



JURISDICTION AND ARBITRATION CLAUSES IN THE
CONTRACT OF CARRIAGE OF GOODS BY SEA: THE
NIGERIAN PRACTICE

BY

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ABSTRACT

In every commercial undertaking, disputes are bound to emerge and identifying in advance as well as putting strong mechanism on how best to resolve those disputes will go a long way in enhancing commercial dealings and provides the much needed certainty. From the perspective of contract of carriage of goods by sea, dispute resolution clauses in a form of jurisdiction and arbitration clauses are normally incorporated into a bill of lading with a view to providing a guideline on how those disputes could be resolved in a more efficient and best way possible. At the moment, with the exception of the New York Convention, 1958, there is no legal regime accepted globally, which is poised at regulating jurisdiction and arbitration clauses in the contract of carriage. This lack of uniformity and integration led to the emergence of various local legislative enactments vis-à-vis hybrid regimes, which open a Pandora Box of problems such as *lis-alibi pendens*, forum shopping, non-recognition and enforcement of foreign judgment or award. It is against this background this research undertakes a voyage to examining the practice in Nigeria pertaining to jurisdiction and arbitration clauses in a contract of carriage of goods governed by a bill of lading with a view to ascertaining whether the Nigerian practice is in tandem with International Best Practice (IBP). In so doing, this research specifically devotes itself with the Nigerian practice towards these clauses albeit taking into consideration the practices in some selected jurisdictions to wit: United States of America (USA); United Kingdom (UK); The European Union (EU); and New Zealand. The rationale behind looking at the practices in those jurisdictions was not for the purpose of making a comparative analysis but with a view to borrowing a leaf on how to adopt an International Best Practice (IBP). In order to carry out the research in an efficient manner, two methodologies were adopted: doctrinal and non-doctrinal. For the former, the research examines some of the relevant legislation as well as some selected judicial authorities dealing with jurisdiction and arbitration clauses in the contract of carriage. For the latter, an unstructured interview was conducted where opinions of the key players in the Nigerian maritime industry were sought concerning the practice of the Nigerian practice. The research findings demonstrate that the Nigerian practice is a far away from an International Best Practice as it has only succeeded in exacerbating the misery of the Nigerian consignee. This is especially when he attempts to enforce a Nigerian judgment or award obtained in breach of either jurisdiction or arbitration clause in a contract of carriage in a foreign country. It further reveals that Nigeria as a party to the New York Convention breaches its treaty obligation to observe and enforce the observance of party autonomy to freely agree on where to arbitrate their disputes. The consequence of this practice left the Nigerian consignee with a barren judgment or award, which bears no fruit thereby forcing him to agree to settle the matter out of court for a very token fee. The research recommends that a more holistic approach should be embraced by adopting new proposed draft legislation, which is in conformity with an International Best Practice.

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DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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JURISDICTION AND ARBITRATION CLAUSES IN THE CONTRACT OF CARRIAGE OF GOODS BY SEA: THE NIGERIAN PRACTICE

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TABLE OF CONTENTS

Abstract	ii
Abstract in Arabic	iii
Approval Page.....	iv
Declaration	v
Acknowledgements	vii
List of International Instruments.....	xii
List of Statutes	xiii
List of Abbreviation	xiv
List of Cases.....	xv
CHAPTER ONE:INTRODUCTION	1
1.1 Background of the research	1
1.2 Statement of Problem	6
1.3 Objectives of the Research	11
1.4 Hypothesis	11
1.5 Literature Review	12
1.6 Scope and Limitations of the Research.....	41
1.7 Methodology.....	41
1.8 Summary of the Research.....	42
1.8.1 The Practice in the United States of America.....	43
1.8.2 The Practice in the United Kingdom.....	45
1.8.3 The Practice in the European Union (EU)	46
1.9 Structure of the Thesis	50
CHAPTER TWO:CONCEPTUAL ANALYSIS OF JURISDICTION AND ARBITRATION CLAUSES IN THE CONTRACT OF CARRIAGE OF GOODS BY SEA.....	52
2.1 Introduction.....	52
2.2 Meaning, Nature and the Crucial Role of Contract of Carriage	53
2.2.1 Charterparty	58
2.2.2 Demise Charterparties.....	60
2.2.3 Time Charterparties.....	61
2.2.4 Voyage Charterparties.....	62
2.2.2 Bill of Lading	63
2.2.2.1 Functions of a Bill of Lading.....	65
2.2.2.2 Bill of Lading as Evidence of the Contract of Carriage ...	66
2.2.2.3 Bill of Lading As a Document of Title.....	68
2.2.2.4 Bill of Lading as a Receipt	69
2.2.4 Standard Forms of Bill of Lading	73
2.2.5 Incorporating Charterparty into Bill of Lading.....	76
2.2.5.1 Incorporation of Jurisdiction and Arbitration Clause	77
2.2.5.2 Specific Rule of Incorporation	78
2.2.5.3 Exception to the Specific Rule of Incorporation	79

