

The Impact of Foreign Arbitration and Foreign Jurisdiction Clauses on the Development of Maritime Arbitration in the Sub-Region –Nigeria as a Case Study

Adewale A. Olawoyin*

Introduction

Transnational commerce is a *sine qua non* to sustained global economic growth. Because disputes are bound to arise in the conduct of such activity, an efficient and fair enforcement mechanism must exist to foster confidence in commercial relations with citizens of a particular country. Private International Law was generated by international economic transactions and it is a system of principles and rules which aim to achieve just solutions to private international controversies.¹ However, the “just solution” to international controversies does not simply lie in the decision that is ultimately rendered by a tribunal or court but starts with the determination of the forum for the resolution of such controversy.

Yet, for many years, the emphasis of discussion in the context of choice of jurisdiction and/or arbitration had been prominently the perceived inexperience and lack of confidence in the impartiality of national courts of developing countries in disputes involving citizens of their country and foreigners. While there was no evident empirical evidence of such phenomenon, the unsubstantiated views held sway for a significant period. The whimper continues and Gabriel M. Wilner, for example notes, aptly, that there is “the ever present, albeit usually unarticulated, fear...that the application of the national procedural and substantive law by domestic courts of the ‘developing’ partner will be unfair – through bias, inexperience, or policy – to the ‘developed’ partner.”²

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¹ See Graveson, *Conflict of Laws*, 7th edn. (1974) 6 *et seq.*

² “Acceptance of Arbitration by Developing Countries” in Thomas E. Carbonneau, ed, *Resolving Transnational Disputes Through International Arbitration*, 283, 285.

Generally, the role that policy plays, and how it plays it, from the evolution and formulation of legal precepts through to the litigational plane is not openly revealed. This is perhaps attributable to an historical peculiarity, prevalent in Commonwealth countries, which has regarded policy as a taboo word suggestive of judicial legislation instead of denoting judicial creative thinking. However, the varying notions of policy remain present, if though unheard, in these facets of the law. The province of maritime law, arguably, is in the forefront in this regard.

According to Professor Dockray, "...when, in general, it is rare for policy issues to be discussed in judgments, it was common for sea carriage disputes to be determined by judges in accordance with their express views of what policy made sense in the special context in which maritime contracts are made and performed."³ The learned commentator then concludes that, "[i]t is no exaggeration to say that in this subject the cases themselves are the most important source of policy discussion and analysis."

The genuflection to received English law without an appreciation of the ability and indeed the need to tweak these legal principles in appropriate circumstances has stultified our country's socio-economic development. Australia is a perfect example of a prominent commonwealth country that regularly challenges the conventional wisdom of the English common law where it does not portend well for its national interests. The primary duty of the court or arbitral tribunal is to navigate through a myriad of legal issues in arriving at an optimum result on the particular circumstances of each case presented to it for adjudication. It is axiomatic that the courts or tribunals have to be well equipped to perform this key role. In the performance of such role, it is also evident on a closer analysis that the domestic courts, in particular, of developed countries, as a matter of principle, appreciated the subterranean influence of extra legal considerations, such as the wider national interest of a country in a

³ *Cases and Materials on the Carriage of Goods by Sea* (1987) 2.

particular industry, in the recognition, adoption and application of legal norms. This as we shall see was not the case in Nigeria for a very long time.

To bring this point into sharp focus, the broad aim of this paper is to draw attention to the subterranean influence of policy considerations in the emphasis of approach in other common law countries, notably England and how this has stymied the development of maritime arbitration in Nigeria. The paper charts the historical context of the enforcement of foreign arbitration and jurisdiction clauses in Nigeria, the impact, if any, of the legislative reform in the early 90's, the confusion wrought by poor legislative drafting in the Admiralty Jurisdiction Act⁴ and the silent unannounced entry of the panacea for the development of maritime arbitration in Nigeria which is the United Nations Convention on Carriage of Goods by sea (Ratification and Enforcement) Act No. 19 of 2005. In addressing the primary thrust of this paper, we have identified 3 main areas of discussion as the template to illustrate how ritual obeisance to received principles of law has stultified the development of maritime arbitration in Nigeria.

Non recognition of the Adherent Nature of Standard Form Contracts in Admiralty

This is the most fundamental area in which evolved principles have been to the disadvantage of developing cargo owning countries. Almost every bill of lading contains a clause to the effect that any dispute arising thereunder or in connection with such bill of lading shall be adjudicated upon, to the exclusion of other courts, by the courts of the country in which the carrier has its principal place of business or to arbitration in a foreign forum. These clauses are recognised and enforced on the conceptual premise of party autonomy or freedom of contract. The jurisdictional competence of local courts in disputes involving a foreign element is a question of vital importance in international civil litigation. The

⁴ Cap A5 Laws of the Federation of Nigeria 2004.

quandary faced by these courts is how far the freedom of choice of forum should be restricted by the need to prevent the evasion of assumption and exercise of jurisdiction by the courts of the forum most closely connected with the dispute.

