be involved.[10]

In the light of the forgoing, where party autonomy is exerted to choose an applicable law or forum, there are certain questions that would readily come to mind, bordering on how far parties can by common consent opt out of the laws and jurisdiction of a legal system or policy rule, otherwise more properly applicable in favour of another. In other words, the relevant question is, whether the parties' choice of forum and applicable law to their transaction is sacrosanct? The extent to which the choice of forum and applicable law will be honoured by the forum court is at the core of our inquiry.

2.0 THE NATURE OF TRANSNATIONAL COMMERCIAL DISPUTES

An attempt to conceptualise what cross-border or transnational commercial transactions entails is polemical. The issue of terminology and characterisation is a relevant consideration, particularly having regards to the various legal traditions and systems that may have close connection to a transaction of that nature. A relevant poser in this context is: what type of

[8] *Forum non conveniens* is a Latin word used to express that a forum is inconvenient. It is a legal doctrine trough which a court acknowledges that the court in another forum is a more appropriate venue to adjudicate in a case brought before it.

[9] (n.1) 14

[10] M.A Petsche, 'International Commercial arbitration and the Transformation of the Conflict of Law Theory' *Michigan State University Journal of International Law* (2009) (18).453

transaction constitute trade or commercial? Should the definition be limited only to transactions that gives rise to contractual obligations? Can transactions of an economic nature, which give rise to non-contractual obligation pass as trade, commercial, as the case maybe? Dalhusein's observation on the issue of terminology is apt, he noted that:
In English commercial law as such is also referred to as trade law. There is a terminology issue here within the common law family, in the US trade law is first and foremost associated with tariffs and international trade restriction and agreements, now centered on the operation of World Trade Organization (WTO). The result is that trade law in English terms is private law and therefore more properly commercial law, but it is in American terms rather public or regulatory law; thus the result of governmental involvement and international arrangements between states meant to facilitate trade or investment.[11]

The problem of terminology and characterisation is further accentuated by the domestic coverage of the subject along the line of legal tradition to each legal system. The different approach in common law and civil law countries is worthy of note. Dalhusein also noted that, "*in common law countries, commercial law is traditionally associated with sales and transportation of goods etc., with the related forms of transportation, insurance, and payment methods, it is therefore traditionally concerned with FOB and CIF, Bill of lading, bill of exchange, Promissory notes, and other methods of payment*"[12]
In civil law countries, the perception is traditionally different. The coverage is broader on the one hand and narrower on the other. In the broader context, it extents to subjects such as company and insolvency, financial services and other services. In the narrower context, civil law does not treat the proprietary aspect of such transaction and their operation in bankruptcy, under the *numerous clausus* principle, as commercial particular at the international or transnational sphere"[13]

The foregoing, therefore underscores the divergence in perception of the subject from the point of view of different legal system. Buhring – Uhle depiction of the current reality, in that regard is apt, he noted that:

> *The last decades have seen a dramatic increase in sheer size and complexity of international business transaction, in contrast to more traditional forms of international trade, consisting of discrete transactions such as sale or transportation of merchandise, these transactions typically expand over long period of time, deal with complex technologies, and frequently include more than two parties. Sophisticated financing schemes often provide lenders with considerable influence on the transaction. And governments are involved, sometimes directly as parties or through state owned entities, or they closely follow and influence projects*

[11] J. Dalhuisen, *Dalhuisen on Transnational. Comparative, Commercial, Financial and Trade Law* vol.1 (Hart Publishing, 2010) 16
[12]Ibid,15
[13] Ibid

> *that are seen to touch vital national interest such as country's national security, its industrial policy, or the exploitation of its natural resources… complex business transactions include, e.g. More or less closely integrated distributorship, long term 'take or pay" supply arrangement, manufacturing joint venture, high technology licensing agreement, natural resources development project, large scale infrastructure development schemes, or "strategic alliances" between two or more industrial conglomerates to develop complex technologies or to manufacture goods in third countries.*[14]

The focus here is on disputes emanating from cross-border transactions of an economic nature, in terms of trade or commerce between nationals of different countries, or sovereign authority or state entities transacting sorely on commercial basis and nationals of another State. The scope of it opened ended and extremely wide. The coverage encompasses trade in goods and services. UNCITRAL's definition of the term commercial is apt:

> *The term 'commercial' should be given a wide interpretation so as to cover matter arising from relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited in the exchange of goods and services; distribution agreement, commercial representation or agency; factory, leasing, investment; financing; banking; insurance; exploitation agreement to concession; joint venture and other forms of industrial or business cooperation, carriage of goods or passenger by air, sea, rail or road.*[15]

Disputes in this context therefore, relates to 'specific disagreement concerning a matter of facts, law or policy in which a claim or assertion of the party is met with refusal, counter-claim or denial by another,'[16] arising from international or trans-border commercial contracts or trade in goods and services, including cross border capital flow between nationals of one State and nationals of another State. International contractual obligation arises out the underlying contract which emanates from legally binding agreements between parties, based in different countries, in which they are obligated to do or not do certain things.[17] Such disputes also includes those arising from non-contractual transactions, but the scope of this work is limited to transactions that are founded on contract. [18]

3.0 THE BASES OF JURISDICTION OF COURTS IN NIGERIA

[14] (n.1) 6

[15] United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1983.

