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EXPENSIVE CHOICES FOR 'CHEAP' CAUSES:

How choice of foreign court provisions can prove too much

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Choice of court / choice of jurisdiction clauses are a staple in many contracts between foreign and Nigerian entities, especially in franchise, distributorship and sales representative agreements or such similar contracts where the foreign entity has no local presence. Typically, the clauses are inserted for the benefit of the foreign entities, to ensure that disputes arising from the agreement would be heard (exclusively) by their home courts or a 'neutral' court of their choosing.

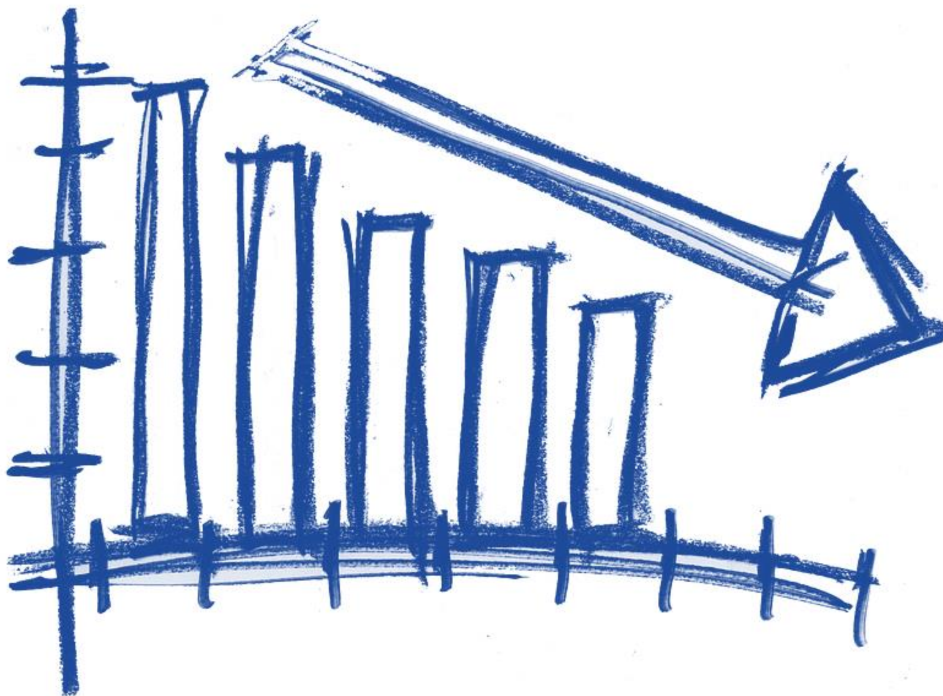
In practice, it is common to see attempts being made to commence lawsuits in Nigeria over contractual disputes that are covered by choice of foreign court provisions. These attempts are usually made by the Nigerian parties, presumably because they may only have realized the extent of the burden of commencing an action in a foreign court at the point that a dispute has arisen. Lately, however, a few foreign parties have themselves found reasons to seek to litigate in-country against their local counter-parties despite their contractual choice of foreign courts.

Considering this atypical trend, we highlight in this article the market conditions that may be responsible for the surge in foreign entities seeking to sue their local counterparties in Nigeria despite having agreed to the courts of other jurisdictions in their contracts. We also discuss the chances and potential implications of a foreign entity successfully litigating in Nigeria despite an agreement to litigate abroad. Finally, we touch on the potential viability of introducing unilateral option clauses in place of exclusive choice of foreign court provisions.

Economic downturn and contractual defaults

Many businesses in Nigeria were deeply affected by the rapid fall in oil prices which began toward the end of 2014, worsened in 2015, and has yet to be fully reversed. The fall significantly reduced foreign exchange liquidity, which was further exacerbated by the tight foreign exchange control measures imposed by the Federal Government for several months as it sought unsuccessfully, amid a rapidly dwindling foreign exchange supply, to peg the Nigerian naira at a determined exchange rate to the United States dollar. In a matter of weeks, the Naira depreciated at the parallel market by as much as 100 per cent while transactions that were eligible to obtain foreign exchange at the official rates were made to wait—virtually indefinitely at the time—until the Central Bank could meet their foreign exchange needs.

As a result, many Nigerian businesses were confronted with the alarming reality that the foreign-currency-denominated transactions they entered into a few years back at an exchange rate of about 196 naira to a dollar (the dollar being sourced, in many cases, from the parallel markets) now required them to pay at least twice that naira value to a dollar. Rather than honour their contractual payment obligations at such high costs, a few of these businesses have opted to default on their contracts, leading to a rise in potential claims by their foreign counterparties.



Practical challenges of a choice of foreign court

The defaults by local parties, especially in respect of their payment obligations, have compelled many foreign entities to weigh their dispute resolution options, which in turn has revealed some practical downsides to contractual selection of foreign courts.