The diverse rules on the enforcement of exclusive foreign jurisdiction clauses in bills of lading or the emphasis in the application of those rules in various jurisdictions reflect the underlying national interest in dispute resolution within the dominion of particular countries.⁵ The courts of some fora, for example England, are freely chosen for their indisputable knowledge and expertise in admiralty law without any connection to the factual matrix of the case in dispute.⁶ Others are preferred simply because they are situated at the carrier's place of business since naturally the carrier would be more "comfortable" at home. The courts of the country of discharge of cargo carried by sea rarely feature in the express clause of the parties. One may then ask the question why?

The bill of lading is a standard form contract unilaterally drawn up by the carrier. In the words of a commentator:

"What equality of bargaining power is there for the small shipper . . . who finds a restrictive forum clause in his bill of lading . . . ? What mutuality of benefit is there for these individuals in such a restriction? There is none, and . . . we will effectively deprive thousands of injured persons of any practical forum for the trial of their causes of action. *Only great companies can afford to try cases in foreign lands, and the burden of doing so must fall upon them. Common carriers who offer services to those foreign lands must expect to be sued in those foreign lands, and cannot contract to avoid such suit by means of restrictive forum clauses.*"⁷ (Emphasis added)

Most developing cargo owning countries are most unlikely to be voluntarily chosen by the party, usually the carrier, who stipulates the forum. The circumstances in which the courts of those countries would be required to assume jurisdiction in disputes arising in connection

⁵ See Kerr, "Modern Trends in Commercial Law and Practice" (1978) 41 M.L.R. 1, 6 on the economic interest in the trial of international disputes in a particular forum.

⁶ *Ibid.* at 1.

⁷ Bergman, "Contractual Restrictions on the Forum" (1960) 48 Calif. L. Rev. 438, 477.

with maritime contracts are cases where there would almost certainly be a derogation from the prescribed venue. By the same token, the carrier is highly unlikely to stipulate arbitration in the forum most likely connected with the dispute. An added consideration is the fact that these clauses were an adroit source of pre-emptive measures that negatively impress upon the substantive enforcement of ownership and contractual rights of cargo owners on the litigational plane.

The True Nature of the Bill of Lading

The contextual nature of the common law has always been rationalised through such devices as analogy, implication and mere fiction. The recognition and enforcement of foreign jurisdiction and arbitration clauses in bills of lading is no exception. The principle of freedom of contract is of paramount importance in international trade.⁸ The right of business people to decide freely to whom they will offer their goods and services and by whom they wish to be supplied, as well as the possibility for them to freely agree on the terms of individual transactions, are the cornerstone of an open, market oriented and competitive economic order.⁹ This laissez-faire axiom is enshrined in the shibboleth *pacta sunt servanda*.¹⁰ From the point of view of cargo owners, and by extension cargo owning nations, such as Nigeria, the party autonomy premise upon which the principles of enforcement have evolved is unreal.¹¹ Where the entire centre of gravity of the cause of action is in the port of discharge, the possibility of referring the case to a foreign forum, either to litigate or arbitrate, by holding the parties to an “agreement” is not only artificial, but truly burdensome.

⁸ See *UNIDROIT, Principles of International Commercial Contracts* (1994) 7.

⁹ *Ibid.*

¹⁰ Simply means that contracts must be kept. A more comprehensive maxim *pacta conventa quae neque contra leges neque dolo malo inita sunt omni modo observanda sunt* is that agreements which are neither contrary to law, nor fraudulently entered into, must in all respects be observed. See Herbert Broom, *A Selection of Legal Maxims* (10th edn.) 476.

¹¹ See *The Report of the Imperial Shipping Committee on Limitation of Shipowners Liability by Clauses in Bills of lading and on Certain Other Matters Relating to Bills of lading*, (H.M.S.O., Cmd. 1205, 1921) where it was noted that historically cargo interests considered freedom of contract in regard to bills of lading as being more technical than real.

The circumstances surrounding the bill of lading in its formation are inconsistent with the notion of freedom of contract and equality of the parties. The bill of lading is a document in standard form providing, inter alia, the terms and conditions of the contract of carriage by sea. It is one, which is issued by and on behalf of one party, usually the carrier, as to the terms under which it is ready, willing and able to receive goods for onward transmission to the port of discharge. The bill of lading is divided into two parts: One is blank, on which the names of the parties, freight and the particular voyage will be reproduced; and one printed on the back, containing clauses inserted unilaterally in advance by the carrier.

