The Contractual Function of a Choice of Court Agreement in Nigerian Jurisprudence (Part 2)

1. **Introduction**

In my last blog post, I made mention of a Nigerian Court of Appeal decision that applied the principle of contract law exclusively to a foreign jurisdiction clause.[1] In that case, applying the principles of Nigerian contract law, the Nigerian Court of Appeal held that the alleged choice of court agreement in favour of Benin Republic was unenforceable because the terms were not clear and unambiguous in conferring jurisdiction on a foreign forum.[2]

The purpose of this blog post is to analyse a more recent Nigerian Court of Appeal decision where the court gave full contractual effect to the parties' choice of court agreement by strictly enforcing a Dubai choice of court agreement.[3]

2. Facts

Damac Star Properties LLC v Profitel Limited ("*Damac*")[4] was the fall out of an investment introduced to the 1st plaintiff/respondent by the 2nd respondent allegedly on behalf of the defendant/appellant wherein the 1st plaintiff/respondent paid a deposit of 350,000.00 US Dollars for 9 apartments in Dubai and being 20% of the total cost of the apartments. The contract between the 1st plaintiff/respondent and defendant/appellant contained an exclusive choice of court clause in favour of Dubai. There was a dispute between the parties as to some of the terms of the contract. This resulted in the defendant/appellant selling the apartments to another buyer. The 1st plaintiff/respondent requested for a refund of the deposit that was paid to the defendant/appellant, but its request was declined. As a result of this, the 1st plaintiff/respondent initiated a suit for summary judgment in High Court, Federal Capital Territory, Nigeria, against the defendant/appellant and the 2nd respondent, and got an order to serve the defendant/appellant through the 2nd respondent, its alleged agent in Nigeria. At this stage, the defendant/appellant did not appear and was unrepresented in

proceedings at the High Court. The High Court proceeded to hear the suit and entered judgment against the defendant/appellant with an order to refund the sum of 350,000.00 US Dollars with 10% interest from date of judgment till the judgment sum was fully liquidated. The defendant/appellant applied to the High Court to set aside the judgment, but the court dismissed the application.

3. Decision

The defendant/appellant appealed to the Court of Appeal. The Court of Appeal unanimously allowed the appeal. The Court of Appeal held on the basis of the exclusive choice of court agreement in favour of Dubai – which it regarded as valid – the lower court should not have assumed jurisdiction.

4. Judicial statements in Support of *Damac*

As stated in my last blog post, there is now a trend among appellate Courts in Nigeria (Court of Appeal and Supreme Court) to give choice of court agreements a contractual function. *Damac Star Properties LLC* (*supra*) is one of the cases where the Court of Appeal simply gives a choice of court agreement a contractual function without considering whether the choice of court agreement ousted the jurisdiction of the Nigerian courts, or whether Nigeria was the *forum conveneins* for the action.[5] This point is important, as it appears that there is now some movement in Nigerian jurisprudence towards giving choice of court agreements a contractual function. Given that Nigeria is a common law jurisdiction, it is worth quoting statements from some Nigerian Supreme Court and Court of Appeal judges that have given a choice of court agreements a contractual function.

Nnamani JSC opined that: "I think that in the interest of international commercial relations courts have to be wary about departing from fora chosen by parties in their contract. There ought to be very compelling circumstances to justify such a departure."[6]

Tobi JSC observed: "The bill of lading contains the contractual terms [foreign jurisdiction clause] between the parties and therefore binding on the parties. Parties are bound by the conditions and terms in a contract they freely enter into… The meaning to be placed on a contract is that which is the plain, clear and obvious result of the terms used… When construing documents in dispute between two parties, the proper course is to discover the intention or contemplation of the parties and not to import into the contract ideas not potent

on the face of the document… Where there is a contract regulating any arrangement between the parties, the main duty of the court is to interpret that contract and to give effect to the wishes of the parties as expressed in the contract document… The question is not what the parties to the documents may have intended to do by entering into that document, but what is the meaning of the word used in the document… While a contract must be strictly construed in accordance with the well-known rules of construction, such strict construction cannot be aground for departing from the terms which had been agreed by both parties to the contract… It is the law that parties to an agreement retain the commercial freedom to determine their own terms. No other person. Not even the court, can determine the terms of contract between parties thereto. The duty of the court is to strictly interpret the terms of the agreement on its clear wordings… Finally, it is not the function of a court of law either to make agreements for the parties or to change their agreements as made."[7]