[16] J. G. Merills, *International Dispute Settlement* (3rd ed, Cambridge University Press, 1998) 1

[17] Ibid

[18] Ibid

The jurisdiction of Nigerian court in transnational disputes is essentially founded on the English law in that regard.[19] There are basically two types of claims: claims *in personam* and admiralty claim *in rem.*[20] The extant law in respect to jurisdiction is predicated on English rules common law rules, and other relevant rules obtainable under Nigerian law.[21] The bases of jurisdiction *in personam* is the presence of the defendant, in effect the defendant is amenable to the jurisdiction of the court if the originating process can be served on him within or outside jurisdiction,[22] and by submission to the jurisdiction of the court.[23] Where it involves natural persons, service presupposes physical presence of the defendants within jurisdiction. In the case of a corporation, presence within jurisdiction can be determined, having regards to several factors under the extant law. A company incorporated in Nigeria is deemed to have presence in Nigeria, even in cases where foreign nationals or corporations are promoters or members of such company.[24]

The exercise of jurisdiction over a party within jurisdiction is possible, even where the person's presence is temporal, as long as the party is served the originating process within jurisdiction. This position is premised on the 'transient presence' rule.[25]Nigerian courts can in appropriate cases, under the relevant rules of court exercise 'long-arm jurisdiction' as the basis of exerting jurisdiction over a defendant who is not ordinarily resident within jurisdiction.[26] However, this is predicated on identifiable connection between the subject of the dispute and Nigeria as the forum. For instance, the High Court in Nigeria has jurisdiction where the subject- matter of the action is in the constituent state or the relevant division of the Federal High Court, the defendant is resident or carrying on business within jurisdiction or where the cause of action arose there or the contract was performed there.[27] The Nigerian court will therefore, assume jurisdiction upon service of the originating process on the defendant in a foreign jurisdiction. The prospective plaintiff must apply and obtain leave of the court to serve the defendant with the process outside jurisdiction.[28]

The courts in Nigeria can also exercise jurisdiction over a foreign defendant in transnational cases, where the defendant submits to the jurisdiction of the

[19] G. Bamodu, 'Jurisdiction and Applicable Law in Transnational Dispute Resolution before Nigerian Courts' *The International lawyer* (1995) 29(3) 555.
[20]Ibid
[21] Ibid
[22] Ibid
[23] Ibid
[24]See Section 78 and 80 Companies and Allied Matters Act, 2023
[25] The rule presupposes that the court can exercise jurisdiction over any person, including a foreigner within jurisdiction; even if the person's state within jurisdiction is temporal. See *Maharanee of Broda v. Wildenstein* (1972) 2 All E.R 689.
[26]Long arm Jurisdiction is the ability of local courts to exercise jurisdiction over a foreign defendant, whether on a statutory basis or through s court's inherent Jurisdiction, and this jurisdiction permits the court to hear a case against a defendant and enter binding judgment against a defendant who is ordinarily resident outside the jurisdiction of the court
[27]See Order 2 of the Federal High Court (Civil Procedure) Rules 2019, order 5 of the High court of Cross River State (Civil Procedure) Rules, 2008.
[28] Ibid

court. Thus, a person who ordinarily would not otherwise be subject to the jurisdiction of the court may his conduct become subject to the jurisdiction of the forum court if the defendant takes steps to defend an action improperly instituted against him on the merit.[29] In that case, a defendant who has taken steps amounting to "an intention" to defend to the action will be deemed to have submitted to the jurisdiction of the court.[30]

A party may also contract either expressly or impliedly submit to the jurisdiction of a forum court by the insertion of the forum selection clause in international contracts.[31] Forum selection clause, have the effect of conferring jurisdiction on a court which would otherwise not have jurisdiction whilst depriving the court that would otherwise have had jurisdiction.[32] However, whilst opting for the forum of another state is permissible in that context, there remains the question of how far can parties utilise contractual forum selection or jurisdiction clauses to oust the jurisdiction of a forum court, which is ordinarily seised with jurisdiction over the cause of action.

4.0 ENFORCIABILITY OF FORUM SELECTION OR JURISDICTION CLAUSES

Jurisdiction clauses or choice of jurisdiction clauses have become the norm in international contract, whereby parties to such contract select the forum for litigating dispute that may arise from their agreement, and such stipulation may be made exclusive. Similarly, in cases where parallel actions have been instituted in more than one jurisdiction, the plea of *lis alibi Pendens*, which literally means that 'there is a pending action elsewhere' can be raised before the court. If the plea is successfully raised, one of the concurrent or cross- actions in parallel jurisdictions may be stayed in favour a foreign forum.

However, the forum court will not readily apply such a clause that confer jurisdiction on a foreign court, particularly in cases where a party seeks to rely on the clause to stay proceedings in favour of the chosen forum or when a plea of *lis pendens* in parallel litigation in another forum is made. The current position in Nigeria is to view the forum selection clause as not ousting the jurisdiction of the court. Under the present dispensation, the courts in Nigeria now take the parties intention into cognisance, when giving effect to such clause that confers jurisdiction on a foreign forum.