It is pertinent to note that “the existence of conditions printed on the back of the bill of lading, including the jurisdiction clause, [is such that] . . . it is impossible for the shipper to question or require to be amended conditions printed on bills of lading which were not contemplated at the time of the conclusion of the contract. The shipper cannot refuse such conditions, for the simple reason that by the time the bill of lading is issued the goods are loaded or at least in the possession of the carrier and: ‘no shipper can afford to have his goods unloaded and to delay the ship because he refuses a jurisdiction clause which had not been agreed on.’”¹² Borrowing the words of Friedmann:

“ . . . it is certain that the standardisation of contracts affects both freedom and equality of bargaining, except where groups of approximately equal bargaining strength confront each other. . . Freedom is affected in so far as the individual has a purely fictitious alternative to accepting the terms presented to him. The [shipper] may have a choice between different . . . shipping companies, but it will hardly ever be a choice between different terms.”¹³

¹² Observations of the Respondents in the main action in *Partenreederei Tilly Russ v. Haven & Vervebedrijf* [1985] 1 Q.B. 931, 943 (E.C.J.) This situation can be distinguished from that relating to charterparties, where after negotiation, it is not uncommon for some printed parts to be crossed out or new additions inserted into the standard charterparty forms.

¹³ *Law and Social Change in Contemporary Britain*, (London: Stevens & Sons Ltd., 1951) at 45-46.

Under English law, the enforcement of a foreign jurisdiction or arbitration clause is nothing more than an application of the principles of freedom of contract.¹⁴ The important consideration is the manifestation of agreement rather than an actual agreement of the parties in the form of a subjective evaluation of the parties' intention. Such objectivity in determining contractual intention has played an overwhelming part in the development of the legal precepts on the enforceability of foreign jurisdiction and arbitration clauses. For all intent and purposes, English law recognises the bill of lading as an agreement, which accords with classical contractual principles on validity and enforceability without scrutinising the bargaining realities behind such contracts.¹⁵ It is immaterial that the adhesive nature of the bill of lading raises questions as to the genuineness of agreement: the backbone of enforceability of foreign jurisdiction and arbitration clauses.¹⁶

Why then does English law not recognise the adhesive character of the bill of lading in the limited circumstances of forum selection? The answer can be found in the special status of England as a centre for dispute resolution. For a country, such as England, which historically has been a centre for dispute resolution in cases where there is no connection in the form of nationality or domicile of the parties or proximity to the cause of action, it is comprehensible for such country to refuse to recognise or adopt an approach, even in limited cases, that would be seen to substantially impact upon the very basis of the party autonomy principle. Any recognition in that regard will resound on other cases which would ordinarily have been entertained by the courts or arbitral tribunals constituted in England. By extension, this would have a significant impact on the economy with the substantial fees for arbitrators,

¹⁴ See Sing Toh Kian, "Stay of Actions Based on Exclusive Jurisdiction Clauses Under English and Singapore Law (Part I)" [1991] S.J.L.S. 103, 105.

¹⁵ See Lord Diplock, in *Schroeder (A) Music Publishing v. Macaulay* [1974] 3 All E.R. 616, 624.

¹⁶ See *The El-Amria* [1980] 1 Lloyds Rep. 390, 393.

solicitors and barristers, administrative staff of institutions such as the London Court of International Arbitration (LCIA) and hotels expenses being transferred elsewhere.

Given the entrenched belief in “freedom to adhere”, the usual rhetoric in England is to the effect that the parties agreed to the forum clause,¹⁷ enforcement of the clauses would be a realisation of the legitimate expectations of the parties,¹⁸ the incorporation of the clause would be in accordance with the reasonable commercial expectations of those engaged in this kind of trade,¹⁹ or that the parties cannot pick and choose favourable terms of the contract.²⁰

However, we see a different conceptual perspective to the element of agreement in the United States. In the particular context of bills of lading there is a clear recognition of the notional rather than real basis of the agreement. Justice Stevens in his opinion in *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer, ET AL.*²¹ stated:

“Because a bill of lading was (and is) a contract of adhesion, which a shipper must accept or else find another means to transport his goods, shippers were in no position to bargain around these ...clauses.”

This view was re-echoing that of the US Supreme Court as far back as 1889 in *Liverpool & Great Western Steam Co. v. Phoenix Ins. Co.*²² that:

“The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to higggle or stand out, and seek redress in the courts. He prefers rather to accept any bill of lading, or to sign any paper, that the carrier presents; and in most cases, he has no alternative but to do this, or to abandon his business.”

¹⁷ See *Unterweser Reederei G.m.b.H v. Zapata Off-Shore Company, “The Chaparral”* [1968] 2 Lloyds Rep. 158 (CA).

¹⁸ Sing, supra note 14.

¹⁹ *The “K.H. Enterprise”* [1994] 1 Lloyds Rep. 593, 605. (per Lord Goff).

²⁰ *The El Amria*, supra note 16 at 393.

²¹ 515 U.S. 528 (1995); 1995 AMC 1817.

²² 129 U.S. 397, 441 (1889).

What this standpoint did (and continues to do) from the perspective of developing maritime law or arbitration in the US was that the courts had and exercised a greater deal of flexibility in refusing to hold the parties to an alleged agreement in the maritime contract and by extension, the dockets of the courts were full of maritime cases which went to trial on substantive legal issues. With the assumption of jurisdiction in more cases by the courts than were refused, a virile and strong maritime bar was developed which in turn was the foundation for an even more prominent and respected maritime arbitration bar starting in New York and extending to other parts of the US.