2.2.5.4 Implications of the Incorporation on Third Party	83
2.3 Party Autonomy in the Contract of Carriage	84
2.4 Nature and Classification of Jurisdiction Clause.....	91
2.5 Nature of Arbitration Clause	93
2.6 Common Law Approach to Jurisdiction and Arbitration Clauses.....	94
2.6.1 Development of <i>Forum Non Conveniens</i>	95
2.6.2 Stages of <i>Forum Non Conveniens</i> in the United Kingdom.....	97
2.6.2.1 Oppressive and Vexatious Test	98
2.6.2.2 The Most Suitable Test.....	100
2.6.2.3 Modern Forum Non Conveniens Test	101
2.6.3 Evolution of Anti-Suit Injunction	104
2.6.3.1 Modern Development of an Anti-Suit Injunction.....	108
2.6.3.2 Anti-Suit Injunction in Restraint of Breach of Jurisdiction and Arbitration Clauses	109
2.6.3.3 Anti-Suit Injunction under the New York Convention	113
2.7 Civil Law Approach to Jurisdiction and Arbitration Clauses.....	115
2.7.1 <i>Lis Alibi Pendens</i>	118
2.7.2 Anti-Suit Injunction under the EC Law	119
2.7.3 <i>Forum Non Conveniens</i> under the EC Law	120
2.7.4 The Italian Torpedo and Race to the Court House.....	121
2.7.5 Anti-Suit Injunction and the Arbitration Exception under the EC Law	124
2.7.6 Anti-Suit Injunctions in a Non-Contracting State.....	128
2.8 Conclusion	129

**CHAPTER THREE:AN APPRAISAL OF JURISDICTION AND
ARBITRATION CLAUSES IN THE INTERNATIONAL LEGAL
REGIMES ON CARRIAGE OF GOODS BY SEA.....131**

3.1 Introduction.....	131
3.2 Pre-Hague Regime.....	132
3.3 The Hague Rules.....	134
3.3.1 The Main Thrust of the Hague Rules.....	136
3.3.2 The Hague Visby Rules	137
3.3.3 The Role of Jurisdiction and Arbitration Clauses under the Hague and Hague-Visby Rules.....	138
3.4 Hamburg Rules	142
3.4.1 Jurisdiction and Arbitration Clauses under Hamburg Rules.....	143
3.4.1.1 Jurisdiction Clause.....	143
3.4.1.2 Arbitration Clause.....	145
3.4.2 Challenges to Jurisdiction/Arbitration Clauses under Hamburg Rules	146
3.5 Rotterdam Rules	152
3.5.1 Background to Jurisdiction and Arbitration under Rotterdam Rules	154
3.5.2 Optional Choice on Jurisdiction and Arbitration	155
3.5.3 Jurisdiction Clause	156
3.5.3.1 Non-Exclusive Jurisdiction Clause.....	157
3.5.3.2 Exclusive Jurisdiction Clause (Volume Contract).....	158
3.5.4 Restrictions on the Right to Vary.....	161

3.5.5 Arbitration	163
3.5.6 Towards Attaining Uniformity and Integration	166
3.6 Lessons from other Conventions	169
3.6.1 Warsaw Convention	169
3.6.2 International Carriage of Goods by Road (The CMR Convention)	171
3.6.3 New York Convention	172
3.6.4 Hague Convention on Choice of Court Agreements (HCCCA) ...	174
3.7 Conclusion	178