The Supreme Court in the case of *Sonnar Nig. Ltd, v Nordwind*[33] relied on the English position in that regards, as enunciated in *The Eleftheria* by Brandon J. The position of the law is that the court is not bound to stay proceedings in favour of the chosen foreign court, although the court has a jurisdiction to either stay or refuse to stay such proceedings, the court will

[29] (n.18) *558*
[30] Ibid
[31] Ibid
[32]Ibid
[33] (1987) 4 NWLR (Pt.66) 520,543

exercise its discretion if the burden of proof is discharged by the plaintiff. The factors to be taken into consideration include: (i) in what country the evidence on the issues of fact is situated, or more readily available, and the effect of the evidence on the relative convenience and expense of trial as between the (forum court) and the foreign court, (ii) whether the law of the foreign court applies and, if so, whether it differs from (forum) law in any material respects, (iii) what country either party is connected, and how closely, (iv) whether the defendants genuinely desire trial in foreign country, or are only seeking procedural advantages and, (v) whether the plaintiff would be prejudiced by having to sue in a foreign court. In addition to the foregoing factors, the Nigerian Supreme Court added one more active factor: "whether the granting of a stay would spell injustice to the plaintiff as where the action is already time-barred in the foreign court and the grant of a stay would amount to permanently denying the plaintiff any redress."[34]

It is however doubtful if the same recognition and validity is applicable in cases of unilateral or asymmetric jurisdiction clauses in international contracts. A defendant can therefore, validly apply to the forum court to decline jurisdiction by stay proceedings or otherwise terminating proceedings which was properly commenced before a domestic court in favour of a foreign forum. The grounds for declining jurisdiction include: a successful plea of *forum non-conveniens,* contractual ouster of court jurisdiction and the successful plea of *lis alibi pendens*[35]. The *forum non - conveniens* is a doctrine that permits court to decline jurisdiction to adjudicate over a dispute on the basis that it will be more appropriately determined in another forum.[36] Initially English law did not contemplate the doctrine of *forum non conveniens,* but the current position which takes cognizance of the plea was established in the case of *Spiliada Maritime Corpn V Cansulex.*[37]

The court will consequently now grant a stay of proceedings in favour of another forum which *prima facie* is more appropriate, except circumstances exist that will defeat the end of justice; making such a grant not expedient.[38]For the plea to succeed, the court must satisfy itself that the other forum have competent jurisdiction to try the same cause more suitably in the interest of the parties and the end of justice.[39] The defendant must also show that Nigeria is not the natural and appropriate forum and that there is another forum that is more appropriate to adjudicate on the dispute. The court will also take a further step to satisfy itself by identifying the natural forum: the forum which has the real and substantial connection to the case.[40]

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[34] Ibid

[35] H.A Olaniyan, 'A Review of Judicial and Legislative Approach of Nigeria to Discretionary Jurisdiction Over Foreign Causes', *International Journal of Business and Social Science* (2012) 3 (12) 204

[36] Ibid

[37] (1987) AC 460

[38] See *Connely V R.T.Z Corp. Plc* (1998) A.C 854, *The Jalakrishna* (1983)2 Lloyd's Report,628.

[39] (n.34) *205*

[40] Ibid

In *The Adidin Davner*[41] Case; Lord Keith defined natural forum as "that which the action has the most real and substantial connection."[42]

Contractual ouster clauses of forum selection clauses in favour of a foreign jurisdiction will be respected by the court in Nigeria. The position in *Adesanya v Palm Line Ltd,*[43]which followed the English Case of *The Fehmarn*[44]is instructive in that regard. It is to the effect that, where there is an express agreement in favour of a foreign forum, due effect is given to the intention of the parties. The doctrine of *lis pendens* have not been applied in Nigeria so far, but it is akin to the doctrine of abuse of court process which was developed to curb forum shopping in instances where litigants institute multiple actions on the same subject matter before more than one court at the same time.[45]

Under English law, one or two or more concurrent or cross -actions may be stayed upon the plea of *lis alibi Pendens*. It has been submitted that, in appropriate cases, the court may stay action in a *forum* court in favour of the foreign *forum*.[46] The court may also restrain the foreign action by granting Anti- suit Injunction, instead of staying of proceedings as applied in *The Christianbong* [47] case. The English Court Appeal in *Societe Industrielle Aero Spatial v Lee Kui juk*[48] restated the essence of anti –suit injunction. Anti- suit injunction is directed at the other party to the proceeding, and not the foreign Court, over which the forum court has no control.

There is no reported case of anti-suit injunction issued by Nigerian court, but it is in principle akin to the doctrine of abuse of court process in Nigeria. The defendant for a successful plea of *lis alibi pendis* has to fulfil the requirement of vexation or oppression, as obtainable in the case of abuse of court process, and to that extent deprives the court of its jurisdiction.

Thus, where the defendant establishes the pendency of another case between the parties before another court on the same subject matter seeking same reliefs, and the defendant further satisfies the court that the action before the *forum* court is oppressive, vexatious and instituted in bad faith to interfere with the cause of justice, then the court will exercise its inherent jurisdiction to strike out the case for being incompetent and for constituting an abuse of court or judicial process.[49]

4.1 Asymmetric Jurisdiction Agreements

The current trend in international contracts, particularly in financial contracts, is the ingenious inclusion of unilateral jurisdiction clauses, also referred to as asymmetric or unilateral jurisdiction clauses in the contracts. The purport of an asymmetric Jurisdiction clause is to "bind one party to

