The Practicality of the Enforcement of Jurisdiction Agreements in Nigeria

By:

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Introduction

Private international law (PIL) is not one of those fanciful subjects that command the attention of students, academics and practitioners at least in Nigeria. As important as this field, it is still largely ignored. Several legal commentators have called our attention to the poor state of PIL in Africa generally (Oppong, 2006; Okoli, 2019). So, we can say Nigeria is not standing alone here. Dr Oppong is one of those who are passionate about the development of PIL in Africa, and I may add Nigeria. In a piece titled 'Private International Law and the African Economic Community: A Plea for Greater Attention', he lamented the general state of neglect of PIL in the African economic integration project. What caught my attention in that article was his remark on the treatment of jurisdiction agreements in some African countries such as Angola and Mozambique. He noted that

> This hostility to jurisdiction agreements is akin to Latin American countries' historical disdain for similar clauses founded on their rejection of the principle of party autonomy- a principle so important in international commerce. This treatment of jurisdiction agreements can be a disincentive to international commercial relations since they are very much part of the current modes of dealing across national boundaries (p.917)

Although Dr Oppong did not examine the attitude of Nigerian courts on this issue, his new work which he co-authored with Dr Okoli (Okoli and Oppong, 2020) gives us an insight. The book is an excellent piece. For the first time, students and practitioners can have access to an avalanche of Nigerian PIL cases and they can measure the mood of Nigerian courts on important subject matters such as jurisdiction agreements. This topic was conceived while reviewing the book.

In recent years, Nigeria has been making frantic efforts to turn around its economy. There is a consistent drive at improving the ease of doing business, and various investment promotion laws have also been enacted to that effect. However, we seem not to appreciate the nexus between PIL and the promotion of cross border commercial transactions. We agree with Dr Oppong that PIL has a role to play in making Nigeria attractive for international trade and commerce. International businesspersons are more interested in economies that enforce contracts, protect and secure property rights, and have simple and efficient dispute resolution mechanisms in place. Jurisdiction agreements are part of contractual terms. As observed from the analysis of Okoli and Oppong (2020), it is difficult to give a straight answer on whether jurisdiction agreements are enforced by Nigerian courts.This calls for great concern as a negative attitude to jurisdiction agreements can potentially disincentivise the inflow of foreign direct investment or international business transactions to Nigeria generally. Even if such businesses must be done in Nigeria, the least is that the non-enforcement of jurisdiction agreements will lead to an increase in transaction cost since there are uncertainties surrounding the enforcement of contracts. Investors may envisage multiple proceedings and the cost of such proceedings are factored into the contract ab initio. They might also envisage

that judgments obtained abroad may not be enforced by Nigeria courts that might have earlier exercised jurisdiction in breach of the agreement. There is also the tendency to have inconsistent judgments. These uncertainties are drawbacks on whatever reforms the Nigerian government might have been carrying out in the area of trade and investment.

Jurisdiction agreements are otherwise called choice of court agreements. In most cases, they form part of the contract agreement. They come in various forms. They may be symmetric (exclusive or non-exclusive) or asymmetric where one party is free to choose any preferred forum and the other party is restricted to a particular venue. Jurisdiction agreement is party autonomy has been embraced in almost all jurisdictions. Like arbitration agreements, parties are allowed to contract out of certain jurisdictions. While a contract may be formed or executed in jurisdiction A and B, the parties may wish that their disputes be resolved in jurisdiction C. For instance, many international contracts choose English courts as their preferred venue forlitigation. Several reasons have been offered for this. They include case management system of the English courts (procedural efficiency), expertise in English law and complex commercial transactions, the quality of the English bar, availability of varieties of interim measures, prioritisation of private justice, independence of the judiciary, pro-enforcement of contracts and judgments amongst others.

Jurisdiction agreements in Nigerian courts

What is the attitude of Nigerian courts to jurisdiction agreements? Theoretically, we may say that Nigerian courts enforce jurisdiction agreements. There are numerous precedents extolling party autonomy and the need to enforce contracts freely negotiated by parties. Nevertheless, in practice, Nigerian courts assume jurisdiction, in some cases, in breach of jurisdiction agreements. There is hardly any distinction between exclusive and non-exclusive jurisdiction agreements. From Okoli and Oppong (2020), and my assessment of reported cases, jurisdiction agreements have only been upheld in five cases: *Nso v Seacor Marine (Bahamas) Inc*(2008) LPELR-CA ,*Beaumont Resources Ltd v DWC Drilling Ltd, Nika Fishing Co Ltd v Lavina Corporation* (2008) 16 NWLR (Pt 1114) 509, *Megatech Engineering Ltd v Sky Vission Global Networks LLC* (2014) LPELR-22539 (CA) and *Damac Star*

Properties LLC v Profitel Limited (2020) LPELR-50699 (CA). An analysis of the reported cases on jurisdiction agreements reveals that jurisdiction agreements are jettisoned on three main grounds as presented below.

a. The mischaracterisation of jurisdiction agreement as an ouster clause

Nigerian jurisdictional law generally lacks any coherent theoretical foundation. Okoli and Oppong's treatment of the topic in chapter 5 attests to this fact. Credit must be given to them for an attempt to synchronise and present in an intelligible form, a body of precedents that is riddled with inconsistencies and contradictions. Unlike elsewhere where courts consider many factors (eg reasonableness, party autonomy, due process, proximity, foreseeability) when treating adjudicatory jurisdiction, Nigerian courts largely see it from the prisms of territorialism and power. It is no surprise that the courts are extremely protective/jealous of their power when a matter is connected to the forum. They generally frown at any attempt to divest the courts of their jurisdiction. Hence, they characterise jurisdiction agreements as ouster clauses.