Rigid Application of the Eleftheria Rules

This was also another area in which the emphasis of approach of the applicable rules had a negative ripple effect on the development of the maritime bar in Nigeria. Assuming that it is even conceded as desirable to start from the premise of a perceived agreement as the conceptual basis of the applicable rule, the courts have the ability to attenuate the effect of a rule in the practical application of it which is an exercise of discretion. The rigid application of the received rules in Nigeria meant that for many years most of the maritime disputes were not tried in Nigeria but abroad. The cases were “concluded” at the procedural stage with the enforcement of the “agreement” as to jurisdiction or foreign arbitration.

Historically, English courts adhered to the ancient common law doctrine that any attempt to oust the jurisdiction of the court was against public policy and therefore void.²³ This view was long abandoned in favour of a modern approach whereby English courts will generally refrain from exercising jurisdiction in derogation of a choice of forum clause

²³ This stemmed from the desire of the courts to guard its jurisdiction against any form of interference from other judicial bodies, particularly arbitrators: Ingrid Farquharson, “Choice of Forum Clauses – A brief Survey of Anglo-American Law” (1974) 8 Int’L. Law. 83, 89.

submitting disputes to the exclusive jurisdiction of a foreign court.²⁴ There was a shift from outright antagonism to a “wider general principle namely, that the court will ensure that people abide by their contracts, and therefore will restrain a plaintiff from bringing an action in breach of his agreement with the defendant that any dispute between them shall be otherwise determined.”²⁵ There is, therefore, a general presumption in favour of a stay of the proceedings brought in derogation of the agreement unless there are extraordinary reasons for not doing so.²⁶

However, the language of the earlier cases was one of more flexibility and deference to the issue of convenience in international litigation. In *Owners of Cargo ex “Athenee” v. “Athenee” (The Athenee)*,²⁷ the Court of Appeal refused to stay an action *in rem* against the ship, brought by receivers of a part cargo of onions, for alleged damage to the cargo in the course of carriage from Alexandria to Hull in England. The court, in applying what can be regarded as a balance of convenience test, held that:

“there are *ample reasons* for the learned president not enforcing it [the jurisdiction clause] in this case. I think *the balance of convenience* and the substantial advantage which the plaintiffs have by suing in this country . . . and many other advantages, such as in respect of proof of loss . . . having regard to the evidence obtained at the time of inspection of the vessel and so on – all those grounds seem to me to afford *ample reason* for the learned president coming to the conclusion that, *in the circumstances of the particular case, the clause in the contract should not be given effect to.*”²⁸

Similarly in *The Fehmarn*²⁹, the plaintiffs, an English company and holders of a bill of lading which acknowledged the apparent good order and condition of a cargo of turpentine, began an action in England against the owner of the German vessel in which the cargo was carried.

²⁴ Zehman Cowen and Derek Mendes Da Costa, “The Contractual Forum: Situation in England and The British Commonwealth” (1965) 43 Can. Bar Rev. 453. See also George A Zaphiriou, “Choice of Forum and Choice of Law Clauses in International Commercial Agreements” 3 Int’L. Trade L.J. 311 (1977-78).

²⁵ Per Mackinnon L.J. in *Race Betting Control Board v. Secretary of Air* [1944] 1 Ch. 114, 126.

²⁶ See *The Sennar (No. 2)* [1985] 1 W.L.R. 490.

²⁷ [1922] 11 Ll.L.R. 6 (CA).

²⁸ [1922] 11 Ll.L.Rep. 6, 7. (Emphasis added) See also Bankes L.J. at 6.

²⁹ [1957] 2 Lloyd’s Rep. 551.

It was a term of the bill of lading that all claims and disputes arising thereunder shall be judged in the then U.S.S.R.

The High Court and the court of appeal rejected the motion to set aside the writ and stay proceedings. The decisions proceeded from the premise that where there is an agreement to submit to a foreign tribunal, it requires a strong case to satisfy the court that the agreement should be overridden. The court then weighed the relative convenience to the plaintiffs in instituting the action in the U.S.S.R., bearing in mind the particular circumstances of the case, that is, the plaintiffs were domiciled in England, the claim arose in England, the damage sued for was discovered, surveyed and ascertained in England. A stay was refused on the grounds that the above factors were sufficient to displace the prima facie presumption in favour of the chosen forum.

The principles for the grant of a stay of actions instituted in derogation of a foreign jurisdiction clause was laid down with definitiveness in *The Eleftheria*. The decision in that case, which has come to be regarded as the *fons et origo* of the issue under discussion in English law, was supposedly an attack on the last vestiges of parochialism on the part of English courts as expressed in the earlier cases. Conversely, however, a closer analysis of the mechanics of *The Eleftheria* rules vis-à-vis local connection cases in particular, seems to suggest that they did not succeed. In actual fact the rules were, as we shall see, geared towards repelling the paramountcy of the element of convenience bearing in mind the possible tensions that would entail with other cases in which English courts readily assume jurisdiction without any connection with the cause of action. The language changed but the generality of the results did not correspondingly change.