**CHAPTER FOUR:THE LEGAL FRAMEWORK OF JURISDICTION
AND ARBITRATION CLAUSES: FROM INTERNATIONAL BEST
PERSPECTIVES182**

4.1 Introduction.....	182
4.2 Rationale for the Selection.....	184
4.3 The United State Legal Framework.....	187
4.3.1 The Sweeping Swing of the Legal Pendulum.....	189
4.3.1.1 Exceptions to the Bremen.....	192
4.3.1.2 Must not Contravene Section 3(8):.....	192
4.3.1.3 Reasonableness	194
4.3.1.4 Inconvenience as a Factor?.....	195
4.3.2 Foreign Arbitration Clauses	198
4.4 The Practice in the United Kingdom	201
4.4.1 Foreign Jurisdiction Clause.....	202
4.4.2 Arbitration Clause	208
4.5 The European Practice	210
4.5.1 Restriction on Jurisdiction Clause.....	218
4.6 New Zealand Maritime Law Context	219
4.7 Comparisms between the Legal Frameworks.....	224
4.8 Conclusion	225

**CHAPTER FIVE:LEGISLATION REGULATING JURISDICTION AND
ARBITRATION CLAUSES IN THE CONTRACT OF CARRIAGE OF
GOODS BY SEA IN NIGERIA228**

5.1 Introduction.....	228
5.2 Brief Overview of the Nigerian Legal System	230
5.2.1 Pre-colonial era	230
5.2.2 Colonial Era	231
5.2.3 Post Colonial Period.....	232
5.3 Admiralty Jurisdiction Act, 1991	238
5.3.1 Rationale behind the Act.....	240
5.3.2 Critical Analysis of Section 20 of the AJA, 1991	244
5.3.3 Arbitration Clauses under the AJA	257
5.3.3.1 Analysis of Section 10 of the AJA	261
5.3.3.2 Analysis of Arbitration and Conciliation Act, 1988 (AA)	263
5.4 The Implications of the AJA	267
5.4.1 The Hamburg Rules Implication.....	273
5.4.2 Enforcement Implication.....	281
5.5 Nigerian Consignee and Privity of Contract Doctrine.....	288

5.5.1 The Privity Doctrine.....	290
5.5.2 Bills of Lading Act, (BLA) 1855	293
5.5.3 The Implied Contract Mechanism.....	298
5.5.4 Carriage of Goods by Sea Act, 1992, U.K.....	301
5.5.5 The Nigerian Legislation on Bill of Lading.....	303
5.6 Conclusion	306
CHAPTER SIX: THE PRACTICE OF THE NIGERIAN COURTS.....	309
6.1 Introduction.....	309
6.2 Background to the Jurisdiction of Nigerian Courts in the Contract of Carriage	310
6.3 The Nigerian Practice Prior to the Admiralty Jurisdiction Act (AJA), 1991 Era.....	316
<i>The Fehrmarn</i>	317
<i>The Eleftheria</i>	319
<i>Ventujol v. Eqo rcpkg"Htcpeckug"fg"nøChtkswg"Qeekfgpvcn</i>	320
<i>Adesanya v. Palm Line Ltd</i>	321
<i>Vjg"Kpncmøu"Case</i>	324
<i>The Nordwind Case</i>	325
<i>Nika Fishing Co. Ltd v. Lavina Corporation</i>	329
Overall Appraisal	334
6.4 The Nigerian Practice Post AJA Era	336
<i>The M.V. Lupex</i>	337
Analysis.....	340
<i>The M.V. Panormous Bayøu"Ecug</i>	342
<i>Vjg"Nkipgu"Cgtkgppgu"Eqp iqncukugø"Ecug</i>	346
Analysis of the Lignes Aeriennes Congolaises	348
<i>Vjg"Dtcycn"Nkpgøu"Ecug</i>	351
<i>Vjg"O0X0"Ocvtkzøu"Ecug</i>	354
Overall Appraisal	356
6.5 Conclusion	361
CHAPTER SEVEN: CONCLUSION	363
7.1 Conclusion	363
7.2 Findings of the Research	364
7.3 Suggestion for Law Reforms and Recommendations.....	371
7.3.1 Justification for the Legal Reform	374
7.3.2 Recommendations	376
7.4 Suggestions for Further Research	382
BIBLIOGRAPHY	385
APPENDIX I - Sample Copy of CONGENBILL 2007.....	400
APPENDIX II - Bimco Dispute Resolution Clauses, 2013	402