This mischaracterisation can be traced to *Sonnar (Nig.) Ltd. v Nordwind* (1987) 4 NWLR (Pt.66) 520 where the Supreme Court imported this idea relying on *The Fehmarn*[1957] 1 W.L.R. 815. In this case, Oputa JSC had this to say on jurisdiction agreements:

> [A]s a matter of public policy our courts should not he too eager to divest themselves of jurisdiction conferred on them by the Constitution and by other laws simply because parties in their private contracts chose a foreign fonun and a foreign law. Courts guard rather jealously their jurisdiction and even where there is an ouster of that jurisdiction by Statute It should be by clear and unequivocal words, If that is so, as indeed It is, how much less can parties by their private acts remove the jurisdiction properly and legally vested In our courts? Our courts should be in charge of their own proceedings. When it Is said that parties make their own contracts and that the courts will only give effect to their intention as expressed in and by the contract, that should generally be understood to mean and imply as contract which does not rob the court of its jurisdiction in favour of another foreign forum (p. 544 paras B-E)

While an earlier case of *Ventujol v Compagnie Francaise DeL'AfrriqueOccidentale* (1949) 19 NLR 32 mentioned an ouster clause, most recent cases rely on the above exceprt from *Sonnar.* Oputa's view was recently echoed by Nweze JSC in *Conoil v. Vitol S.A.* (2018) 9 NWLR (Pt. 1625) 463 at 502, para A-B where his Lordship noted that: 'our courts will only interrogate contracts which are designed to rob Nigerian courts of their jurisdiction in favour of foreign fora or where, by their acts, they are minded to remove the jurisdiction, properly and legally, vested in Nigerian courts.'

The Fehmarn was a 1957 English decision and may well reflect the mood of the courts in that era where party autonomy was still emerging. Two problems are identified here. First, laws should always be read in context. *The Fehmarn* did not treat jurisdiction agreement as an ouster clause. Rather, that case established the fact that a court which is properly seized, nevertheless, has the discretion to decline jurisdiction in deference to the parties' jurisdiction agreement. The substance of *The Fehmarn* is that 'where there is an express agreement to a foreign tribunal, clearly it requires a strong case to satisfy this court that that agreement should be overridden ' (p. 820). Second, many Nigerian lawyers have equally misunderstood the nature of jurisdiction agreements. In those cases where the courts have shown this combative attitude, some counsel have asked courts for dismissal on the ground that the courts lacked jurisdiction based on jurisdiction agreements.

A wrong characterisation leads to negative treatment. While ouster clauses are special statutory clauses which are meant to prevent courts from entertaining specific cases that engage state interest, jurisdiction agreements only appeal to the courts to decline jurisdiction in deference to parties' choice. It is interesting to also note that an arbitration agreement is never treated as such and there area plethora of authorities on this point (For instance see *Felak Concept Ltd. v. A.-G., Akwa Ibom State* (2019) 8 NWLR (Pt. 1675) 433; *Mainstreet Bank Capital Ltd. v. Nig. RE* (2018) 14 NWLR (Pt. 1640) 423). One wonders whether there is any rational or legal basis to treat a jurisdiction agreement differently from an arbitration agreement.

b. Mandatory statutes

Some Nigeran statutes confer mandatory jurisdiction over some subject matters on Nigerian courts. The reasonability or otherwise of such sweeping and exclusive jurisdiction over matters that are purely civil and commercial will not be addressed here for want of space. Examples of these statutes are the Admiralty Jurisdiction Act and the Civil Aviation Act. One can sympathise with Nigerian courts when they are asked to enforce jurisdictional agreements which fall within the scope of these statutes. No amount of judicial pragmatism would override mandatory national statutes vesting exclusive jurisdiction in Nigerian courts. It was on this basis that the courts refused to enforce jurisdictional agreements in *Swiss Air Transport Coy Ltd v African Continental Bank* (1971) 1 NCLR 213, for instance.

c. *Forum non conveniens*

Forum non conveniens(FNC) is a pragmatic procedural mechanism developed by common law judges (even though it has a Scottish origin) to advance efficiency and justice in civil litigation. Many transactions have connections with more than one jurisdiction and parties would want to commence litigation in any of those fora that can deliver maximum results for them. In some cases, it may be simply to harass the opponent. Thus, where a court has jurisdiction over a matter under its national laws, it can decline jurisdiction (by staying an action) to allow parties to litigate in a more convenient forum.

