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.

Ƨjǯ0F ЈЪÞЯв

ÕŸǩ ĞłƵÊǫò ŎĠÊïä ŎŘƵà üƵģ ĞłƵę ĞÉïß ȝǐ`Ā ÕòØðÃ ÛÁĝĠÊŋ ȻÆʌÆƠ Ļǫʌ ЧęϒǹÀ ÆĤæ ϕò ĂĜÌÀΘ ötÀÀ Îŋ ŎõŽ ĞłƵÊǫò ÎƵʌæ éĜÌÀä Ź ÛÀĤUĠïä ∃ȝ ȝəÅŘĠïä ŎÕǫ ÆÕȝ ĞÉģÅφ dbŋ ÛĞÕǰïä KƵǩĀ ĞłÌÀDzǫïä ÇϒŋÅĤǫïä ÂłÂĤǫò ÜçÅȝïÅÁţä ĞÉÁÉÓïä þüÎæ çäìÅÌÎâĀ çÅƬÉDƵǩ KƵǩ ùÆŏ dbHUÎïä ȝÀÀÎǩ Ž ĻÉÓHUǫïäĀ òÅÔǫǹŕå ìƵʌæ ŎÒÌ Ž çÅȝïÅÁţä ÅĝţÅȝ üƵǵÕŋ Ɔƶφåę ýÁŢφ ÆDƵʌ ŕ ſģ Ž .ĞłÒŧţä úÀÛïä ŎŘƵà üϒǹ dbŋ çÅȝïÅÁţä ÕŸǩ Ŏģ Åŏ dbÒɛ Ɣïä .ŎÕłÆïä ÆÕȝ Ž ĻÉÓHUǫïäĀ ĞÉəÅŘÕïä ĞʌŕƵïä ôÀÀÌ ĻÉŢÁǩ Ž ÆĤǫÊǩ ƔïäĀ Ûý1958 ýÅĤó ûîƵʌƵÉφ ĞÉęÅÁĞå ÞÅÁǰǫèÅæ ĂØïäĀ ÛÆÉÆDZ Бâ ÅĝÆDZ ÆÉƵţä ĞŧŢφj ĞÉŸ+ä çĤĤÀÎǫïä dbŋ ÆʌÆÉĤïä îƵƬş Бâ āìà ÜäØŁ ŎŋÅÓǫïäĀ úÅÊǩŕå ýÆȝ ĻÒΣä ØÉÁÆǩĀ ùŕʊȝŕå ýÆȝÀ ÛúƵÊǫïä āÆǪʌŋĀ ÛÅĝæÅÉd ĞÕŸĤţä āÃÅȝÆëÅõ çϒÓÎŧŸö āîĀÁÉφÅæ úÁÆÆǩò ØĀÆæ ĞǫƵ ÅʌKDzÉφ Ž œƵŕƵţÅæ ĞŸÔïä çäí çÅèîÅŧţä Ġèîæ ÆƬĤǪʌ ǪHUĠïä þǔƵ ĞÉÁŸǰå ¢ØŁ ÈÒȝ ʔŸȝ .îĀÕïä Ãà ЧDƵÅǰå ǨφÅõ äíå Åư ÆÕüǫïä ùÆŏ dbHUÎïä ȝÀÀÎǩ ÅƬŧÒȝ ȝəÅŘĠïä ŎÕφ ÆÕȝ Ž ĻÉÓHUǫïäĀ òÅÔǫǹŕå ìƵʌæ ĞÕŸĤǫţä ÆʌÆÉHUǫò ɸŋÅŧǫŁâ БÃà ǪHUĠïä äØŁ .ÕòØæ ýÅÉÕïä Ž (IBP)ĞÉÃÆïä çÅèîÅŧţä ŎŘƵà ȝŋ ĘÁǫǩ ĞʌKDzÉÁïä ĞèîÅŧţä ĞÉəÅŘÕïä çÅÛŸÉïä ŘĤæ Ž çÅèîÅŧţä îÅĠǫȝŕå ǩĤæ Øǹjå ȝŋ ôÀÀÎïä ¢ØŁ ĘÉÕƠ ŎDZà dbŋ ĞʌKDzÉÁïä ĞèîÅŧţä .äÆÁŸʌƵÉφÃ Ü (EU) ŸÃĩÃjå ìÅƠŕ÷Ã Ü (UK)æÆHUǫţä ĞÒŸŧţÃ (USA). ĞÉÒʌŋjå æÆHUǫţä çÅʌŕƵïä :ãĩÅǫÁţä ĞęĩÃ ìäÆȝâÃ ÀʌÕǩ ùÆŏ dbÒïÃ þĩÅÕŋ ÕÉŸƠ ÞÀDZâ óÀ8ò ŕ ĞÉəÅŘÕïä çÅÛŸÊïä ÕŸǩ çÅèîÅŧţä Бâ dbHŧǫæ ÀŢÁöïÃ Ž ȝǪǫţä ǰƬÁţä ÛĞöÅĤǩ ĞÕʌÀÛæ èƵHUĠïä ÞÀDZâ ŎDZà dbŋ (IBP). ĞÉöÃÆïä çÅèîÅŧţä ŎŘƵà ìÅŧǫȝä ĞÉÁÉõ üƵģ ȝŋ ÕŋÅĤǫŸö ãĩÅǫÁţä ĞÉəÅŘÕïä çÅÛŸÊïä ŘĤæ ÕòØðÃ ĞŸÔïä çäí çÅĤʌÎǫïä ŘĤæ ǪШ ƶŁÃ ЧəÀʌÕǫèâ :ĞèîÆïä ĠȝÅÁÔïä Ž ĠŧƬţä çÅƬƨä ȝŋ ĠŧŢÁŋ Kd ĞŸæÅÕŋ ĶʌDZà ÛĶǹjå äØT .ÕÕʌÖïä ÆÕȝ Ž ĻÉÓHUǫïäĀ òÅÔǫǹŕå ìƵʌæ ŎŘƵà dbŋ æÆÉĤæ ЧŁ GʌKDzÉÁïä ĞèîÅŧţä þǔƵ ǪHUĠïä ǰəÅǫφ ĻŁà .GʌKDzÉÁïä ĞèîÅŧţÅæ ýÅŧǫŁŕå þüÎæ GʌKDzÉÁïä GʌÀHUĠïä ĻÒǵ ØÉÁÁǩ üÁÅȝ ÅŋÆÁȝ ĞÒÀʌÁ äØŁ .ɸÉïä ÕèÀţä ĂKDzÉÁïä ðúæ ĻęÅÁǩ Ž ÙÕƵ ĶHUƱ ÅyäĀ ĞÉöÃÆïä çÅèîÅŧţä .ĻʌDZà ÆŸæ Ž ÕÕʌÖïä ÆÕȝ Ž ĻÉÓHUǫïäĀ ôÀÌ Ãà òÅÔǫǹä Ãà úÀʌ Ž ÅƬÉŸȝ üƵÔΣä Ź Ɣïä îÀÕïä Ãà ĂKDzÉÁïä ýʔuǵä óÀƶĀ ĞĠęÀţ æÆŁÅĤţä ÆDƵǫ ýŸÂǫŕ÷ä ĶęÀʌ ûîƵʌƵÉφ ĞÉęÅÁǩä Ž ÅæÀÙ ÅƬÁòƶæ ÅʌKDzÉφ þà dbȝ Ƶ Î ÒĶ Åŧõ ȝŋ ɸÉïä ÕèÀţä ĂKDzÉÁïä ÛÀǩ ĞèîÅŧţä ¢ØT ĞDzÉφĀ .ĻőÅȝÂφ ĻÉÓHUǫïä þÁÒŋ ʔŸȝ GʌÀHUĠïä ĞÉęÅÁǩŕå Ž ùʔÀÙjå ĞʌÀǵ Gŧ+ä éĜÌʌ ĞûüÊţä GƵʌÊĶ ʔŸȝ ĞÕƶƵţä ʔŸȝ ŒDZà dbư ȝÂφ Ăä ɸĤŋ Ŏŧȝ ŕ ĂØïäĀ ÛÎʔÀę Ãà ÞäÌÀDZ ƱəÅŘę ĻÒǵ ĂØïä ÛêuÕţä ÆʌÆƨä þƶφÅÕïä öÀÀÎŋ ÌÅŧǫȝä Ž ĞÉƵƶ ÀǰÕà ǰŒ öʌĠĶä ʔŸȝ ǪHUĠïä ƱÒƶʌ .äǴDZ ĞʌÂŋÎ ýƶèÎ ÒæÅÕŋ .ĞÉöÃÆïä çÅèîÅŧţä ŎŘƵà ȝŋ ĘÁǫʌ