In Conoil Plc v Vitol SA,[8] *the Supreme Court Justices were unanimous on the contractual effect of a choice of court agreement. Nweze JSC in his leading judgment stated that: "*In all, the truth remains that if parties, enter into an agreement, they are bound by its terms."[9] Okoro JSC concurred that: "The law is quite' settled that parties are bound by the contract they voluntarily enter into and cannot act outside the terms and conditions contained in the said contract. When parties enter into a contract, they should be careful about the terms they incorporate into the contract because the law will hold them bound by those terms. No party will be allowed to read into the contract terms on which there has been no agreement. Any of the parties who does so violates the terms of that contract.… Having agreed that any dispute arising from the contract should be settled at the English court, the appellant was bound by the terms of the contract."[10] Eko JSC also concurred that: "Where parties, fully cognizant of their rights, voluntarily elect and nominate the forum for the resolution of any dispute arising from their contract, with international flavour as the instant, the courts always respect and defer to their mutual wishes and intention. The courts only need to be satisfied that, in their freedom of contract, the parties negotiated and agreed freely to subject their dispute to the laws and country of their choice."[11]

Owoade JCA held that: "…it is pertinent to observe that as a general rule in the relationship between national law and international Agreements, freely

negotiated private international agreement, unsullied by fraud, undue influence or overwhelming bargaining power would be given full effect. This means that, where such contract provides for a choice of forum, such clause would be upheld unless upholding it would be contrary to statute or public policy of the forum in which the suit is brought."[12]

In Beaumont Resources Ltd v DWC Drilling Ltd,[13] *the Court of Appeal Justices were unanimous on the contractual effect of a choice of court agreement. Otisi JCA held that: "…*it is settled that, in the absence of fraud, misrepresentation and illegality, parties to an agreement or contract are bound by the terms and conditions of the contract they signed… It is also well established that the Court cannot make contracts for the parties, rewrite the contract or go outside the express terms of the contract to enforce it…"[14] Sankey JCA concurred that: "The Court of law, on the other hand, must always respect the sanctity of the agreement of the parties – the role of the Court is to pronounce on the wishes of the parties and not to make a contract for them or to rewrite the one they have already made for themselves. The judicial attitude or disposition of the Court to terms of agreement freely entered into by parties to contract is that the Court will implement fully the intention of the contracting parties. This is anchored on the reasoning that where the terms of a contract are clear and unambiguous, the duty of the Court is to give effect to them and on no account should it re-write the contract for the parties. In the absence of fraud, duress or misrepresentation, the parties are bound to the contract they freely entered into."[15]

The above judicial statements are replete with applying the principles of Nigerian contract law to the terms of a choice of court agreement. In essence, parties are bound by the clear and unambiguous terms of a choice of court agreement, which the Nigerian court will strictly enforce. On this score, *Damac* is on strong footing and unassailable.

5. Judicial decisions that might be against *Damac*

Some of the above stated judicial cases, though giving a choice of court agreement a contractual function also considered whether such agreements oust the jurisdiction of the Nigerian court, and whether Nigeria was the more appropriate forum to resolve such disputes despite the presence of a choice of court agreement. *Damac* is one of the few Court of Appeal cases that exclusively give a choice of court agreement a contractual function without a consideration of

whether it is an ouster clause or the Nigerian Court is the *forum conveniens*.[16]

5.1 Ouster Clause

On the issue of ouster clause, in the early case of *Ventujol v Compagnie Francaise De L ' Afrique Occidentale*,[17] Ames J held that in a contract of employment which was entered into in France to be performed in Nigeria, where the defendant also had agents (in Nigeria), the clause for submission of disputes to a Tribunal de Commerce de Marseilles (a French Court at that time) was an agreement to oust the jurisdiction of the court and of no effect. Similarly, in *Allied Trading Company Ltd v China Ocean Shipping Line*,[18] the plaintiff sought to recover damages for non-delivery of goods. The defendant entered an unconditional appearance, admitted the goods were lost, and denied liability on the grounds, *inter alia*, that the court had no jurisdiction since the parties had agreed that all disputes arising under or in connection with the bill of lading should be determined in the People's Republic of China. It was held, inter alia, that this provision purported to oust the jurisdiction of the Nigerian court entirely and was therefore contrary to public policy. In *Sonnar (Nig) Ltd v Partenreedri MS Norwind****[19]*** Oputa JSC opined that as a matter of public policy Nigerian Courts "should not be 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 forum … Courts guard rather jealously their jurisdiction and even where there is an ouster clause of that jurisdiction by Statute it should be by clear and unequivocal words. If that is so, as is 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 a contract which does not rob the Court of its jurisdiction in favour of another foreign forum."[20]

