Waiving the Right to a Foreign Arbitration Clause by submitting to the Jurisdiction of the Nigerian Court

Introduction

Commercial arbitration is now very popular around the globe. It forms an important part of Nigerian jurisprudence. In Nigeria, it is regulated by the Arbitration and Conciliation Act ("ACA").[1]

Clauses designating an arbitral tribunal to resolve dispute between parties are now common place in international commercial transactions. Generally, the Nigerian courts respect and strictly enforce the parties' choice to resolve their dispute before an arbitral tribunal in both domestic and international cases.[2] This right is however not absolute. The right to resolve disputes before an arbitral tribunal could be waived by submitting to the jurisdiction of the Nigerian court. Indeed, Section 5(1) of the ACA provides that: "If any party to an arbitration agreement commences any action in any court with respect to any matter which is the subject of an arbitration agreement any party to the arbitration agreement may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceeding."[3] In essence, if a party to an international arbitration clause delivers any pleadings or takes any steps in the proceedings, such a party is deemed to have waived its right to an arbitration clause by submitting to the jurisdiction of the Nigerian court,

What provokes this comment is that in a recent Nigerian Court of Appeal decision in *The Vessel MT. Sea Tiger & Anor v Accord Ship Management (HK) Ltd*[4] ("*Tiger*"), the Court of Appeal held *inter alia* that where a party is served with a judicial claim, in breach of a foreign arbitration clause, but fails or refuses to appear before the court, such a party is deemed to have waived its right to an arbitration agreement by submitting to the jurisdiction of the Nigerian Court. It also held that payment of an out of court settlement amounts to submission.

This comment opines that the Court of Appeal's decision was wrongly decided insofar as it held that where proceedings are instituted in breach of a foreign arbitration clause, failure or refusal to appear before judicial proceedings, and payment of an out of court settlement amounts to waiver by submitting to the jurisdiction of the court.

Facts

In *Tiger,* the 2nd plaintiff-appellant and the 1st defendant-respondent – both foreign companies before the Nigerian Court – entered into a ship management agreement on 18th of February 2012 in Hong Kong for the management of the 1st plaintiff-appellant vessel. The parties agreed in clause 23 and 25 of the ship management agreement that any dispute arising from their agreement shall be referred to international arbitration in London.

When a dispute arose as to the payment of the management fees between the parties, the 1st defendant-respondent instituted proceedings (suit No. FHC/L/CS/1789/2013) at the Federal High Court, Nigeria for the arrest of the 1st plaintiff-appellant vessel. In that proceeding, the 1st defendant-respondent (as plaintiff) sued the plaintiff-appellants (the vessel and owners of the vessel) as the defendants in that case. The plaintiff-appellants settled the claim out of court by making payments to the 1st defendant-respondent. Subsequently, on 27th February 2014, the 1st defendant-respondent as plaintiff in suit No. FHC/L/CS/1789/2013 withdrew its suit and the vessel was ordered to be released.

In consequence of the arrest of the 1st plaintiff-appellant from 31st December 2013 to 27th February 2018, the appellants sued the defendant-respondents in the Federal High Court, Lagos for a significant amount of compensation arising from what it claimed to be the wrongful arrest of the 1st plaintiff-appellant in breach of their agreement to settle their dispute by international arbitration in London.

Decision

The Court of Appeal unanimously dismissed the claim of the plaintiff-appellants by

holding that they had waived their right to the international arbitration clause by submitting to the jurisdiction of the Nigerian Court. The decision was reached on two principal grounds. The first ground was failure or refusal to appear and challenge the proceedings after being served with court processes. The second ground was the payment of an out of court settlement in order to release the vessel. In order to provide more clarity, the relevant portions of the decisions are quoted.

First, Garba JCA in his leading judgment held that:

The failure or refusal by it (plaintiff-appellants) to appear in reaction to the originating processes to enable the appellant challenge the jurisdiction of the lower court on the ground of the arbitration clauses in the Ship Management Agreement…left no other reasonable presumption in law and option to the lower court than that the appellants had submitted to the jurisdiction of that court to adjudicate over the suit since the only challenge to the suit by the appellants was entirely and completely predicated and founded on the arbitration clauses in the Ship Management Agreement and not on the lack of jurisdiction on the part of the court, in any event, entertain the suit on any cognizable ground of law. The failure or refusal to enter an appearance and be represented in the suit constituted and amounted to a muted but clear submission to the jurisdiction of the lower court in the case.[5]

Second, Garba JCA held that: "…the lower court is right that the appellants submitted to its jurisdiction in the suit no:FHC/L/CS/1789/2013 by the payment and settlement of the 1st respondent's claim in order to secure the release of the 1st appellant from the arrest and detention it was placed under in the case thereby not only taking a step in the case, but actively and effectively so, in the circumstances of the case."[6]

Comments

The Court of Appeal's decision in *Tiger* is very important from the perspective of private international law and international commercial arbitration. The implication of *Tiger* is that where proceedings are instituted in a Nigerian court in breach of a foreign arbitration clause, the party requesting arbitration would be

wise to *appear* before the court and immediately request the court to stay its proceedings in favour of a foreign arbitration clause. If this is not done, an international arbitration clause is ineffective in Nigerian law on the basis that the party requesting arbitration would be deemed to have waived its right by submitting to the jurisdiction of the court. In addition, the payment of an out of court settlement would amount to waiver by submitting to the jurisdiction of a Nigerian court.

