The Nigerian Court of Appeal declines to enforce a Commonwealth of Virginia (in USA) Choice of Court Agreement

I am coordinating together with other African private international law experts (Richard Frimpong Oppong, Anthony Kennedy, and Pontian Okoli) an extended and in-depth version of this blog post and more topics, titled "Investing in English-speaking Africa: A private international law toolkit", which will be the topic of an online Master Class at TMC Asser Institute on June 24-25, 2021.

Introduction

In the year 2020, the Nigerian Court of Appeal delivered at least three decisions on foreign choice of court agreements.[1] I discussed two of those cases in this blog here and here. In the first two decisions delivered in the year 2020, the Nigerian Court of Appeal gave full contractual effect to the parties' foreign choice of court agreement.[2] In other words, the Nigerian Court of Appeal interpreted the parties' foreign choice of court agreement strictly according to is terms as it would do to a contractual document between commercial parties.

In November 30 2020, the Nigerian Court of Appeal delivered a third decision where it declined to enforce a Commonwealth of Virginia (in USA) Choice of Court Agreement.[3] In this connection, the author is of the view that the Court of Appeal's decision was delivered *per incuriam*. This is the focus of this comment.

Facts

In this case, the claimant/respondent commenced action at the Kaduna High Court with a writ of summons and statement of claim dated the 18th December,

2018 wherein it claimed against the defendant/appellant, the sum of $18,103.00 (USD) being due and unpaid software licensing fee owed by them by virtue of the agreement between the parties dated 12th day of June, 2013.

The defendant/appellant filed a conditional appearance along with a Statement of defence and counter affidavit. Its argument, *inter alia*, was that by virtue of Article 12 and 13 of their agreement, the Nigerian court had no jurisdiction in this case. The relevant portion of their agreement reads as follows:

"ARTICLE 12
GOVERNING LAW: The Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia, USA without regard to the principle of conflicts of any jurisdiction."
"ARTICLE 13
With the exception of an action or suit for the Licensee's failure to make any payment required hereunder when there was no suit or action arising under this Agreement may be brought more than one (1) year following the occurrence giving rise thereto. All suits and actions arising under this Agreement shall be brought in the Commonwealth of Virginia, USA and License hereby submits to the jurisdiction of the Courts of the Commonwealth of Virginia and the United States District Courts Sitting in Virginia."

By a ruling delivered on the 11th December, 2019, the trial High Court entered judgment in favour of the claimant/respondent. The defendant/appellant appealed to the Nigerian Court of Appeal.

Decision

Though the Court of Appeal (Hussaini JCA) was of the view that the choice of court agreement in favour of the Commonwealth of Virginia (in USA) was clear and unambiguous and did not have any vitiating circumstances surrounding it (such as fraud), it unanimously held that it would not apply the principle of *pacta sunt servanda* (agreements between parties should be respected) in this case. It followed the obiter dictum of Oputa JSC which reads as follows:

"[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."[4]

In applying this *obiter dictum* to the facts of the case, Hussaini JCA held as follows:

"By reason of Section 6(1)(2)(6)(b) of the Constitution of FRN, 1999 (as amended) the judicial powers vested in the Courts "extend to all matters between persons or between Government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person". Consequently, no person or group of persons by their own private treaty or arrangements can agree to oust the jurisdiction and provisions vested in the Courts by the Constitution. Even where such clauses are put in place in or as a contract with international flavour to rob the Courts of the land of jurisdiction in favour of another foreign forum, the Courts of the land are obliged to apply the blue pencil rule to severe those clauses from the contract or ignore same by virtue of the Constitutional provision which confer on the Court, the jurisdiction and power to entertain those cases.
Talking about the jurisdiction of the Courts, the Court below, by virtue of Section 272 of the Constitution of Federal Republic of Nigeria, 1999 (as amended) has jurisdiction to entertain cases such as recovery of debts, as in the instant case on appeal. It is for this reason that clauses in the likes of Articles 12 and 13 in the Article of the Agreement should be ignored when determining the rights and liabilities between the parties herein in matters such as this and the trial Court took the right approach when it discountenanced same to reach the conclusion that it did.
In any case, is it for the recovery of the sum of $18,103, (USD) only claimed by the Respondents, that parties herein are required, by that contract or agreement to submit themselves to a foreign forum in Virginia, USA for adjudication of their case, without consideration of the concomitant procedural difficulties attendant