[41] (1984) A.C 398, 415
[42] Ibid
[43] (1967) LLR 18
[44] (1957) 2 All E. 707
[45] (n.34) *205*
[46] Ibid
[47] (1885) 10 P.D 141, 152-153
[48] (1987) AC 71
[49] See *Seven Up Bottling Co Ltd v Abiola & Sons Bottling Company Ltd* (1996)7 NWLR (Pt.75)156 at 157, *Pavex International Co Ltd v IBWA* (1994) 5 NWLR (Pt.347) 685

commence proceedings in one particular jurisdiction, whilst allowing the other party to commence proceedings before any competent court"[50] or forum. In other words, an asymmetric jurisdiction clause makes provision for one party to elect between several or multiple jurisdictional forums in which to institute proceedings in the event of dispute, while restricting the other party to the contract to commencing proceedings in only one jurisdiction.[51] It thus, has the effect of restricting one party to the contract to where it can bring an action, but not the other party. These clauses are usually used in financial contracts where the creditor especially banks seeks to retain the flexibility of suing the debtor in any jurisdiction where the debtor has assets.[52]

It has almost become a norm to include asymmetric jurisdiction clause in certain type of international contract particularly in international finance agreement,[53] usually because "banks want to be able to sue the borrower in the chosen court and to ensure that the borrower must also sue there, but they also want to have the choice of suing the borrower in other countries in case that is better to enforce against the borrower's assets."[54] An asymmetric jurisdiction clause therefore, is incorporated to enable one party to elect between multiple jurisdictional forums to pursue their claims whilst restricting the other party to one jurisdiction; in the event of dispute and this raises the question of its validity having regards to the fact that it is unilaterally tilted in favour of one party, usually the powerful party arguably to the apparent detriment of the other party. The present writer is not aware of any judicial decision of the validity of such clause in Nigeria.

The unilateral option to say the least, are not universally enforceable largely because of the apparent imbalance in the parties option to utilise the available fora to pursue their contractual rights.[55]Atake[56] is of the opinion that in spite of the dearth of Nigerian case law in that regard, it is likely that such clause would be upheld in Nigeria. The learned writer based his assumption on the decision of the Court of Appeal in the case of *United world Inc v. M.T.S Ltd*,[57]in that case, a foreign company sued a local counterparty to recover debts whilst placing reliance on a contractual dispute resolution clause stipulating among other things that, any ensuing dispute be referred to arbitration, but at the same time gave the foreign

[50] Z Allana, 'Asymmetrical Jurisdiction Clauses in International Dispute Resolution',Fieldfisher Publication-available at<www.fieldfisher.com/en/insight/asymmetrical-jurisdiction-clauses-in-international-dispute-resolution> accessed on 27/2/20

[51]J.Rahman & H.Pizzey, 'Rebalancing the Law on Asymmetric Jurisdiction Clauses', Mondaq Newsletter, available at <www.mondaq.com/uk/Litigation-Mediation-Arbitration/587138/>, accessed on 26/3-/20.

[52] (n.49) 40

[53]Ibid

[54] Michael Frisby, 'How effective are asymmetric jurisdiction clauses that name EU Member State' sourced from- <www.stevens.bolton.com> accessed on 07-02-2020

[55] A. Atake,'Expensive choice for 'cheap' causes: How choice of foreign court provision can prove too much' *Templars- Thoughts- Leadership- Article-choice- of – law- clauses,* available at <www.templars-law.com > accessed on 07-12-19.

[56] Ibid

[57] (1998) 10 NWLR (Pt. 568) 106

company the unilateral option to institute a law suit in Nigeria against the local company. The Court of Appeal acknowledged the lop-sidedness of the unilateral option of the contractual clause in contention, but held that the local company accepted the clause in the first place and refused the contention of the local company that the claim must be submitted to arbitration.

It is submitted that, even though the validity of the unilateral clause was not directly questioned in that case, the position of the English Court in that respect has a persuasive effect in Nigeria. The English court considers asymmetric jurisdiction clauses enforceable at common law. For instance, in *Mauritius Commercial Bank v. Hestia Holdings & Anor*[58]; wherein the English High Court confirmed that unilateral jurisdiction clauses are valid under English law. The position of the English Court is unlike the stance of the French Court *de cassation,* taken in the case of *Mme X v Banque privee Edmond de Rothschild,*[59]wherein the French Court refused to uphold an asymmetric jurisdiction clause on the grounds that it violates Article 23 of the Brussels Regulation because of its portative.[60]

4.2 Foreign Jurisdiction Clauses in Admiralty Matters

The jurisdiction in admiralty matters in rem is spelt out in section 1 and 2 of the Admiralty Jurisdiction Act[61], an action in *rem* may therefore be brought against a ship, aircraft or property within the framework of the claims cognizable under the admiralty jurisdiction of the Federal High Court as provided by the Act. The Admiralty jurisdiction of the court in Nigeria as circumscribed by the Act is essentially territorial and a plaintiff may invoke the jurisdiction of the court in that regard only on the grounds stipulated in the Act including claims relating to proprietary interest in a ship or aircraft, any maritime claim as stipulated in paragraphs(a)-(u) of subsection 2 of section of the Act covering proprietary and general maritime claims.[62] In appropriates cases, the ship or other property can be served with the writ of summons in Nigerian territorial waters and may be arrested at any place within the limits of the territorial waters of Nigeria.[63]

However, in admiralty matters the position of law in respect of foreign jurisdiction clause is somewhat different. Section 20 of the Admiralty Jurisdiction Act[64] invalidates any agreement relating to 'admiralty matter'[65] which has the effect of ousting the jurisdiction of the Nigerian court where the condition listed in paragraphs (a)-(h) are present, i.e. if the place of performance, execution or delivery, act or default takes place in Nigeria, any of the parties resides or has resided in Nigeria, any payment under the agreement (implied or express) is made or is to be made in Nigeria, or where