APPROVAL PAGE

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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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Signature é é é é é é é . Date é .....

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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 Arbitratorsô Association
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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Whistler International Ltd v. Kawasaki KK Ltd (The Hill Harmony), [2001] 1 Lloydôs Rep. 147 at 156 (HL).
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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] Robert Force, and Martin Davies. ñForum Selection Clauses in International Maritime Contracts,ò in *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. However, this is subject to the courtôs discretion in disregarding such clauses on the ground of a ñstrong cause.ò 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 ï no matter how inconvenient this was

[3] Ibid.

[4] [1969] 1 Lloydôs Rep. 291. See also *The EL Amira* [1985] 1 Lloydôs Rep. Per Brandon LJ at 123-4. 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 *Elefhteria* and have since come to be known as the óBrandon test.ô They are as follows:
i. ñWhere a plaintiff sued in England in breach of an agreement to refer disputes to a foreign court, and 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 England; (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.ò

[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:

> ñNo one who comes to these courts asking for justice should come in vain. 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.ò[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 Lord Denningôs reasoning[8] and has now adopted the doctrine of f*orum 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 *Bonny v. Society of Lloydôs*.[12] In *Bremen*, the parties chose London as their forum. This choice was reasonable, both in terms of the

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[6] [1973] 1 Q.B. 364. 382.
[7] Ibid.
[8] [1974] A.C. 436, especially per Lord Reid at p. 453: ñthat seems to me to recall the good old days, the passing of which many may regret, when inhabitants of this island felt an innate superiority over those unfortunate enough to belong to other races.ò
[9] Jonathan Harris, ñAgreements on Jurisdiction and Choice of Law: Where Next?,ò *Lloydôs Maritime and Commercial Law Quarterly* 4, (2010): 136. Essentially, this means that the applicant for stay of the English proceedings must ñsatisfy 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 would be available to him if he invoked the jurisdiction of the English courts.ò
[10] Hakeem Olaniyan, ñA Review of Judicial and Legislative Approach of Nigeria to Discretionary Jurisdiction over Foreign Causes,ò *International Journal of Business and Social Science* 3, (2012): 12.
[11] (1972) 407 U.S 1.
[12] 3 F. 3d 156 (7th Cir. 1993).