Prior to *Tiger,* waiver to an arbitration clause by submitting to the jurisdiction of the Nigerian court could only be established where the defendant enters an unconditional appearance or defends the case on its merits without challenging the jurisdiction of the court.[7]

It is submitted that *Tiger* is a wrong extension of the principle to the extent that it holds that failure or refusal to appear before proceedings which breach an international arbitration clause constitutes waiver by submission to the jurisdiction of a court. A defendant that does not appear before court proceedings cannot be deemed to have waived its right by submitting to the jurisdiction of the Nigerian court. In other words, failure or refusal to appear to proceedings upon being duly notified is the very antithesis of submission to the jurisdiction of a court. Indeed, there is an earlier Nigerian Supreme Court's decision that clearly held that failure or refusal of a defendant resident in Nigeria to appear in the English court despite being duly notified of judicial proceedings in England, did not qualify as submission to the jurisdiction of the English court.[8] Though this Supreme Court case was concerned with the recognition and enforcement of foreign judgments under the 1922 Ordinance, the logic of this decision can be way of analogy be applied in *Tiger's* case to the effect that failure or refusal to appear to court proceedings cannot constitute submission. In this connection, the Court of Appeal's decision in *Tiger* is therefore *per incuriam*.

It is illogical to hold that that a defendant who has failed or refused to appear to court proceedings has "delivered pleadings" or "taken steps in the proceedings" in the eyes of Section 5 of the ACA. A defendant is entitled to ignore court proceedings by sticking to the arbitration clause. This should also be seen as a pro-arbitration stance that is consistent with Nigeria's approach of upholding the sanctity of arbitration agreements. Indeed, as stated in the introduction, Nigerian courts generally enforce arbitration agreements strictly.

The truth is that *Tiger's* case reflects the attitude of some Nigerian judges to absentee defendants. Some Nigerian judges regard it as impolite for a defendant not to appear to court proceedings upon being duly notified. The preferable approach in Nigerian jurisprudence is to enter a *conditional appearance* and then challenge the jurisdiction of the court. Indeed, in *Muhammed v Ajingi*,[9] the Court of Appeal (Abiru JCA) unanimously held that a defendant who has been duly notified of proceedings but fails or refuses to appear to promptly challenge the jurisdiction of the court is deemed to have waived its right by submitting to the jurisdiction of the Nigerian court. Though, *Muhammed v Ajingi* was not an arbitration case, it demonstrates the attitude of some Nigerian judges to absentee defendants.

The Court of Appeal in *Tiger* was also wrong to have regarded the payment of an out of court settlement sum by the plaintiff-appellants to release the vessel as waiver by submitting to the jurisdiction of the court. Such an approach does not amount to delivering pleadings or taking steps in the proceedings in the eyes of Section 5 of the ACA. Indeed, in the earlier case of *Confidence Insurance Ltd*,[10] the Court of Appeal (Achike JCA) unanimously held that: "effort made out of court to settle the matter in controversy between the parties"[11] does not amount to submission in the eyes of Section 5 of the ACA. Nigerian courts should be seen to encourage out of court settlement. The Court of Appeal in *Tiger* did not explicitly have regard to Achike JCA's judicial opinion in *Confidence Insurance Ltd*, though it cited the case. There is wisdom in Achike JCA's judicial opinion. If the law is that efforts made towards out of court settlement amounts to submission, this might discourage a potential defendant from making out of court settlements, where there is the presence of a foreign arbitration clause.

Moreover, the payment of the settlement sum by the plaintiff/appellants was for the purpose of releasing their vessel which had been detained on the order of a Nigerian court. Comparatively, this has never qualified as submission to the jurisdiction of the court in England. Payment of settlement to release the vessel is hardly ever voluntary – the claimant in such maritime claims can use the arrest of the vessel as a way of wrongfully obtaining settlement. Indeed, there are English cases where damages have been awarded for wrongful detention of vessel despite the other party paying a settlement sum to the party that arrested the vessel.[12]

Tiger properly so called was an action in damages for breach of an international arbitration clause. Since it has been argued in this case that the plaintiff-

appellants did not submit to the jurisdiction of the Nigerian court, damages should have been awarded for breach of the international arbitration clause.[13] If the Court of Appeal had adopted this approach, it would have honoured the Nigerian judiciary's approach to generally and strictly enforce the sanctity of arbitration agreements. It was obvious in this case that the plaintiff-appellants suffered loss from the arrest of their ship in breach of an international arbitration clause. It is quite unfortunate that the Court of Appeal did not award compensation in this case.