LIST OF INTERNATIONAL INSTRUMENTS

- Brussels Convention 1968.
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LIST OF ABBREVIATION

AA	Arbitration Act
ALL NLR	All Nigerian Law Report
AJA	Admiralty Jurisdiction Act
AMLA	American Maritime Law Association
BLA	Bills of Lading Act
BL	Bills of Lading
BIMCO	Baltic and International Maritime Council
CA	Court of Appeal
CMI	Comité Maritime International
COGSA	Carriage of Goods by Sea Act
ECJ	European Court of Justice
EU	European Union
FAA	Federal Arbitration Act
FCT	Federal Capital Territory
FDI	Foreign Direct Investment
FHC	Federal High Court
FWLR	Federation Weekly Law Report
GAFTA	Grain and Feed Trade Association
HCCCA	Hague Convention on Choice of Court Agreement
HC	High Court
IBP	International Best Practice
IMB	International Maritime Bureau
ILA	International Law Association
JCA	Justice of the Court of Appeal
JSC	Justice of the Supreme Court
LFN	Laws of the Federation of Nigeria
LMAA	London Maritime Arbitration Centre
LMAC	London Maritime Arbitration Centre
NBA	Nigerian Bar Association
NSC	Nigerian Shipping Council
NWLR	Nigerian Weekly Law Report
MAAN	Maritime Arbitration Association of Nigeria
MLJ	Malaysian Law Journal
MSA	Merchant Shipping Act
NZ	New Zealand
OLSA	Ocean Liner Service Agreement
SAN	Senior Advocate of Nigeria
SMC	Supreme Military Council
SC	Supreme Court
SCMA	Singapore Chamber of Maritime Arbitration
UK	United Kingdom
UKHL	United Kingdom House of Lords
UN	United Nations
UNCITRAL	United Nation Commissions on International Trade Law
USA	United States of America

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CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE RESEARCH

Before the advent of safe and reliable overland trade routes, many ancient societies used the sea to transport goods and materials in far away ports. Inevitably, conflicts and other serious incidents occurred without civilised means of resolving them. A simple misunderstanding could degenerate into violence.

This is evidenced by the fact that contracts of carriage of goods by sea frequently involve an international dimension, either because the parties involved are resident in different countries or because performance of the contract is required in a state other than that in which it was concluded. Many of the standard bill of lading and charterparty forms make express provision for such an eventuality by including clauses specifying a particular forum and choice of law.¹

Foreign Jurisdiction and arbitration clauses are of critical importance to international transactions. It is typically the most crucial issue in a transnational case. Nowhere is this truer than in maritime law, where forum selection is the first and sometimes the only point of contention in international maritime litigation.² It is almost indispensable precondition to achieving orderliness and predictability essential to any international business transaction. Thus, it is not uncommon these days for parties involved in contract of carriage of goods to specify in the contractual agreements a court of a particular country or a *forum arbitri* where they want their

¹ John Wilson, *Carriage of Goods by Sea*, (London: Pearson Education, 2007), 307.

² TqdgvtvHqteg."cpf"Ocvkp"Fcxkgu0"ôHqtw o"Ugngevkqp"Encwugu"kp"Kpvgtpcvkqpcn"Ockvk o g"Eqpvtcevu.ö"kp" *Jurisdiction and Forum Selection in International Maritime Law 2005*, ed. Martin Davies (The Hague, Netherland: Kluwer International, 2005), 1.

dispute resolved. Such clauses or provisions in a commercial agreement are known as jurisdictional clauses. By inserting those provisions no other court, (including the forum court) has jurisdiction to adjudicate over the disputes of the parties. However, in spite of such provisions, you still find parties to such agreements referring their disputes to the forum court in breach of the foreign jurisdiction clause.³

The position of jurisdiction clauses in bills of lading is to hold the parties to their agreement. The strong cause test was derived from the English decision of *The Eleftheria*.⁴ The presumption was that parties would be held to the agreed forum, unless the plaintiff could satisfy the court that there was an adequate reason why the agreement should not have been enforced. This test asserts the primacy of the *pacta sunt servanda*. In essence, English law tends to start from the premise that an agreement is there to be enforced; and that English courts should offer their support to ensure that the agreement is respected albeit with a highly compelling reason to the contrary.⁵ At one time the English courts took a rather chauvinistic view that the plaintiff could choose English justice no matter how inconvenient this was

³ Ibid.