[58] (2013) EWHC 1328 (comm)
[59] (2013) I.LP R.12
[60] See Review at <http://uk.particallaw.thomsonreuters.com>
[67]Admiralty Jurisdiction Act Cap A20, LFN, 2004
[62] Ibid
[63] Ibid, Section 7,
[64]Ibid
[65]Ibid

In any admiralty action or in case of a maritime lien, the plaintiff submits to the jurisdiction of the court and makes a declaration to that effect, where the *rem* is within Nigerian jurisdiction, or in the case in which the Federal Government or the Government of a State of the Federation is involved and the Federal Government or the Government of the state submits to the jurisdiction of the court, where 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 under any convention, for the time being in force to which Nigeria is Party, the national of a contracting State is either mandated or has a discretion to assume jurisdiction, or where in the opinion of the court, the cause, matter or action should be adjudicated upon in Nigeria.[66]

Thus, section 20 of the Act effectively "eroded the discretion exercised by the court when confronted with (contractual) clauses ousting their jurisdiction" in admiralty causes,[67]and invariably confers mandatory jurisdiction in all admiralty causes on the court were the stipulated conditions are satisfied.[68] The admiralty jurisdiction of Nigerian court in *rem* is therefore strictly territorial.

4.3 Arbitration Agreements and Choice of Law Clauses

Arbitration is a consensual process that depends on the legally binding agreement between the parties[69], provided *"that the agreement to arbitrate is sufficiently clear and valid, numerous international conventions and national laws recognize and enforce arbitration agreements between parties to an international contract*".[70] Accordingly, majority of international arbitration proceedings arises under commercial contracts that contain arbitration clauses. An arbitration clause is basically a written consensus that any dispute that arises in relation to the right and obligation of parties to a contractual agreement will be referred to a mutually agreed independent third party or tribunal, other than the Court for adjudication. It is now well established position of law in Nigeria, that an arbitration clause in a contract does not necessarily have the effect of ousting the jurisdiction of the court.

Nigerian courts have over the years, maintained the position that parties must be bound by the terms of their Agreement[71]. Thus, where parties to a contract have expressed in words, the law which they intend to govern the contract, that expression of intention, as a general rule determines the proper law of the contract. However, to ensure the effectiveness, the choice of law must also be *bon fide*, legal and reasonable. In relation to the issue of whether an arbitration clause in an agreement operates to prevent the parties from having recourse to the court. In *L.A.C v A.A.N Ltd*[72] the Court of Appeal reiterated the position of law to the effect that, an arbitration clause

[66] Ibid
[67] (n.34) 212.
[68]Ibid.
[69] See *Obanye v. U.B.N* (2018) 17 NWLR (Pt.1648) 378,398
[70] Ozlem Susler, 'The Jurisdiction of the Arbitral Tribunal: A Transnational Analysis of the Negative Effect of Competence' MQJBL(2009) (6.)121, also available a <http://www.researchgate.net/publications228209436> accessed on 04-04-20.
[71] *Mekwunye v.Imoukhuede* (2019) 13 NWLR (Pt.1690) 439
[72] (2006) 2 NWLR (Pt.963) 49

in an agreement generally does not oust the jurisdiction of the court or prevent the parties from having recourse to the court in respect of dispute arising therefrom. A party to an agreement with an arbitration clause has the option to either submit to arbitration or to have the dispute decided by the court. The choice of arbitration does not bar resort to the court to obtain security for any eventual award.

Thus, where there is an arbitration clause in a contract between parties and disputes arises therefrom, the appropriate step to be taken is for the parties to first explore arbitration rather than institute legal proceedings in court, where a party proceeds to litigate issues arising from the contract first, the other party usually would challenge the competence of the suit and the jurisdiction of the court on the premise of failure to fulfil the condition precedent as contained in the contract agreement.

5.0 THE QUESTION OF THE APPLICABLE LAW

Domestic courts when dealing with transnational disputes, after assuming jurisdiction still have to determine the question of the applicable law, because of the transnational nature of the dispute. It is also possible that the laws of more than one of the connected countries may be applicable as envisaged under the doctrine of *depecage*: which entails applying the law of different states to different issues in a legal dispute by applying choice of law on an issue by issue basis.[73] The multiplicity of substantive law that may therefore compete for application is a major cause of uncertainty. In such circumstances, it will be practically impossible for the court to apply law of the *lex fori*.[74]

The court dealing with transnational dispute will necessary have to ascertain and apply the proper law. Lord Simonds described the proper law as "the system of law by reference to which a contract was made or that with which the transaction has its closest and most real connection".[75] The doctrine of the proper law of contract essentially comprises of "a hierarchy of three rules".[76] The parties to the contract may make an express choice of law,[77] in the absence of an express choice of law clause; the court may apply the "system of law by reference to which the contract was made"[78] or, the law "with which the transaction has its real closest and most real connection",[79] otherwise referred to as the "objective proper law."[80]

As noted earlier, the principle of party autonomy relating to commercial transaction is firmly entrenched in Nigeria. Thus, parties can expressly

[73]C A Whytock; 'Conflict of Laws, Global Governance, and Transnational Legal Order' *UC Irvine Journal of International, Transnational, and Comparative Law (2016)* 117. Available at <http://scholarship.law.edu/ucijil/vol.1/iss1/6> accessed on 19-12-19

