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TEMPLARS ThoughtLab

Court of Appeal Reinforces the Effectiveness of Choice of Foreign Law and Jurisdiction Clauses in Contracts

Introduction

As Nigerian law practitioners with a bias for private international law, the most frequent query that we receive from Nigerian and foreign clients transacting in cross-border trade, is whether, under Nigerian law, contracting parties have the liberty to select their governing law(s) as well as the forum for the resolution of their disputes, and whether Nigerian courts will give effect to such choice. From a reading of decided cases that have emanated from Nigerian courts especially in the past forty years, the answer to these questions have not always been straightforward. Similar questions were posed to the Court of Appeal in the recently reported case of ***Sqimnga (Nig) Limited v. SAP (Nig) Limited.***[1] How the Court decided these questions, forms the basis of this publication.

Background

In a previous publication titled, **Fundamental Considerations Before Entering into Cross Border Contracts**, we noted that three questions always arise, in relation to international commercial contracts, to wit: (i) what laws govern the respective obligations of the contracting parties; (ii) if a dispute arises under the contracts, what mechanism of dispute resolution can the parties have

[1] [2025] 2 NWLR (Pt. 1977) 423.

recourse to; and (iii) at the end of the process, will the resulting decision be recognised and enforced in the jurisdictions where the losing party has assets.

In relation to the first question, it is concerned with which system of law governs the validity, scope, interpretation, or performance of the contract. In other words, what do the courts consider when called upon to determine the governing law of a cross border contract. In ***Enka v. Chubb***[2], the UK Supreme Court provided guidance on how to resolve this question by stating that where an English court has to decide which system of national laws governs a contract, the court will apply the rules developed by the common law for determining the law governing contractual obligations. Those rules are that a contract (or relevant part of it) is governed by: (i) the law expressly or impliedly chosen by the parties; or (ii) in the absence of such choice, the law with which the contract is most closely connected.[3]

The above principle finds expression in the common law concept of party autonomy, which is simply to the effect that contracting or commercial parties generally have the freedom to choose the law that will govern their contractual rights and obligations. As a general rule, once the parties have validly made this choice, the courts have no business interfering with the parties' choice.[4]

By section 45(1) of the Interpretation Act, the Common Law of England, the Doctrine of Equity together with the Statutes of General Application that were in force in England on the 1st day of January 1900, were received as part of Nigerian law. Consequently, the concept of party autonomy applies in Nigeria subject to a few specified exceptions[5] and contracting parties to both domestic and cross border contracts have the liberty to select not just their governing law but also the means of resolution of any dispute that arises under their contract. Therefore, when called upon to interpret the terms of a contract, it is the law chosen by the parties that guides Nigerian courts in the determination of the parties' rights and obligations. In practice, however, Nigerian courts have not been consistent in giving effect to the concept of party autonomy.

Historically, the biggest source of confusion, has been the dictum of Oputa, JSC in the case of ***Sonnar (Nig) Ltd v Partenreederi MS Nordwind***[6] where His Lordship stated that a choice of law is only effective where the choice is "real, genuine, bona fide, legal and reasonable." The apex Court rejected the express choice of German law as the governing law of a transaction between a Nigerian shipper and a Liberian shipowner on the basis that the choice was "capricious and unreasonable" because the chosen law had little or no connection with the parties or their transaction. Consequently, many interpreted the judgment of the apex Court as amounting to a departure from the general rule of giving effect to the concept of party autonomy.

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[2] *Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb* [2020] UKSC 38. Similar rules apply under the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) applicable in the European Union.

[3] See Dicey, Morris & Collins on The Conflict of Laws, 15th Edn. (2012) rule 64(1). See also See also the dictum of Lord Simmons in Bonython v. Australia [1951] AC 201, 219-220.

[4] This is captured in the maxim, ***pacta conventa quae , neque contra leges neque dolo malo inita sunt omni modo observanda sunt***- meaning agreements which are neither contrary to the law nor fraudulently entered into, should be adhered to in every manner and in every detail. See the Sqimnga's case at page 442 paras F-G. Thus, the courts will rightly interfere if the agreement is contrary to law or fraudulently entered into.

[5] One exception to the general rule is where Nigerian courts find that the choice of the parties is against Nigeria's public policy or where the mandatory rules of Nigerian law forbid the choice of another law – other than Nigerian law – to govern a transaction, in whole or in part.

[6] *Sonnar (Nig) Ltd v Partenreederi MS Nordwind (1987) 4 NWLR (Pt. 66) 520* ('The Nordwind').

With the approach of the Supreme Court in **The Nordwind** case, the question of whether a court in Nigeria would give effect to an express choice of law clause or jurisdiction agreement in a cross-border contract in any given case became a fact-specific determination which depends on the circumstances of each given case. The situation has also been further complicated by the Nigerian law principle, that parties cannot by their agreement oust the courts of their jurisdiction validly conferred by law or confer jurisdiction on a court that otherwise lacks jurisdiction. It is against the foregoing background that the Court of Appeal was called upon to resolve the ***Sqimnga*** appeal.