As a learned commentator noted: the policy behind *The Eleftheria* is clear: There is a presumption that the case should be tried in the agreed forum, but if the case is a strong

enough one this can be rebutted and the case allowed to proceed in the present forum.³⁰ Brandon J. (as he then was) noted that it was essential to give full weight to the prima facie desirability of holding parties to their agreement and that the court should be careful not just to pay lip service to the principles involved.³¹

Thus, as in earlier cases,³² the spring from which the basic hypothesis of *The Eleftheria* restatement flows is that of an agreement or bargain. The notion of freedom of contract continued to wrought the applicable principles in this area. From an internationalist standpoint, *The Eleftheria* test, is by and large a tenable one, in the absence of either total disregard or acceptance, as the case may be, of foreign jurisdiction clauses in all cases.³³ Nevertheless, in spite of the logical merits of this approach it bristled with difficulties in local connection cases. At its extreme, it is one in which the prima facie presumption is overwhelming, but the court would retain a discretion, albeit one that is sparingly exercised to avoid serious injustice to the plaintiffs. At the other end of the spectrum, it is at its most liberal one that attaches great weight to matters of litigational convenience of the parties within the broader question of the most natural and appropriate forum. This is done either by paying lip service to the prima facie presumption or regarding the forum clause as a connecting factor in the balancing process.

While there was a modification of terminology from “ample” or “good” reasons to a “strong case or reason” it was clear that that the courts still had the flexibility in arriving at the same result of assuming jurisdiction if they were inclined to. The difficulty for the English courts was (and remains) how to masquerade the refusal to enforce foreign jurisdiction clauses in local connection cases, while proclaiming the sanctity of the party

³⁰ A. Briggs, “The Staying of Actions on the Ground of “Forum non Conveniens” in England Today” [1984] 2 LMCLQ 227, 242.

³¹ *The Eleftheria* [1969] 1 Lloyd’s Rep. 237, 245.

³² With the exception of the “close connection” approach of Lord Denning in *The Fehmarn*.

³³ See generally the cases noted in Dicey & Morris at 419 fn. 53.

autonomy principle save in exceptional circumstances, without appearing to be treating such cases on a basis akin to *forum non conveniens*.³⁴ That *The Fehmarn* was described by English commentators as being on “the verge of the law” is further testament to the underpinning policy considerations in this area. There was clearly nothing wrong with the decision of Lord Denning in that case.

Most of the cases that came before Nigerian courts were factually similar to the *Athenee* and the *Fehmarn* which were decided before the *Eleftheria*. The circumstances of the cases are such that the court will pay lip service to the prima facie presumption and eventually exercise its discretion on the basis of convenience and appropriateness of forum. Indeed, this was also the position in England in a number of reported cases with a local connection in England.³⁵

However, the subtle nuances in the emphasis of approach of the *Eleftheria* rules which would be beneficial to cargo owners and to the development of Nigerian maritime law and arbitration practice was not readily appreciated by our courts in the adoption and application of the *Eleftheria* Rules. In *Sonnar (Nig.) Ltd v. Partenreederer M.S. Nordwind (Owners of M.V. Nordwind & Ors)*³⁶ (the Nigerian *locus classicus* on the issue) a full panel of the Supreme Court comprising seven justices gave their opinions. Three main views were expressed, the leading judgment being that of Eso JSC who observed that the important

³⁴ This expression means the most appropriate and natural forum. For a discussion of the origin of the doctrine, its development and eventual acceptance as part of English law, see *Dicey and Morris, The Conflict of Laws*, Lawrence Collins, Gen. ed. (London: Sweet & Maxwell, 12th edn., 1993) (hereafter “Dicey & Morris”), 395-405; Briggs, “The Stay of Actions on the Ground of “*Forum non Conveniens*” in England Today” [1984] 2 L.M.C.L.Q. 227.

³⁵ See *The Adolf Warski* [1976] 1 Lloyd’s Rep. 107; [1976] 2 Lloyd’s Rep. 241 (CA); *Aratra Potato Co. Ltd & anor v. Egyptian Navigation Co. (The “El Amria”)* [1980] 1 Lloyd’s Rep. 390 (Sheen J.); [1981] 2 Lloyd’s Rep. 119 (CA); *The Nile Rhapsody* [1992] 2 Lloyd’s Rep. 399. (Though not a case with a local connection, and therefore not directly germane to the suggested trend in this article, the extent to which *The Spiliada* principles might come to subsume *The Eleftheria* test - an interesting proposition indeed - emerges from the case. The remark by the learned judge that “the consequence of the establishment of the Egyptian jurisdiction agreement amounts to no more than a shift in burden of proof in favour of the defendants [that is, the carrier]” cannot be any truer in local connection cases. The language does not suggest that the maxim *pacta sunt servanda* was a predominant concern.)