[74] C.M.V Clarkson & J. Hill, *The Conflicts of Laws* (3rd ed, Oxford University Press, Oxford, 2006) 170

[75] *Bonython v Commonwealth of Australia* (1951) AC 201, 219

[76] (n. 70)170

[77]*Vita Food product Inc v Unus Shipping Co Ltd* (1939) AC 277

[78] *Bonython v Commonwealth of Australia* (1951) AC 201, 219

[79]Ibid

[80]Ibid

determine the law by which their contract should be determined and construed through a choice of law clause. The choice of law clause presupposes that the agreement of parties to a contract to subject their dispute to a system of law, and in the absence of bad faith it will be respected and applied by the court. At common law, the courts usually gives effect to express choice of law clause provided such clause are *bona fide* and not contrary to public policy.[81]

The second rule in the hierarchy creates room for the possibility of the court applying an implied choice of law, rather than an express choice. Implied choice of law clause may be inferred from the form of the contract, arbitration clause or jurisdiction agreement.[82] The third rule in the hierarchy is apt in cases where the party have not made an express choice of law, the objective of the law in that regard, is the application of the law of the country with which the contract is most closely connected to give effect to both the reasonable expectation of the parties and the interest of the country which is likely to have the greatest interest in the outcome of the parties' disputes.[83]

The general rule therefore presupposes that every international contract has a governing law which at common law is referred to, as the proper law or applicable law. In essence, the position of the law is that: subject to certain limitation parties to a contract are free to choose the applicable law and where parties fail to make a choice, the law of the country with which the contract is most closely connected will govern the transaction as the applicable or proper law.[84] The approach of the court at common law is to give effect to the express and unambiguous contractual stipulation of the applicable law, absent of which, the court will apply its national choice of law provision to determine which law to apply. The applicable law, otherwise known as the proper law of the contract is easily ascertainable were parties expressly makes provision in that regard.

The principle of party autonomy as it relates to commercial transactions is upheld at common law. Hence, parties have the liberty to agree and express in their contract, the system of law by which they desire the contract to be construed and governed.[85] Under the current dispensation, the court will respect and upheld such choice of law clause in the absence of bad faith.[86] In the case of *Vita Food Products v Unus Shipping Co Ltd,*[87] the Judicial Committee of the Privy Council in that case, which emanated from Nigeria held that, a clause expressing the parties choice as to the proper law will be upheld provided the choice is *bona fide* and legal and provided no reason exist for avoiding the choice on grounds of public policy. Thus, subject to some limitations, parities are entitled to determine the proper law to govern

[81]*Vita food Product Inc v Unus Shipping Co Ltd(supra)*
[82] (n.70)171
[83]*Ibid*
[84]*Ibid*
[85] (n.18) 570
[86]Ibid
[87] 1939 APP. Cas. 277.

their contract, as noted by Lord Reid in *Miller & Partners Ltd v. Whitworth Street Estate Ltd.*[88] The foregoing is the position of the Law in Nigeria.

In context of arbitration, several laws are involved. The governing law applicable to the substance of the dispute (*lex causae*), and it is distinguished from the procedural law applicable to the arbitral process (*lex arbriti*). The *lex arbirti* loosely referred to as procedural law applicable to arbitration is actually a convenient term for all non-substantive law applicable to arbitration. It consists of procedural law, but extends to such non – procedural matters bordering on matters such as arbitrability, appointment and challenge of arbitrators, jurisdiction, admission of evidence, interim measure, national court intervention, grounds on which the award may be set aside, among others.[89] Paulsson distinguished the applicable laws in relation to arbitration as follows: "the applicable law in arbitration", and "the applicable law to arbitration", referring to the substantive and procedural applicable law respectfully.[90]

The arbitral tribunal resolves the substance or the merit of the dispute by the application of the *lex cause* to determine the right and liabilities. The parties have the latitude to choose the governing law applicable to the substance of their dispute, but in the event that the parties fail to exercise their right to choose the applicable law, the tribunal would have to determine the applicable law in that regard. The choice of law chosen by the parties therefore governs the substance of the dispute, but in the absence of an express choice of law agreed upon by the parties, the arbitral tribunal will have recourse to the relevant conflict of law rules such as the law with the closest connection to the dispute.[91] It is well established that the tribunal may resort to the choice of law rules of the seat of arbitration.[92] It has been rightly observed that, most national conflict of law rules contemplates the parties' autonomy as relates to the complete freedom of choice in respect of their substantive agreement provided it does not conflict with public policy or mandatory law of the place of adjudication.[93]

In the case *lex arbriti*, parties may also expressly chose the law applicable to the arbitration agreement itself as separate contract and in the absence of an express choice of law in that regard, the arbitral tribunal would have recourse to the law of the seat.[94] Where the parties fail to expressly designate a choice of applicable law and the seat of arbitration cannot be ordinarily implied; the arbitrator will ascertain the applicable law to the arbitration agreement from the law of the country which is more closely connected or

[88] 1970 APP CAS. 583,603.
[89] Jan Paulsson, 'Arbitration in Three Dimensions' *ICLQ* (2011) (60) 291
[90] Ibid
[91]Ibid
[92]Ibid
[93]Richard Garnett, 'International Arbitration law: Progress towards Harmonisation' *Melborne Journal of International law* (2002) (18) 3 (2) 400
[94]R.E Cirlig, 'The Arbitral Tribunal's Authority to Determine the Applicable Law in International Commercial Arbitration: Patterns and Trends*', Juridical Tribune (Tribuna Juridica), Bucharest Academy of Economic Studies, Law Departmen*t Vol.9 (1) 18-32

from general (international) principles.[95] Parties often times in practice exercise their right to choose their own rules of procedure by adopting the rules of arbitral institution such as the ICC, LCIA, among others.[96]