thereto, as for instance, of having to return the case to Nigeria, the place where the contract was concluded initially, to register the judgment obtained at that foreign forum, in Virginia, USA, to be enforced in Nigeria? I think the Courts in Nigeria, fully seized of the case, will in the exercise of its discretion refuse the request to refer the case to a foreign forum for adjudication. It is for all the reasons already expressed in this discourse that I hold the firm view that the trial Court was competent or is competent when it entertained and adjudicated over the recovery suit or action filed by the Respondent against the Appellant."[5]

Comments

There are five comments that could be made about the Court of Appeal's decision (Hussaini JCA) in *A.B.U. v VTLS*.[6] First, the Court of Appeal (Hussaini JCA) in *A.B.U. v VTLS*[7] followed Oputa JSC's obiter dictum in *Sonnar (Nig) Ltd v Partenreedri MS Norwind*.[8] It should be stressed that Oputa JSC's obiter dictum is not binding on lower courts according to the Nigerian common law doctrine of *stare decisis*. In addition, Oputa JSC's obiter dictum was a concurring judgment. Indeed, the Supreme Court in *Sonnar* (*supra*) had unanimously given preference to the enforcement of a foreign jurisdiction clause except where strong cause is advanced to the contrary.[9] The majority of the Supreme Court did not treat it as an ouster clause. It is incongruous to hold, on the one hand, that the Nigerian court would hold parties to their bargain in enforcing a foreign jurisdiction clause except where strong cause is shown to the contrary, and on the other hand, treat a foreign jurisdiction clause as if it were an ouster clause. In *Sonnar*, the choice of court agreement was not enforced because strong cause was shown to the contrary – the proceedings would be time-barred in a foreign forum, and the claimant would not have access to justice.

Furthermore, the Nigerian Supreme Court in another case held that where a plaintiff sues in Nigeria in breach of a foreign jurisdiction clause, Nigerian law "requires such discretion to be exercised by granting a stay unless strong cause for not doing so is shown. The burden of showing such strong cause for not granting the application lies on the doorsteps of…the plaintiff."[10] The Supreme Court in this case enforced the choice of court agreement and stayed the proceedings in Nigeria because the plaintiff did not file a counter affidavit to demonstrate strong reasons why the proceedings should not be heard in a foreign

forum chosen by the parties.[11]

If the *ratio decidendi* in the Supreme Court cases in *Sonar* and *Nika* are applied to the recent Court of Appeal's decision in *A.B.U. v VTLS* (*supra*), it is clear that the Court of Appeal (Hussaini JCA) reached its decision *per incuriam*. There was nothing in the judgment to demonstrate that the plaintiff provided strong reasons (such as time bar in a foreign forum) why the choice of court agreement in favour of the Commonwealth of Virginia (in USA) should not be enforced. The argument that the choice of court agreement is an ouster clause without more is not a strong reason not to enforce the choice of court agreement.

Second, a foreign choice of court agreement does not mean the Nigerian court's jurisdiction no longer exists (without jurisdiction) under the Nigerian Constitution, as the Court of Appeal (Hussaini JCA) held in this case. Such jurisdiction exists, but it is up to the Nigerian court in *exercise* of its jurisdiction to decide whether or not to *stay* proceedings. This view is consistent with the Nigerian Supreme Court's decisions in *Sonar* and *Nika*. The fact that such proceedings are *stayed* and *not dismissed* means that a Nigerian court's jurisdiction is not ousted.

Third, some Nigerian judges confuse choice of court with choice of law. The Court of Appeal (Hussaini JCA) also fell into this error. The choice of the law of the Commonwealth of Virginia is not the same thing as choosing the courts of the Commonwealth of Virginia. For example, the Nigerian courts *could* assume jurisdiction and apply the law of the Commonwealth of Virginia.