If the above judicial postulations were given literal effect by the Court of Appeal in *Damac* the exclusive choice of court agreement in favour of Dubai would be regarded as null and void. In effect, treating a choice of court agreement as an ouster clause has the effect of making a choice of court agreement illegal, unlawful or at best unenforceable. Recently, Nweze JSC has interpreted the concept of ouster clause to the effect "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."[21] I will interpret Nweze JSC's statement to mean that where a Nigerian court as a matter of state interest is exclusively vested by statute, the constitution or common law with a subject matter, then no foreign court can have jurisdiction in such matters.[22] Under common law, a clear example of this is a matter relating to immovable property, where the Nigerian court has exclusive jurisdiction. So the implication of this is that the concept of ouster clause has very limited effect in Nigerian jurisprudence.

5.2 Brandon Tests

Damac did not consider the application of the Brandon tests in Nigerian jurisprudence. The Brandon test is a form of application of *forum non conveniens* to choice of court agreements.

Brandon J, in *The Eleftheria*,[23] delivered a brilliant decision on this subject. The decision provided comprehensive guidelines that the English court should take into account in deciding whether to give effect to a foreign jurisdiction clause. This is often referred to as "the Brandon test" in Nigerian jurisprudence. Nigerian courts have regularly referred to the Brandon test and utilised it with approval in decided cases.[24] The test is stated hereunder as follows (as it has been referred to and applied) in the Nigerian context: 1. Where plaintiffs sue in Nigeria in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the Nigerian 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. 2. The discretion should be exercised by granting a stay unless strong cause for not doing it is shown. 3. The burden of proving such strong cause is on the plaintiffs. 4. In exercising its discretion the court should take account of all the circumstances of the particular case. 5. In particular, but without prejudice to (4), the following matters where they arise, may be properly regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the Nigerian and foreign courts. (b) Whether the law of the foreign court applies and, if so, whether it differs from Nigerian law in any material respects. (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 s would be prejudiced by having

to sue in the foreign country because they would (i) be deprived of security for that claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in Nigeria; or (iv) for political, racial, religious, or other reasons be unlikely to get a fair trial (v) the grant of a stay would amount to permanently denying the plaintiff any redress.

The only reported cases where the plaintiff(s) have successfully relied on the *Brandon* test is where their claim is statute barred in the forum chosen by the parties.[25] Indeed, the burden is on the plaintiff to show strong cause why Nigerian proceedings should be stayed in breach of a choice of court agreement; if not Nigerian courts will give effect to the choice of court agreement.[26]

In *Damac*, the plaintiff did not demonstrate strong reasons why the choice of court agreement should not be enforced. So even if the *Brandon* test was considered by the Court of Appeal, the claimant will not have succeeded.

6. Some Reservations

There are three reservations I have about the Court of Appeal's decision in *Damac*. First, the Court of Appeal should have ordered a stay of proceedings rather than holding that the lower court did not have jurisdiction. This is what is done in other common law countries. There is wisdom in this approach. If it turns out that the claimant cannot institute its claims in Dubai, the Nigerian forum should remain available to promptly institute its actions against the defendant in this case.

Second the Court of Appeal held that jurisdiction can be raised for the first time on appeal. This statement only applies to substantive jurisdiction. Procedural jurisdiction cannot be raised on appeal for the first time. Thus, if it is established that the defendant/appellant did not promptly raise the issue of choice of court agreement in favour of Dubai at the High court, this might be a ground upon which the defendant/appellant can successfully challenge the decision of the Court of Appeal. This is because the issue of choice of court agreement is a procedural matter and a defendant that wants to raise the issue of choice of court agreement must do so promptly, or it will be deemed to have waived its right by submitting to the jurisdiction of the Nigerian court.

Finally, the Court of Appeal made wrong reference to choice of venue rules[27] as applicable, assuming the choice of court agreement in this case is invalid. Choices

of venue rules are only applicable to determine the judicial division to institute a matter for geographic convenience. For example, Lagos State has four judicial divisions: Lagos, Ikeja, Epe and Ikorodu. In the event there is a dispute as to which of the judicial divisions should hear a matter, the rules of court are to be relied on.[28] Choice of venue rules do not apply to determine private international law matters as in this case.