In Nigeria, the foregoing internationally accepted position is given expression by Section 15 of the Arbitration and Mediation Act ("AMA"), stipulates the parameter to be used in ascertaining the law applicable to the substance of the dispute thus:

(1) the arbitral tribunal shall decide the dispute in accordance with the rules of law that is chosen by the parties as applicable to the substance of the dispute
(2) Any designation of the law or legal system of a given jurisdiction or territory shall be construed, unless otherwise expressed, as directly referring to the substantive law of that Jurisdiction or territory and not to its conflict of law rules
(3) Where parties fail to choose or designate any law or legal system of a given jurisdiction or territory as required in subsection (1), the arbitral tribunal shall apply the law determined by the conflict of law rules which it considers applicable
(4) The Arbitral tribunal shall not decide *ex aequo et bono* or as *amiable compositeur*, unless the parties have expressly authorized it to do so
(5) In all cases, the arbitral tribunal shall-
(a) decide in accordance with the terms of the contract: and
(b) where established by credible evidence, take account of the usages of the trade applicable to the transaction[97]

Sub section (4) and (5) above, add an interesting twist to the subject of the applicable law in arbitration. The provisions of subsection (5)[98] contemplates best practices in international arbitration, wherein the parties may choose that the dispute between them be resolved in accordance with the applicable laws of a country or according to the general principles of law or industry practices as it relates to applicable custom and usages, often referred to as the modern law of merchant or *lex mercatoria*.[99] Section 15 (4) of AMA makes reference to the concept of *Ex aequo et bono*, which means 'according to right and good', or 'from equity and conscience', and *amiable compositeur*, which entail the latitude given to the arbitral tribunal

[95] Ibid
[96] (n.89)
[97] Arbitration and Mediation Act, 2023, Section 15 (1), (2), (3) & (4)
[98] Ibid, section 15(5)
[99] The modern *Lex Mercatoria* is rooted in the ancient law of merchant, and conjures up romantic notions of laws and practices adopted by merchants in medieval times as they traded from place to place. There is no universal consensus as to what the precise definition of *lex mercatoria* and it exact content. Scholars from continental Europe of civil law tradition argue strongly in support the concept of *lex moratoria* as a distinct system of law applied by international merchants based on commercial rules and principles, whereas scholars with the common law background views the concept with cautions, and do not largely accept that it constitutes an autonomous system of law. According to Ole, the new *lex mercatoria* constitutes a legal system comprising of commercial rules and principles, model law, general terms and conditions and general principles and international arbitration, and is valid law because it had obtained its binding character from the fact that it had been accepted by the societies form the state and regulates commerce. See Lando Ole, 'The law Applicable to the Merit of the Dispute', in Sarcevic (ed), *Essays on International Commercial Arbitration* (Boston, London 1991)129

to conduct the arbitral proceeding in such a manner as to consider what is appropriate so as to achieve fair hearing.[100]It is submitted that Section 15 (5) of AMA takes into cognizance the applicability of other sources of law that are said to constitute *lex mercatoria.*

However, its existence has to be proved by leading evidence the existence of such norms. Similarly, the doctrine of *ex aequo et bono* hold that adjudication should decide disputes based on that which is considered fair, and in good conscience.[101] AMA hinges its applicability on the express consent of the parties. Thus where parties in the exercise of their right to choose the applicable law to the dispute, elects for their dispute to be resolved by *amiable compositeur* or *ex aequo et bono,* their choice has to be respected. It has been submitted that their dispute should be resolved *ex aequo et bono* only in exceptional cases, particularly in relation to disputes where parties are engaged in complex and long term relationships, or in emerging field where the law is either undeveloped or inadequately developed or unsuitable to resolve such complex disputes with novel issues.[102] It has been posited that the concept of *ex aequos et bono* has evolved into the *lex mercatoria*, and finds expression in contemporary Arbitration Rules.[103]

6.0 LIMITS TO THE PARTIES' CHOICE OF LAW APPLICABLE LAW

Choice of law clauses are no longer deemed sacrosanct, contrary to the earlier position as encapsulated in the dictum of Lord Atkin in *R International Trustees,*[104] which hitherto considered choice of law clauses as exclusive and absolute. The current position of law as noted earlier is that, in the absence of bad faith, a clause expressing the party's choice of law to govern their contract will be respected and upheld by the court. In *Vita Foods product v. Unus*[105]it was held that a clause expressing the parties' choice as to proper law will be upheld provided the choice is *bona fide* and legal and *provided* no reason exist for avoiding the choice on grounds of public policy.[106] In the latter case of *Miller &partners Ltd v. Whitworth Street Estates Ltd,*[107]Lord Reid reiterated what had become the position of the law in that regard, to the effect that, parties are entitled to agree what is to be the proper law of their contract, and that there is no reason why, subject to some limitations, they should not be so entitled.[108]

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[100] Lord Mustill stated the sources of *lex mercatoria* to include: public international law, Uniform laws, general principle of law, rules of international organisation, international customs and usages, standard form contracts, and reporting of arbitral award. See Michael Mustill, 'The New *Mercatoria*: The First Twenty- five years', Arb. Int'l (1988) 86

[101] T. Leon, '*Ex Aequo et Bono*: Demystifying an Ancient Concept', *Chicago Journal of International law* (2008) 8 (2) 621: available at <https://chicagounbound,unichicago.edu/cjil/vol8/iss/Ii> accessed on 22/7/22

[102] Ibid, .622

[103] UNCITRAL Arbitration Rules, Article 33, ISCID Convention, Article 42(6)

[104] (1937) AC

[105] (1939) App. Cas.277 (P.C), the appeal incidentally emanated from Nigeria.