The Facts of the Sqimnga case

Two companies registered and doing business in Nigeria, Sqimnga Nigeria Limited ("**Sqimnga**") and Systems Applications Products Nigeria Limited ("**SAPNL**"), entered into a Master Service Agreement ("MSA") for services pertaining to a software solution system. Pursuant to Clause 14 of the MSA, the Parties agreed that the Agreement shall be governed by the laws of the Republic of South Africa and that any dispute arising under the MSA shall be submitted to the exclusive jurisdiction of the South African courts.

A dispute subsequently arose between the parties and Sqimnga approached the High Court of Lagos State. SAPNL objected to the jurisdiction of the Court to entertain the claim, on the strength of the provisions of Clause 14 of the MSA by which the parties mutually agreed to have their contract governed by the laws of South Africa and to submit their dispute to the exclusive jurisdiction of South African courts. After considering the objection, Pedro J. of the High Court of Lagos State upheld the provisions of the MSA and declined jurisdiction to entertain the matter. The Court held that Sqimnga had failed to show why it should assume jurisdiction in defiance of the parties' choice of court agreement. Dissatisfied, Sqimnga appealed to the Court of Appeal.

The decision of the Court of Appeal

The Court of Appeal unanimously held that, by reason of the universally accepted *pacta sunt servanda* principle, agreements which are neither contrary to law nor fraudulently entered into, should be adhered to by the parties. Since the MSA entered into by the parties was not made contrary to law, and was not fraudulently entered into, the parties were under obligation to adhere to the provisions thereof. The Court of Appeal also found that the burden of proof was on Sqimnga to demonstrate why the High Court should not have given effect to the parties' choice of law and jurisdiction agreement, which burden Sqimnga failed to discharge. As a result, the Court of Appeal dismissed the appeal and upheld the decision of the High Court to decline jurisdiction in favour of South African courts.

Analysis of the Court of Appeal's decision and the way forward

From a reading of the Court of Appeal's decision, it is obvious that the appeal relates to the question of jurisdiction of a Nigerian court to determine a claim in the face of a choice of foreign court and not necessarily the question of choice of foreign law. However, in determining the appeal, the Court of Appeal upheld both the foreign jurisdiction clause and the governing law clause in the MSA.

Overall, the Court of Appeal corrected a widely held but mistaken belief that the Supreme Court rejected the party autonomy principle in The Nordwind. Instead, and as the Court of Appeal correctly noted, the better view regarding the position of Nigerian law is that Nigerian courts retain the discretion to uphold or reject an express choice of law and jurisdiction agreement in a contract,

and in the absence of strong reasons to the contrary, such discretion will usually be exercised in favour of holding parties to their bargain.[7] The guidance to assist the courts in ensuring that such discretion is exercised judiciously and judicially was laid down by Brandon J. in ***The Eleftheria***[8]and became known as the Brandon Tests which were adopted by the Nigerian Supreme Court in ***The Nordwind*** case.

In sum, to determine whether a Nigerian court should uphold a foreign jurisdiction clause or the governing law clause, the party praying a Nigerian court to discountenance the foreign jurisdiction clause or the governing law clause must show "strong cause" or "compelling circumstances" why the court should depart from the law or forum selected by the parties.

From a procedural point of view, one issue that arose in this case merits highlighting. SAPNL, as defendant, filed its Preliminary Objection on grounds of law and therefore did not file an affidavit in support. In responding, Sqimnga not did see the need to file an affidavit in opposition or an Affidavit of Fact since there was no supporting affidavit to respond to and instead sought to rely on the facts contained in substantive pleadings. The Court of Appeal refused to countenance this practice. The lesson from this is where an application is filed, and the burden of proof lies on the respondent to satisfy a legal requirement, the respondent must file an affidavit in opposition to the objection, even if the application was not supported with an affidavit. Otherwise, the court must deem that the respondent has failed to discharge that burden.

Conclusion

As Nigeria continues in its quest to increase the inflow of foreign investments into the country, one of the fundamental duties that the Nigerian legal system owes to businesses and the economy in general is the need for clarity and certainty in the law. As the learned authors of the seminal work, *Dicey, Morris and Collins, The Conflict of Laws* famously observed, legal certainty especially in the context of cross-border transactions is crucial for reducing transaction costs.[9] The investing community prefers to invest in jurisdictions where laws are certain and predictable, where they can understand the rules and reasonably anticipate potential outcomes before making their final investment decisions, thus decreasing risks and costs associated with disputes. This is why clients often want to know, from the outset, whether Nigerian law recognises their rights to select their governing law or to choose their preferred medium or forum for resolving their disputes. It is in this regard that we consider the decision of the Court of Appeal as a welcome and very timely intervention.

If you require any further clarification, do not hesitate to contact us.

[7] In The Nordwind, the Nigerian Supreme Court relied on the dictum of Wilmer, L.J. in *Unterweser Reederei G. M. B. H.v. Zapata Off Shore Coy. "The Chaparral" (1968) 2 Lloyd L.R. 158.*

[8] *The Eleftheria" (1969) 1 Lloyds L. R. 237.*

[9] L Collins (gen ed), *Dicey, Morris and Collins, The Conflict of Laws* (London, Sweet and Maxwell, 14th edn, 2006), observed at para 11-062.