³⁶ [1987-1990] 3 NSC 483.

question in the case was: “Upon what facts is the court in Nigeria to assume jurisdiction despite a clause in the bill of lading, which positively adopts Germany as the place of litigation, in regard to any dispute arising under the bill of lading?”³⁷ Given the wider importance of the need to foster confidence in the impartiality of Nigerian courts and the perceived resonance which such decision would have on international commercial agreements generally, the Supreme Court was confronted with not only legal, but policy arguments as to the direction of Nigerian law on this issue. It was advocated in that case that there was nothing solemn about obligations arising out of contracts of adhesion.

Eso JSC was, however, not impressed by the adhesion argument, concluding that bills of lading are contracts of international standard where the parties are at arms length.³⁸

Continued his lordship:

“To ask a court to decide only as a result of public policy or public good, goes beyond the measure of liberalism in the application of the law or even viewing the matter from the socio-economic context of law. Who is to determine what constitutes public policy? To rely on public policy or public good simpliciter, is to give room to uncertainty in the law.”³⁹

While courts should generally refrain from relying on public policy to fathom a decision, the importance of policy considerations in fashioning a proper rule of law within the context of the particular circumstances of a country cannot be over emphasised.

³⁷ See above note 68 at 189. Perhaps a more enlightening formulation of the main point of contention was that of Nnamani JSC at 192-193: “Whether *pacta sunt servanda* should be allowed in all its rigidity in a suit in which the parties as per clause 3 of the bill of lading agreed that all disputes be referred to a foreign country – Germany.”

³⁸ *Ibid* at 188. A conclusion reminiscent of Lord Diplock’s view in *A Schroeder Publishing Co. Ltd v. Macaulay* [1974] 3 All ER 616.

³⁹ *Ibid*. See also the scathing remark of Nnamani JSC at 194 describing public policy as “nebulous and dangerous”. The most oft quoted shibboleth on the nature of public policy, which regrettably has been unduly relied on by Nigerian judges, is that of Burrough J. in *Richardson v. Mellish*, 130 E.R. 294, 303 where it is referred to as an “unruly horse”. See also Winfield, “Public Policy in English Common Law” 42 Harv. L.R. 76, on the amorphous nature of public policy and the possibility of abuse. But see Nussbaum, “Public Policy and the Political Crisis in conflicts of Laws” 49 Yale L.J. 1027 (1940): “Although the utilization of the public policy concept in Anglo-American law is wide and varied, much confusion can be avoided if the various legal uses of this concept are kept separate. One such use is affirmative: public policy is relied upon in order to solve doubts as to the interpretation of legal rules ... Two other uses of the concept are negative and limitative. (1) public policy limits freedom of contract, invalidating, for instance yellow – dog contracts or agreements in restraint of trade.”

The Supreme Court in *The Nordwind* focused largely on the potential problems of deciding cases purely on “a sledgehammer use of public policy argument”⁴⁰, rather than, as a matter of policy, questioning the underlying presumption on which the applicable rules evolved in other countries with a view to adopting it wholesale or with variations, as the case may be. In the case, the adhesion argument was argued in tandem with the public policy argument. However, they are conceptually two different issues that require separate consideration. The argument about contracts of adhesion is geared towards questioning the undue reliance on the element of agreement as the basis of the enforcement principles and is essentially a question of fact. It challenges the unreality of the assumed agreement and the underlying basis in favour of the shipowner. The courts do not have to embark on a voyage of determining the public good to decide whether a bill of lading is a contract of adhesion or not.

On the other hand, the public policy argument is one of an extensive appeal in the sense that it directs the enforceability regime to be adopted in the first place. It also determines whether the courts should adopt a strict or liberal attitude in the application of the enforcement mechanism. In the conflict of laws arena, policy should consist of the reserved right of the courts of the chosen forum to reach a decision more compatible with justice and fairness as locally conceived. Unfortunately, the Supreme Court did not use the opportunity of *The Nordwind* to express a statement of policy applicable to the enforcement of forum selection clauses that is liberal by nature and recognises the unreality of agreement. The true effect was that cases were in the final analysis “transferred” to foreign courts and arbitral tribunals. In tow with the transfers were maritime law development and expertise and the invisible trade opportunities which are an inexorable appendage to international civil litigation.

⁴⁰ W Reese & M Rosenberg, *Conflict of Laws: Cases and Materials*, 8th edn. (1984) 467.

“Phantom” Legislation Purporting to Stop the “Transfer” of Maritime Cases

In the late 80’s and early 90’s it became evident that Nigerian maritime industry had to be re-energised with far-reaching policy initiatives by the government. In 1987, the Nigerian Maritime Authority was established under the aegis of the Nigerian National Shipping Policy Act⁴¹ which authority has metamorphosed into the National Maritime Administration and Safety Agency (NIMASA) that we have today. In the same vein, it also became evident that Nigerian maritime law and practice had to be developed in order to support the government initiatives in the maritime industry. The unconstructive effect of the erstwhile enforcement mechanism of foreign jurisdiction clauses was one of the important issues that engaged the attention of the lawmakers in the Admiralty Jurisdiction Act 1991.⁴² The AJA sets out the extent of the jurisdiction of the Federal High Court in admiralty matters.⁴³ In addition, it made provisions concerning the validity and enforceability of foreign jurisdiction clauses in such matters. The main thrust of the new regime is to declare agreements as to jurisdiction, null and void. Section 20 of the Act provides that:

“Any agreement by any person or party to any cause, matter or action which seeks to oust the jurisdiction of the court shall be null and void, if it relates to any admiralty matter falling under this Decree and 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) the payment under the agreement (implied or express) is made or is to be made in Nigeria; or

⁴¹ Cap 279 Laws of the Federation of Nigeria 1990.