[106](n.18) 570.

[107] (1970) App. Cas. 583,603

[108]Ibid.

The limitation at common law and statute that limits the extent of parties freedom to conclusively determine the proper law governing their contractual obligations borders on issues of public policy and mandatory law of the forum with particular reference to the Revenue and penal laws.[109] The position of the Supreme Court in *Adesanya v. palm Line*[110] reiterates the state of the law in Nigeria in that regard. The Apex Court per Adefarasin J. (as he then was) noted that: "*where the parties expressly stipulates that the contract shall be governed by a particular law, that law will be the proper law of the contract provided the selection is bona fide and there is no objection on grounds of public policy even where the law has no apparent connection with the contract*".[111]Oputa J.S.C, puts it more succinctly in the case of *Sonar (Nig) Ltd v. Partenreedri MS Nordwind (owners of MV Norwind)*[112] where he stated that in order for a choice of law clause to be effective, the choice of law must be real, genuine, legal, reasonable and made in good faith. The choice of law should not be capricious and absurd. Thus the courts in Nigeria do not treat choice of law clauses as conclusive in all cases.[113]

Ndifon righty noted that: "*two categories have been identified when foreign law may be excluded*".[114]The learned author categorised the first group of cases as those generally relating to the public policy of the forum. Public order exception on the basis of public policy, necessitates the exclusion of the application of a foreign law where it will lead to result or outcome which are unacceptable. The second group relates to situation where the court is not obliged to refer to foreign law as a result of the nature of issue to be considered, such as issues bordering on divorce, nullity, separation and maintenance proceedings, custody and adoption cases, admiralty, issues bordering on damages and procedure.[115]

The first category is exclusionary in character and relevant to our consideration within the context of this work. The doctrine of public policy in relation to contractual obligation presupposes that in certain cases, a situation may arise where a foreign law applicable to a dispute as ascertained through the instrumentality of the relevant conflict of law rules, leads to a result, which is not acceptable to the society and the court of the forum.[116] The *forum* court will disregard the foreign applicable law in the circumstance and apply its own law, particularly in such situation where the application of the foreign law may lead to the infringement of fundamental principles of ethical, political and economic order of society."[117]

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[109]. *Golden Acres Ltd v. Queensland Estate Pty. Ltd, 1969 L.R.378*

[110] (1967) L.L.R.18,19

[111]Ibid.

[112] (1987) 4 NWLR (Pt.66)520

[113] B. A Sodipo, 'Nierian chapter in "ship building 2019", in A.J van Steenderen (ed*), Lexology-Getting the Deal Through*- available online at <www.lexology.com/gtdt> accessed on 07-02-20.

[114] C.O Ndifon, *Issues in Conflict of law* (Vision Connections Digital Publishers, Calabar,2001) 199

[115]*Ibid* p.198

[116] Hans van Houtte, *The Law of International Trade* (2nded, London, Sweet & Maxwell, 2002).17

[117]*Ibid.*

Similarly, the forum court may exclude the application of foreign law where there are provisions of mandatory law of the forum country in respect of the subject matter of the dispute. The mandatory laws of a country are considered to be of vital importance and to that extent the courts will notwithstanding apply them when there is some connection to the forum. Mandatory laws in this context are different from the public order exception to the extent that they impose mandatory substantive rules, but do not necessary prevent the application of the relevant conflict of law rule.[118] In the same vein, the forum court in Nigeria will refuse to apply any foreign law that will amount to aiding the parties evade the laws of the forum court or any jurisdiction closely connected to the subject of the dispute.[119]

7. CONCLUSION

Parties to an international contract can mutually agree on the choice applicable law to the substance of the dispute. They can also select the jurisdiction or forum where any dispute that arises in respect of their right and obligation will be determined. Courts in Nigeria recognises and enforces choice of forum clauses but not without limitations. Judicial response in Nigeria tilts towards applying the choice of the applicable law of the parties, except where the choice of applicable law conflicts with the mandatory laws or are contrary to public policy in Nigeria. The parties' choice must also be reasonable and not wanting in good faith. In the same vein, the relevant Courts in Nigeria will readily enforce and arbitration agreement, even where the parties to arbitration and arbitrators chose to delocalise or internationalise their dispute when exercising their right to select the governing law.

In the light of the foregoing, it is recommended, in particular reference to unilateral jurisdiction clauses that court in Nigeria should properly scrutinized the agreement to ensure mutuality of intention which seats at the core of every valid contract in the eyes of the law. It is submitted that where the forum selection clause, upon construction irresistibly points otherwise, particularly where one party raises an objection to that effect, it will be in the interest of justice to jettison such jurisdiction clause, and assume jurisdiction if other requirement of the national conflict of law rules are satisfied. The foregoing should be viewed against the backdrop of the fact that the presence of undue influence and duress are vitiating elements in relation to contractual obligations under the extant law.

[118]Ibid.
[119] Ibid