FNC test as stipulated by Brandon J in *The Eleftheria* [1969] 2 All ER 641 has been adopted and applied by the Nigerian Supreme Court in *Sonnar (Nig.) Ltd. v Nordwind.* Brandon J was merely laying down general factors that the court should consider when asked to decline jurisdiction. Brandon test supports the enforcement of jurisdiction agreement. The underlying principles are largely based on convenience and justice. The case emphasised ‘a strong’ cause for assuming jurisdiction in breach of a jurisdiction agreement. The strong cause has further been qualified in subsequent cases such as *Donohue v Armco Inc &Ors* [2001] UKHL 64 where many FNC grounds were discountenanced (see para 24-39). The US Supreme Court would also require ‘some compelling andcountervailing reasons’ to allow an action to proceed in a non-choen court if the agreement was reached ‘by experiencedand sophisticated businessmen’ (See *Bremen v. Zapata Offshore* Co.92 S. Ct. 1907 (1972)). This is contrary to the Nigerian courts' approach where any FNC test no matter how weak may

displace foreign jurisdiction clause. The Supreme Court recently re-emphasised the approval of any of the FNCs grounds in *Nika Fishing Co Ltd*. However, an application for stay was granted in that case because the party in breach did not file any counter affidavit.

In *Ubani v Jeco Shipping Lines* (1989) 3 NSC 500 and *Inlaks Ltd v Polish Ocean Lines* (1989) 3 NSC 588, jurisdiction agreements were not enforced either because the matter would be statute-barred in the chosen jurisdiction or parties and evidence were located in Nigeria. It is conceded that one of the tests of FNC is the availability of an alternative forum. It can easily be argued that these decisions are justified on the ground of justice because the Claimants would not be able to file a claim in the chosen jurisdiction. However, there is a danger in applying FNC grounds to jurisdiction agreements. As rightly suggested in *Donoghue* where jurisdiction agreement is in issue, FNC grounds should ordinarily not apply. Non-enforcement of jurisdiction agreement should be restricted to very strong reasons such as where third parties who are not bound by the agreement are parties to the suit or where the claim falls within the exclusive jurisdiction of the non-chosen forum (see *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90; *Continental Bank NA v AeakosCompania Naviera SA and Others* [1994] 1 WLR 588). One can also add inability to sue in the chosen forum for reasons beyond parties' control such as the ongoing global lockdown (*RCD Holdings Ltd v LT Game International (Australia) Ltd* [2020] QSC 318) or the protection of weaker parties like consumers and emloyees. This is the approach of the English courts and the same is followed in other commonwealth jurisdictions such as Australia (FAI *General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association* (1997) 41 NSWLR 559) and New Zealand (*RCD Holdings Ltd v LT Game International (Australia) Ltd* (supra); *Kidd v van Heeren* [1998] 1 NZLR 324). A party who agreed to litigate in a particular forum had contracted to be bound by the law and procedure of that jurisdiction. Limitation period, location of parties and evidence should not be a valid excuse without more. Put differently, inconvenience and procedural disadvantages should be discountenanced especially when those factors are forseable when parties are negotiating the contract.

Conclusion

Legal certainty and predictability of results are key values of modern PIL especially in the area of cross border commercial transactions. A PIL framework that is driven by these values will promote and enhance commercial activities because it is a risk management mechanism in itself. Businesspersons are interested to do business in jurisdictions where contracts are enforced. They want to make informed decisions about the governing law of the contracts, the jurisdiction in which contractual disputes are resolved, jurisdictions whose judgments can be respected and enforced abroad.

Courts ought to help parties to achieve their contractual goals. They should neither frustrate negotiated terms nor rewrite them for the parties provided it is a contract that is negotiated at arm's length. Nigerian courts should promote party autonomy as much as practicable. With this approach, foreign businesses would take the Nigerian justice system seriously and would be confident to do business with Nigeria. It can potentially attract more FDIs to Nigeria if we earn the trust of foreign investors.

Non-enforcement of jurisdiction agreements disincentivise commercial transactions because of litigation and enforcement risks. Assuming that foreign companies must do business with Nigerians nevertheless, these risks ultimately be factored into contractual negotiations as businessmen would not want to spend their profits on litigation in unfamiliar/non-chosen fora. Cost of doing business with Nigeria will invariably be higher and this will further lead to an increase in the cost of goods and services in Nigeria.

Based on the foregoing, it is only sensible that Nigerian courts should give maximum effect jurisdiction agreements. The first task is to get the legislators to review some of the extant legislation such as the Admiralty Jurisdiction Act and Civil Aviation Act which vest exclusive jurisdiction in Nigerian courts over awide range of purely private commercial transactions. Also, the courts can learn from the developments in other jurisdictions, particularly, how 'strong cause' has been redefined in the light of modern developments to admit of only genuine cases where it is either practically or reasonable impossible to litigate in the chosen forum or where non-parties are genuinely involved in the suit. Lastly, Nigeria needs to join the Hague Conference and the 2005 Choice of Court Convention. It will benefit from the rich jurisprudence and expertise

available at the Hague Conference and foreign businesspersons will be assured of the commitment of Nigeria to the enforcement of jurisdiction agreements.

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