Fourth, looking at the bigger picture, I generally acknowledge that the principle of *pacta sunt servanda* in enforcing choice of court agreements are aimed at enhancing the efficacy of business transactions and, legal certainty and predictability in international commercial litigation. However, I must point out that despite the Nigerian Supreme Court decisions on the point that hold that choice of court agreements should be enforced except there are strong reasons to the contrary, I am generally not in favour of Nigerian courts declining jurisdiction in international commercial litigation. It ultimate hurts the Nigerian economy (e.g. less job for Nigerian lawyers), hampers access to Nigerian justice, and does not help Nigerian judges in strengthening our legal system. What is the solution? I suggest that in the future the Nigerian Supreme Court should apply the test of "interest of justice" in determining whether or not it will enforce a choice of court

agreement. The burden of proof should rest on the claimant to manifestly demonstrate that taking into account all the relevant circumstances of the case, the interest of justice will not be served if the foreign choice of court agreement is enforced. I also suggest that in such cases where a foreign choice of court agreement is enforced in Nigeria, a stay should be granted. In addition, if it is sufficiently demonstrated that the chosen foreign forum later becomes inaccessible or impracticable for the claimant to sue, the Nigerian court in the interest of justice should retain jurisdiction to handle such claims.

Fifth, Nigeria should consider ratifying the Hague Choice of Court Convention, 2005. This Convention will work better in Nigerian courts if litigation is made attractive for international commercial actors, so they can designate Nigerian courts as the chosen forum. Speed, efficiency, legal aid for poor and weaker parties, and integrity of the Nigeria's system are some of the issues that can be taken into account in enhancing Nigeria's status as an attractive forum for international commercial litigation.

Conclusion

The Nigerian Court of Appeal has delivered three reported decisions on choice of court agreements in the year 2020. The recent Court of Appeal's decision in *A.B.U. v VTLS* (*supra*) was reached *per incuriam* because it is inconsistent with Nigerian Supreme Court decisions that hold that a choice of court agreement should be enforced except there are strong reasons to the contrary.

The Nigerian Supreme Court in the future should rise to the occasion to create new tests for determining if a choice of court agreement should be enforced in Nigeria. These tests should reconcile the needs of access to Nigerian justice on the one hand, and respecting the contractual agreements of parties to designate a foreign forum.

The Nigerian government should create the necessary infrastructure and requirements that will enable Nigeria effectively ratify and implement the Hague Convention on Choice of Court agreements, 2005.

[1] *Kashamu v UBN Plc* (2020) 15 NWLR (Pt. 1746) 90; *Damac Star Properties LLC v Profitel Limited* (2020) LPELR-50699(CA); *A.B.U. v VTLS* (2020)

LPELR-52142 (CA).

[2] *Kashamu v UBN Plc* (2020) 15 NWLR (Pt. 1746) 90; *Damac Star Properties LLC v Profitel Limited* (2020) LPELR-50699(CA).

[3] *A.B.U. v VTLS* (2020) LPELR-52142 (CA).

[4](1987) 4 NWLR 520, 544 – 45, approving Lord Denning's statement in *The Fehmarn* [1958] 1 All ER 333 , 335 . Cf. *Conoil Plc v Vitol SA* (2018) 9 NWLR 463, 489 (Nweze JSC) – "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." See also LAC v AAN Ltd (2006) 2 NWLR 49, 81 (Ogunbiyi JCA as she then was).

[5]*A.B.U. v VTLS* (2020) LPELR-52142 (CA) 15 – 18.

[6] (2020) LPELR-52142 (CA),

[7] (2020) LPELR-52142 (CA),

[8](1987) 4 NWLR 520, 544 – 45

[9] Even Oputa JSC held thus: 'Where a domestic forum is asked to stay proceedings because parties in their contract chose a foreign Court … it should be very clearly understood by our courts that the power to stay proceedings on that score is not mandatory. Rather it is discretionary which in the ordinary way, and in the absence of strong reasons to the contrary will be exercised both judiciously and judicially bearing in mind each parties right to justice ' –*Sonnar* (*supra*) at 545 (emphasis added).

[10] *Nika Fishing Company Ltd v Lavina Corporation* (2008) 16 NWLR 509, 535 (Mohammed JSC, as he then was).

[11] *Conoil Plc v Vitol SA* (2018) 9 NWLR 463, 489 (Nweze JSC), 500-1 (Okoro JSC), 502 (Eko JSC).