Conclusion

It remains to the seen whether *Tiger* will go on appeal to the Nigerian Supreme Court. If it does go on appeal, it is proposed that the Supreme Court overturns the Court of Appeal's decision. If it does not go on appeal to the Supreme Court, it is proposed that the Nigerian Court of Appeal and Supreme Court in future holds that the failure or refusal to appear to proceedings in breach of an international arbitration clause, and the payment of out of court settlement does not constitute waiver by submission to the jurisdiction of the Nigerian court.

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[1]Cap. A18, LFN 2004.

[2]The cases in support of this are numerous. It is sufficient to cite the Nigerian Supreme Court authorities: *Owners of MV Lupex v Nigerian Overseas Chartering and Shipping Ltd* (2003) 15 NWLR 469; *Mainstreet Bank Capital Limited* & *Another v Nigeria Reinsurance Corporation Plc* (2018) 14 NWLR (Pt. 1640) 423, 444 (Kekere-Ekun JSC). See also CSA Okoli and RF Oppong, *Private International Law in Nigeria* (Hart, 2020) 127-138.

[3]It is a matter if Section 5 of the ACA applies to only domestic arbitration, and not international commercial arbitration. In *Owners of MV Lupex* (*supra* n 2) the Nigerian Supreme Court applied Section 5 of the ACA to international commercial

arbitration. However, in a later case of *SPDCN Ltd v CIRN Ltd* (2016) 9 NWLR (Pt. 1517) 300, 323 (Obaseki-Adejumo JCA), the Court of Appeal, relying on Section 58 of the ACA, held that the ACA only applies to domestic arbitration. If the Court of Appeal's decision is correct, then Section 5 of the ACA only applies to domestic arbitration.

It is submitted that the Supreme Court's position in *Owners of MV Lupex* is preferred for three reasons. First, Section 58 of the ACA means that the ACA applies in all States of the Federation, and not that the ACA applies only to domestic arbitration. Second, there is no specific provision that states that the ACA does not apply to international arbitration. Third, Part III of the ACA has a title which states that it relates to "ADDITIONAL PROVISIONS RELATING TO INTERNATIONAL ARBITRATION AND CONCILIATION." This implies that the ACA governs domestic and international commercial arbitration, with Part III of the ACA making additional provisions relating to arbitration.

[4](2020) 14 NWLR (Pt. 1745) 418.

[5]*Tiger* (n 4) 453-4.

[6] *Ibid* 457.

[7]*Obembe v Wemabod Estates Ltd.* (1977) 5 SC 115 (Fatayi-Williams JSC as he then was); *K.S.U.D.B. v Fanz Const; Ltd.* (1990) 4 NWLR (Pt. 142) 1, 27 (Agbaje JCS), 50 (Obaseki JSC); *Mainstreet Bank Capital Limited & Another v Nigeria Reinsurance Corporation Plc* (2018) 14 NWLR (Pt. 1640) 423, 445-6, 452 (Kekere-Ekun JSC); *Onward Ent. Ltd. v MV Matrix* (2010) 2 NWLR (Pt. 1179) 530, 551; *Federal Ministry of Health v Dascon (Nig.) Ltd* (2019) 3 NWLR (Pt. 1658) 127, 139-140 (Abiriyi JCA); *SCOA (Nig) Plc v Sterling Bank Plc* (2016) LPELR-40566 (CA) (Oseji JCA as he then was) *Sino-Africa Agriculture & Ind Company Ltd and Others v Ministry of Finance Incorporation and Another* (2013) LPELR-22379 (CA) 1, 33 – 36, (2014) 10 NWLR (Pt. 1416) 515, 537 (Orji-Abadua JCA); *Osun State Government v Dalami (Nig.) Ltd* (2003) 7 NWLR (Pt. 818) 72, 93, 101 (Onalaja JCA); *Confidence Insurance Ltd v Trustees of O.S.C.E.* (1999) 2 NWLR (Pt.591) 373, 386 (Achike JCA as he then was).

[8]*Grosvenor Casinos Ltd v Ghassan Halaoui* (2009) 10 NWLR 309. In this case

the Supreme Court was interpreting Section 3(2)(b) of the Reciprocal Enforcement of Judgments Act 1922, Cap 175 LFN 1958 ("1922 Ordinance"), which provides that the Nigerian court will refuse to register a foreign judgment where a judgment-debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court. This implies that *not voluntarily appearing* before a Nigerian court does not constitute submission despite being duly notified with court processes. Indeed, Section 3(2)(b) is a codification of Nigerian common law on what qualifies as submission as a basis of jurisdiction in private international law matters. Under common law, submission in establishing jurisdiction in private international law against a defendant can only be established where there is unconditional appearance, defending the case on its merits without challenging the court's jurisdiction or counter-claim.

[9] (2013) LPELR-20372 (CA).

[10] (n 7).

[11] *Ibid* 386.

[12] See *Gulf Azov Shipping Co Ltd v Chief Idisi (No.2)* [2001] EWCA Civ 505; *Kallang Shipping SA v AXA Assurance Senegal* [2008] EWHC 2761 (Comm).

[13]See Okoli and Oppong (n 2) 138; JC Betancourt, "Damages for Breach of an International Arbitration Agreement under English Arbitration Law" (2018) 34 *Arbitration International*

511-532.