⁴ [3; 8; _3"Nnq{ f0u"Tgr0"4; 30"Ugg"cnuq"The EL Amira]3; :7_3"Nnq{ f0u"Tgr0"Rgt"Dtcpfqp"NL"cv"345-4. Certain comprehensive guidelines were laid down to assist a court in deciding whether or not to entertain an action in the face of a jurisdiction clause. They were formulated by Brandon J in the *Eleftheria* case. The defendant applied for a stay, the English Court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not; ii. the discretion should be exercised by granting a stay, unless strong cause for not doing it is shown; iii. The burden of proving such a strong cause is on the plaintiff; iv. In exercising its discretion the Court should take into account all the circumstances of the particular case; v. In particular, but without prejudice to the (iv), the following matters, where they arise, may be properly regarded: (a). In what country the evidence on the issue of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts; (b) whether the law of the foreign court applies and, if so, whether it differs from English law in any material aspects; (c) with what country either party is connected and how closely; (d) whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; (e) whether the plaintiff would be prejudiced by having to sue in the foreign court because they would (i) be deprived of security for the claim; (ii) be unable to enforce any judgment obtained (iii) be faced with a time bar not applicable in the foreign country.

⁵ Adrian Briggs, *Agreements on Jurisdiction and Choice of Law*, (Oxford University Press, 2008), 14.

for the defendant. In short, the attitude adopted by the English court can perhaps best be described in the dictum of Lord Denning which was referred to in *The Atlantic Star*⁶ that:

Even a foreigner can seek the aid of our courts if he desires to do so. You may call this forum shopping if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and speed of service.⁷

The decision in *The Atlantic Star*, however, marked the beginning of a change in the attitude, which was adopted by the English Court. The House of Lords rejected *Nqtf" Fgppkpiøu" tgcupkpi*⁸ and has now adopted the doctrine of *forum non conveniens* recognised in Scotland. It rather adopted the view that it had to work within the then existing framework of English law which required that a plaintiff should not be acting vexatiously, oppressively or in abuse of the process of the court, but it moved away from a strict approach and expressed the view that these concepts should be interpreted more liberally.⁹

In contrast, the U.S courts do not plainly disregard the foreign jurisdiction clause.¹⁰ The old U.S authorities on the subject are the duo cases of *The Bremen v. Zapata Off-Shore Co.*¹¹ and *Dqpp{ "x0" Uqekgv{ "qh" Nnq{føu.*¹² In *Bremen*, the parties chose London as their forum. This choice was reasonable, both in terms of the

⁶ [1973] 1 Q.B. 364. 382.

⁷ Ibid.

⁸]3; 96_ "C0E0"658. "gurgekcn{ " rgt"Nqtf" Tgkf" cv" r0"675< ðv jcv"ugg ou"vq" o g"vq" tgecm"v jg" iqqf" qnf" fc{u. "v jg passing of which many may regret, when inhabitants of this island felt an innate superiority over those wphqtvwpcvg"gpqw i j"vq" dgnqpi"vq"qv jgt" tcegu0ø"

⁹ Lqpcv jcp" Jcttku. ðC i tgg o gpwu" qp" Lwtkufkevqp" cpf" Ej qkeg" qh" Nc y<" Y jgtg" PgzvA. ö" "Nnq{føu" Octkvkog" and *Commercial Law Quarterly* 4, (2010): 136. Essentially, this means that the applicant for stay of the Gpinkuj" rtqeggfkpiu" owuv" ðuctisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense. The stay must not deprive the plaintiff of a legitimate personal or legal advantage which yqwnf" dg" cxckncdng" vq" jk o "kh" jg" kpxqmgf" v jg" lwtkufkevqp" qh" v jg" Gpinkuj" eqwtvu0ø"

¹⁰ Jcmgg o" Qncpk{ cp. ðC" Tgxky" qh" Lwfkekn and Legislative Approach of Nigeria to Discretionary Lwtkufkevqp"qxgt" Hqtgkip" Ecwugu. ð *International Journal of Business and Social Science* 3, (2012): 12.

¹¹ (1972) 407 U.S 1.

¹² 3 F. 3d 156 (7th Cir. 1993).