A typical scenario is where a foreign entity is faced with a local counter-party (a distributor, for example) which has received and commercially exploited valuable goods or services provided by the foreign entity but, citing constraints arising from the economic downturn, continues to withhold payment for those goods or services. In such cases, ample evidence usually exists to support a successful claim for summary judgment in-country. This may prompt the foreign party to re-assess the benefits and burdens of abiding by any choice of foreign court provisions, and thus bring to the fore the considerations that could recast a choice of foreign court provision from a valuable contractual advantage into a costly and inefficient framework for enforcing a contractual right.

Those considerations include, among others: (i) the amount of the claim relative to the cost of having to litigate in a foreign court first before seeking to (register and) enforce the foreign judgment in Nigeria; (ii) the chances that the defaulting party has sufficient assets to satisfy a favourable judgment, so as to make the trip to a foreign court and back worth the ride; (iii) the general non-registrability (and therefore potential unenforceability) in Nigeria of any foreign non-money judgments or orders (e.g. *mareva* injunctions or other preservative orders) which may be crucial to preserve attachable assets; and (iv) applicable limitation periods.

After considering these variables, a few foreign entities who are prospective claimants may find that litigating in Nigeria is more advantageous to them, regardless of any relevant forum selection clauses they may have agreed to. In this event, they must then consider the prospects and implications of abandoning their choice of court provisions and filing an action in Nigeria.

Prospects and implications of overcoming the choice of a foreign court

Under Nigerian law, a choice of court provision in a contract does not in itself oust the jurisdiction of Nigerian courts over matters that are ordinarily within their subject-matter and personal jurisdiction.[1] Whether a choice of court provision should be enforced is, fundamentally, a question for the Nigerian court's discretion, albeit guided by clearly-defined parameters. As much as Nigerian courts would generally be inclined to enforce contractual terms which parties have voluntarily agreed to, they are also required to proceed with some caution and circumspection if the term in question is a choice of foreign court. The following considerations are usually weighed in determining whether to enforce a choice of court provision:

a. The country in which the evidence on the issue of facts is situated or more readily available and the effect of that on the relative convenience and expense of trials (for example, the fact that a contract is to be performed in Nigeria and the material pieces of evidence to establish a claim are in Nigeria are a factor to be considered in weighing whether a contractual selection of a foreign court should be discountenanced);

b. Whether the law of the foreign courts apply and if it differs from Nigerian law in any material respect (for example, if all or part of the prospective claimant's claim is forbidden under the law of the chosen foreign jurisdiction but not in Nigeria, this would factor into a Nigerian court's consideration of whether to enforce the choice of the foreign court);

c. What country either party is connected to and how closely (for example, a Nigerian court would consider the nexus between the country of the chosen court and the parties / transaction to which a claim relates, to assess whether the choice of a foreign court is cosmetic or based on legitimate rationale);

d. Whether the defendant genuinely desires trial in the foreign country or is only seeking procedural advantages (for example, a Nigerian court could consider the likelihood that the defendant would participate in proceedings in the chosen foreign court, to ensure that its insistence on enforcing the choice of court selection is not designed merely to frustrate the claimant); and

e. Whether the plaintiff will be prejudiced by having to sue in the foreign court because he would be deprived of security for that claim (for example, if the defendant is insolvent and has no assets in the chosen foreign jurisdiction), be unable to enforce any judgment, be faced with a time bar not applicable in Nigeria (for example, if the claim has become time-barred in the jurisdiction chosen by the parties but is not time-barred yet in Nigeria); or for political, racial, religious or other reasons be unlikely to get a fair trial.[2]

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[1] *Sonnar (Nig.) Ltd v. Partenreedri M.S. Nordwind (owners of the M.V. Nordwind* (1987) 4 NWLR (Pt. 66) 520 at 543 ("**Nordwind**"); *Beaumont Resources Ltd. & Anor. v DWC Drilling Limited* (2017) LPELR-42814 (CA).

[2] *ibid*.

With careful articulation of its claims, a foreign entity seeking to sue its local counter-party in Nigeria, in respect of contracts which were to be performed in Nigeria, could satisfy the above requirements and thus demonstrate that its case is deserving of adjudication in Nigeria despite any pre-existing agreement to submit the claim to a foreign court. By contrast, unless a Nigerian counter-party has some real connection to a chosen jurisdiction, it may find itself hard pressed to justify an insistence on enforcement of the choice of foreign court provision. It would be difficult to convince a Nigerian court that such insistence is anything more than a mere delay tactic designed to obtain a procedural advantage over the foreign counter-party. Accordingly, it is possible for a foreign entity to sue successfully in Nigeria regardless of any choice of foreign court provisions it agreed to with its Nigerian counterparty.