In particular, given that *Damac* was a contractual private international law matter where the defendant was neither resident or submitted to the jurisdiction of the court,[29] Order 8(1)(e)(ii) of the High Court of Federal Capital Territory, Abuja (Civil Procedure) Rules, 2018 may have been considered.[30] Order 8(1)(e)(ii) provides that the court may allow any originating or other processes to be served outside Nigeria where: the claim is brought against a defendant to enforce, rescind, dissolve, annul or otherwise affect a contract or to recover damages or other relief for or in respect of a contract made by or through an agent residing or carrying on business within jurisdiction on behalf of a principal residing or carrying on business outside jurisdiction.

7. Conclusion

Damac is a recent trend among Nigerian courts to give a choice of court agreement a contractual function. Indeed, *Damac* is one of the few cases where issues of ouster clause and *forum non conveniens* no longer feature in the judgment of the court. There are good reasons why a choice of court agreement should be strictly enforced contractually. It promotes certainty and enhances the efficacy of international commercial transactions. However, given contractual enforcement to a choice of court agreement should only be regarded as a *general rule* and not an *absolute rule*. Nigerian courts should retain its discretion not to enforce choice of court agreements especially in the interest of justice and the protection of economically weaker parties.

[1]*Kashamu v UBN Plc* (2020) 15 NWLR (Pt. 1746) 90.

[2] *Ibid* 114-6.

[3] *Damac Star Properties LLC v Profitel Limited* (2020) LPELR-50699(CA).

[4] *Ibid*.

[5]For an extended analysis see generally CSA Okoli and RF Oppong, *Private International Law in Nigeria* (Hart, 2020) 107 – 125.

[6]*Sonnar (Nig) Ltd v Partenreedri MS Norwind* (1987) 4 NWLR 520, 541.

[7] *Nika Fishing Company Ltd v Lavina Corporation* (2008) 16 NWLR 509, 542-3.

[8] (2018) 9 NWLR 463, 489.

[9] *Ibid*

[10]*Ibid* 500-1.

[11]*Ibid* 502.

[12] *Captain Tony Nso v Seacor Marine (Bahamas) Inc* (2008) LPELR-8320 (CA) 12-3.

[13](2017) LPELR-42814.

[14] *Ibid* 30.

[15]*Ibid* 49-50.

[16] See also *Megatech Engineering Limited v Sky Vision Global Networks Llc* (2014) LPELR-22539 (CA); *Kashamu v UBN Plc* (2020) 15 NWLR (Pt. 1746) 90; *Unipetrol Nigeria Ltd v Prima Alfa Enterprises (Nig) Ltd* (1986) 5 NWLR 532.

[17] (1949) 19 NLR 32.

[18] (1980) (1) ALR Comm 146.

[19](1987) 4 NWLR 520.

[20] *Ibid* 544-5.

[21] *Conoil Plc v Vitol SA* (2018) 9 NWLR 463, 489

[22]See generally CSA Okoli and RF Oppong, *Private International Law in Nigeria* (Hart, 2020) 117 – 124.

[23]*The Owners of Cargo Lately Laden on Board the Ship or Vessel ' Elftheria ' v '*

The Elftheria ' (Owners), ' Th e Elft heria ' [1969] 1 Lloyd ' s Rep 237.

[24] See generally *GBN Line v Allied Trading Limited* (1985) 2 NWLR (Pt. 5) 74 ; *Sonnar (Nig) Ltd v Norwind* (1987) 4 NWLR 520 ; *Nika Fishing Company Ltd v Lavina Corporation* (2008) 16 NWLR 509 ; *Captain Tony Nso v Seacor Marine (Bahamas) Inc* (2008) LPELR-8320 (CA) ; *Beaumont Resources Ltd v DWC Drilling Ltd* (2017) LPELR-42814 (CA) .

[25] *Sonnar (Nig) Ltd v Norwind* (1987) 4 NWLR 520.

[26] *Nika Fishing Company Ltd v Lavina Corporation* (2008) 16 NWLR 509.

[27] In applying the choice of venue rules of Abuja on matters of contract, it considered where the contract was made, place of performance and residence of the parties as prescribed in the rules of court.

[28] Order 4 of the High Court of Lagos (Civil Procedure) Rules 2019 (formerly Order 2 of the High Court of Lagos (Civil Procedure) Rules 2012).

[29]In Nigerian common law private international law, a court has jurisdiction as a matter of right where the defendant is either resident or submits to the jurisdiction of the court. See generally CSA Okoli and RF Oppong, *Private International Law in Nigeria* (Hart, 2020) 50 -86.

[30]This is on the assumption that there was no valid choice of court agreement.