⁴² Cap A5 Laws of the Federation of Nigeria 2004.

⁴³ See ss. 1 & 2.

- (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 *res* is within Nigerian jurisdiction;
or
- (e) it is a case in which the Federal Military Government or a State of the Federation is involved and the Government or State submits to the jurisdiction of the court; or
- (f) there is financial consideration accruing in, derived from, brought into or received in Nigeria in respect of any matters 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 should be adjudicated upon in Nigeria.”

This speaker has argued elsewhere about the conceptual incongruity wrought by the inelegant drafting of section 20.⁴⁴ Jurists have also not minced words about the inapt language and conceptual basis of the law. In *The Owners of the M.V. Lupex v. Nigerian Overseas Chartering and Shipping Limited*⁴⁵ Uwaifo JCA (as he then was) noted that “section 20 was walking on its head...and it would seem, and I say this with due respect – may I add imaginatively – that the subsections of section 20 have contemplated (though in wrong circumstances) the observations of Brandon J. in *The Eleftheria* which the Supreme Court approved in...*The Nordwind*.” 20 years on and there is no visible salutary effect on the

⁴⁴ See Adewale A. Olawoyin, “Forum Selection Disputes Under Bills of Lading in Nigeria: A Historical and Contemporary Perspective” (2005) 29 *Tulane Maritime Law Journal* 255.

⁴⁵ [1993-1995] 4 NSC 182 at 200.

“mischief” that section 20 sought to address. Cases continue to leave Nigerian shores in droves. London, New York and more recently, Singapore have benefitted from this state of affairs. The irresistible conclusion is that section 20 of the AJA is no more than a phantom legislation gracing our statute books without any attendant benefit derived from its existence. Rather than enhance coherence in the corpus of our laws, it has rather engendered more confusion particularly in the context of enforcement of foreign arbitration clauses. We see from the Court of Appeal divergent authorities on the application of section 20 to the enforcement of foreign arbitration clauses. The cases of *MV Panormos Bay & Ors v. Olam Nigeria PLC*⁴⁶ and *Lignes Aeriennes Congolaise v. Air Atlantic Nigeria Limited*⁴⁷ are instances in which the Court of Appeal refused to enforce of foreign arbitration clauses in maritime claims on the basis that section 20 was also applicable to such clauses.

This writer had argued elsewhere that while the conceptual analysis in *the Panormos Bay* was clearly wrong, the result in that case was an important impetus for the development of Nigerian maritime arbitration and practice.⁴⁸ However, in *Onward Enterprises Limited v. MV “Matrix” & 2 Ors.*⁴⁹ the same division of the Court of Appeal held that section 20 of the AJA did not prevent the enforcement of a foreign arbitration clause in the bill of lading in that case and refused to follow the earlier decision in the *Panormos Bay*. The court rather followed the Supreme Court decision in the *The Owners of the M.V. Lupex v. Nigerian Overseas Chartering and Shipping Limited*⁵⁰ which enforced a foreign arbitration clause in a charterparty. However, it is instructive to note that the Supreme Court did not consider section 20 of the AJA in the *Lupex* case.

⁴⁶ (2004) 5 NWLR (Pt. 865) 1.

⁴⁷ (2005) 11 CLRN 55.

⁴⁸ See Adewale A. Olawoyin, “Safeguarding Arbitral Integrity in Nigeria: Potential Conflict Between Legislative Policies and Foreign Arbitration Clauses in Bills of Lading” (2006) 17 *American Review of International Arbitration* 239.

⁴⁹ (2010) 2 NWLR (Pt.1179) 530.

⁵⁰ (2003) FWLR (pt. 270) 1428.

Further Statutory Intervention – “The Knight in Shining Armour”

The laudable concerns that instigated the extreme position of section 20 at the relevant time of its enactment have now been fully addressed by the United Nations Convention on Carriage of Goods by Sea (Ratification and Enforcement) Act⁵¹ which codified the Hamburg Rules into the corpus of Nigerian law. Section 1 of the Act provides, *inter alia*, that as from the commencement of the Act, the provisions of the United Nations Convention on Carriage of Goods by Sea set out in the Schedule to the Act shall have the force of law and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive and judicial powers in the Federal Republic of Nigeria.

