

The Contractual Function of a Choice of Court Agreement in Nigerian Jurisprudence

Many international commercial parties usually provide for a choice of court agreement as a term of their contract. This is done to enhance predictability, certainty and reduction of costs in the event a dispute arises between the parties. Since a choice of court agreement is a term of the contract, does the principle of contract law apply to determine a choice of court agreement? Though this is a matter of controversy in Nigerian law,[1] some recent appellate courts (Court of Appeal and Supreme Court) have given a foreign choice of court agreement a contractual function.[2]

Kashamu v UBN Plc[3] is a most recent Court of Appeal decision that analyses a foreign choice of court agreement exclusively from the principles of contract law. In this case, The Banque International Du Benin (“BIDB”), a limited financial institution in Benin Republic, granted medium term loan facilities, in different sums, to the Societe d’ Egrenage Industrial De Cotonu du Benin (“SEIC-B”), a private limited company registered in Benin Republic, for construction of its Cotton Ginning factory. The facilities were secured by, inter alia, SEIC-B’s goodwill, factory and land. In addition, the defendant/appellant, the alter ego of SEIC-B, personally guaranteed the facilities in a personal guarantee agreement. The loan agreement between BIDB and SEICB provided that the law and courts of Benin Republic should determine their dispute. However, the guarantee agreement between BIDB and the defendant/appellant did not explicitly provide for a choice of court agreement.

SEIC-B defaulted in the repayment of the loans despite repeated demands. As a result, BIDB appointed the plaintiff/respondent, a public limited financial institution in Nigeria, as its attorney to recover the outstanding facility. Further to the donated power of attorney, the plaintiff/respondent claimed recovery of the debt from the defendant/appellant in the Lagos High Court, Nigeria. The defendant/appellant counter-claimed and also challenged the jurisdiction of the

Lagos High Court as being the wrong forum to institute the action. The Lagos High Court held that it had jurisdiction.

The defendant/appellant was dissatisfied with this decision and appealed to the Court of Appeal. The defendant/appellant argued that the proper forum for the action was the Courts in Benin Republic, given that the loan agreement between BIDB and SEICB provided that the law and courts of Benin Republic should determine their dispute. He argued that the choice of court agreement in the loan contract should also be incorporated into the guarantee agreement, so that it was the intention of the parties that the courts of Benin Republic should determine their dispute. He also argued that the execution and performance of the contract were to be in Benin Republic hence the agreement was in French Language.

The plaintiff/respondent argued that the loan agreement and guarantee agreement were distinct. It observed that the parties were bound by the terms in the guarantee agreement. It added that the parties in the guarantee agreement did not agree that the court in Benin Republic would have exclusive jurisdiction over disputes arising from it. It asserted that the guarantee agreement was not expressly incorporated in the loan agreement. It opined that the defendant/appellant was not privy to the loan agreement and would not take a benefit from or enforce it for want of privity of contract. It claimed that the content of the guarantee agreement was clear and must be given its literal meaning.

The Court of Appeal unanimously dismissed the appeal. In construing the loan and guarantee agreement to determine if the parties chose the courts of Benin Republic, it applied the principles of Nigerian contract law to the effect that courts are allowed to read a document holistically so as to reach and garner harmonious results of its content. In construing a document, the court is enjoined or mandated by law to apply the literal rule as a canon of interpretation, that is, to accord the words employed there in their ordinary grammatical meaning without any embellishment.[4] It then held that for the document of parties to a private contract to confer jurisdiction on a court, the words used must be clear and explicit and devoid of woolliness and ambiguity. In the instant case, the guarantee contract did not precisely confer jurisdiction on the Benin Republic court.[5] It further held that loan contract did not in any way allude to the guarantee to benefit from the doctrine of incorporation by reference. The doctrine of incorporation could not be invoked because of the want of connection between

the two documents.[6]

Kashamu's case demonstrates the recent attitude of some Nigerian appellate courts to treat choice of court agreements as a term of the contract which should be construed strictly according to the literal and ordinary words used in the contract. In effect in the absence of vitiating circumstances, the parties are bound by the terms of a choice of court agreement, and a Nigerian court will not add or subtract from the way the parties drafted the contract. The Court of Appeal's approach in *Kashamu* reflected Nigeria's law that interprets contractual documents strictly. *Kashamu* is a modern approach that applies the principles of contract law to choice of court agreements.

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

[2]*Nika Fishing Company Ltd v Lavina Corporation* (2008) 16 NWLR 509, 542 (Tobi JSC); *Conoil Plc v Vitol SA* (2018) 9 NWLR 489 - 490 (Nweze JSC); 497 (Kekere-Ekun JSC); 500 (Okoro JSC); 501 - 2 (Eko JSC); *Captain Tony Nso v Seacor Marine (Bahamas) Inc* (2008) LPELR-8320 (CA); *Megatech Engineering Limited v Sky Vision Global Networks Llc* (2014) LPELR-22539 (CA); *Beaumont Resources Ltd v DWC Drilling Ltd* (2017) LPELR-42814 (CA); *Kashamu v UBN Plc* (2020) 15 NWLR (Pt. 1746) 90. See also *Felshade International (Nig.) Ltd v Trafugura Beheer BV Amsterdam* (2020) 14 NWLR (Pt. 1743) 107, 144.

[3]*Kashamu (Ibid)*

[4] *Kashamu (Ibid)* 114-5 (Ogbuinya JCA).

[5] *Kashamu (Ibid)* 115 (Ogbuinya JCA).

[6] *Kashamu (Ibid)* 116 (Ogbuinya JCA).