However, overcoming a choice of foreign court provision and successfully litigating in Nigeria could amount to a waiver, moving forward, of the right to insist on enforcement of that choice in subsequent proceedings. A Nigerian court could conclude that a choice of foreign court provision has been waived if there is evidence that the defendant which seeks to enforce the choice had previously and successfully initiated a suit in Nigeria under the same contract having the choice of foreign court provision. For long-running contracts, this may be a challenge for the foreign entity because it could entail that the benefit and convenience of not having to defend a claim in Nigeria (its counterparty's home county) will have been lost for the remaining term of the contract. For short-term or one-off contracts, however, this may not give much cause for concern.

Overall, foreign parties who seek to litigate in Nigeria against their Nigerian counterparties notwithstanding the choice of a foreign court in their contract would need to balance the prospects of being able to do so successfully against the potential risk of being deemed to have forfeited their selection of foreign courts altogether.

Exploring unilateral option clauses

Considering the potential challenges which a choice of foreign court provision could present, especially in circumstances where speedy and enforceable judicial intervention in-country is needed, a migration to unilateral option clauses may offer a better deal. A unilateral option provision[3] on dispute settlement would typically give one party the option of electing from two available fora for adjudicating contractual disputes (in this case, a chosen foreign court and a Nigerian court) while limiting the other party to only one forum (in this case, the chosen foreign court). For example, a choice of court clause in a distributorship agreement could contain a unilateral option provision which gives the supplier (the foreign entity) the right to sue either in its own home courts or in the home courts of the distributor (the Nigerian entity) but restricts the distributor to suing in the supplier's home court.

Admittedly, unilateral option clauses are controversial. They are certainly not universally enforceable because they arguably create some imbalance in parties' access to available fora for enforcement of contractual rights. But whilst there is a dearth of Nigerian caselaw where the validity of unilateral option clauses has been addressed directly, it is still likely that such clauses would be upheld. In one decision,[4] a foreign entity successfully sued to recover debts from a local counterparty by relying on, among other things, the dispute resolution provision in the contract which required disputes to be arbitrated but allowed the foreign entity the unilateral option of a lawsuit in Nigeria against the local entity. The Court of Appeal held that as lopsided as it seemed, the local entity accepted the unilateral option clause which, together with other unfavourable evidence in the case, sufficed to defeat the local entity's contention that the foreign entity's claim must be submitted to arbitration. Even though the local entity in this case appears not to have specifically questioned the validity of the unilateral option provision at issue, the fact that the court had no hesitation in enforcing the option is arguably indicative of what the court's position would have been if the question had been raised. Moreover, English courts apparently consider unilateral option clauses enforceable as a matter of common law;[5] therefore it is likely that Nigerian courts could be persuaded to do the same by following the reasoning in the relevant decisions of the English courts.[6]

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[3] These are also known as asymmetric clauses.

[4] *United World Inc v M.T.S Ltd* (1998) 10 NWLR (Pt. 568) 106.

[5] *See*, for example, *Mauritius Commercial Bank v Hestia Holdings Limited* ([2013] EWHC 1328 (Comm) where a clause that provided for the exclusive jurisdiction of English courts but allowed the claimant to take out proceedings in any other courts in any jurisdiction was upheld. The English court's decision appears to have been predicated on its acknowledgement of the commercial rationale behind the provision (to ensure that creditors can litigate in debtor's home court or the court where assets are available), the fact that the provision represents the parties' bargain and the right it confers only applies where the creditor is the claimant, and the absence of any particular policy consideration for invalidating the provision.

[6] By virtue of various statutory provisions that apply in federal and state courts, the common law and doctrines of equity applicable in England are also applicable in Nigeria unless they are inconsistent with Nigerian legislation. *See*, for example, the Interpretation Act, Cap I23, Laws of the Federation of Nigeria, 2004, section 31(1): Subject to the provisions of this section and except in so far as other provision is made by any Federal law, the common law of England and the doctrines of equity, together with the statutes of general application that were m force in England on the 1st day of January, 1900, shall, in so far as they relate to any matter within the legislative competence of the Federal legislature, be in force in Nigeria.

Conclusion

Much as choice of foreign court provisions may seem attractive for foreign entities who contract with local counterparties in Nigeria, they do not always guarantee practical benefits when claims arise. Nor do they always entail that the foreign entity is necessarily precluded from presenting a claim in-country if the prevailing circumstances at the time a claim arises are sufficiently compelling to justify moving away from the choice. It is prudent, therefore, for foreign entities to seek proper legal advice in-country when preparing their contractual documents as well as when claims arise, to ensure that practical challenges that could arise from local peculiarities are factored into the overall dispute resolution approach. Being condemned to an expensive dispute settlement process that obligates a party to first sue in a foreign court and then seek to enforce the foreign judgment in Nigeria over relatively simple claims is certainly not a win for any claimant.

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