Article 21 of the Hamburg Rules set out in the Schedule to the Act states that in judicial proceedings relating to carriage of goods under the Convention, the plaintiff, at his option, may institute an action in a court of competent jurisdiction situated in (a) the principal place of business or, in the absence thereof, the habitual residence of the defendant, or (b) the place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made, or (c) the port of loading or the port of discharge, or (d) any additional place designated for that purpose in the contract of carriage by sea.

Similarly, Article 22 of the Hamburg Rules set out in the Schedule of the Act makes provisions regarding arbitration agreements in bills of lading and charterparties. Sub-article (1) recognises the right of parties to agree in writing that any dispute that may arise relating to carriage of goods by sea shall be referred to arbitration. Sub-article (3) is the critical

⁵¹ No. 19 of 2005. This is an Act to enable effect to be given in the Federal Republic of Nigeria to the United Nations Convention on the Carriage of Goods by Sea and for related matters.

provision and it states that the arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places, (a) a place in a State within whose territory is situated, (i) the principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or (ii) the place where the contract was made, provided that the defendant has there a place of business, branch, or agency through which the contract was made; or (iii) the port of loading or the port of discharge; or (b) any place designated for that purpose in the arbitration clause or agreement.

To further entrench the transposition of the element of agreement with a subjective discretion in favour of the claimant as evinced in the foregoing provisions, Article 23 provides that any stipulation in a contract of carriage of goods by sea, in a bill of lading, or other document evidencing the contract of carriage by sea is null and void to the extent that it derogates, directly or indirectly from the provisions of the Convention. The implication of this provision is very clear and does not give room for the conceptual uncertainty that had bedevilled Nigerian law under the AJA. Irrespective of the agreement as to foreign jurisdiction or foreign arbitration, the holder or consignee of a bill of lading or the charterer of a vessel, has the option to decide which of the stated alternative fora to institute an action. The primacy of the agreement (notional or actual) of the parties has been subjugated to a subjective exercise of a discretionary choice by the claimant. In reality, it is unlikely that a Nigerian claimant would institute a claim in a forum other than Nigeria (the port of discharge) except there are tactical reasons which may exist dictating the institution of the suit in another named forum in Article 22 or indeed the originally agreed forum.

Conclusion

The courts of various countries have consistently engaged in a delicate balancing act having regard to the international dimension in the scheme of things. But as aptly described

by Sir Gerald Fitzmaurice, “[y]et – and here is the paradox – although the rules of private international law – that is to say the conflict rules of each State – discharge for that State an international duty, these rules have nevertheless undoubtedly been evolved by States, not specifically with a view to, or in performance of, any international duty as such, but in their own national interest.”⁵² It cannot be gainsaid that the slavish obeisance to received English law in the context of choice of forum for the resolution of maritime disputes has negatively affected the development of maritime law and arbitration in Nigeria. Regrettably, we never really focused on the transformative role that lawyers and judges could play as change agents with the law enacted by the legislature. The idea of judicial government – one in which the judiciary also sees its role as governmental in the holistic process of economic development was seen as an anathema. This resistance to judicial government was premised on another historical anathema in the common law legal tradition which was against any form of judicial activism. Yet, judicial government is not the same as judicial activism. Transformative judicial government focuses on the emphasis of approach in the application of rules in the context of wider national and socio-economic implications. We see this in the results of English cases after the decision in the *Eleftheria* where it appeared that the courts were more inclined to lay more emphasis on the issues of convenience in refusing to grant a stay in favour of the agreed forum.

The decisions from Nigerian courts in this area of the law have unwittingly engendered wealth discreation⁵³ rather creation in Nigeria. Despite the legislative initiatives by the government with the passing of the Regional Centre for International Commercial

⁵² See “The General Precepts of International Law Considered from the Standpoint of the Rule of Law”, 92 *Recueil Des Cours* 1957 Vol. II, 221-222.

⁵³ This is a term picked from a paper by Tunde Ogowewo titled “Wealth (dis)creation through corporate (mis)governance and banking (mis)supervision: the outlines of a reform agenda” presented at Pound Hall, Harvard Law School on 19 November 2009 and subsequently on 25 November 2009 in honour of Hon. Justice E.O. Ayoola at the Nigerian Institute of International Affairs.

Arbitration Act⁵⁴ there was no discernible improvement in the development of Alternative Dispute Resolution (ADR) in Nigeria. It is obvious that the development of the maritime industry through robust policy initiatives from regulators such as NIMASA must be done in tandem with the development of a responsive and experienced maritime bar and necessary infrastructure for the entrenchment of arbitration. The reform agenda should now shift from the traditional change agents – the legislature – to practising lawyers and the judiciary. To demonstrate this point, it is surprising that close to 5 years after the enactment of the United Nations Convention on Carriage of Goods by Sea (Ratification and Enforcement) Act 2005, there is still on continuous basis applications for stay of proceedings pending arbitration or litigation in a foreign forum on the dockets of the Federal High Court. The statutory platform needed for engendering the development of maritime arbitration is firmly in place. The applicable law should be applied with absolute vigour. Change is nigh and we should now grab it with both hands.

⁵⁴ Cap R5 Laws of the Federation of Nigeria 2004.