The Nigerian Court of Appeal declines to enforce an Exclusive English Choice of Court Agreement

The focus of this write-up is a case note on a very recent decision of the Nigerian Court of Appeal that declined to enforce an exclusive English choice of court agreement.[1] In this case the 1st claimant/respondent was an insured party while the defendant/appellant was the insurer of the claimant/respondent. The insurance agreement between the 1st claimant/respondent and defendant/appellant provided for both an exclusive choice of court and choice of law agreement in favour of England. The claimants/respondents issued a claim for significant compensation before the High Court of Cross Rivers State, Nigeria for breach of contract and negligence on the part of the defendant/appellant for failure to fully perform the terms of the insurance contract during the period the 1st claimant/respondent was sick in Nigeria. The defendant/appellant challenged the jurisdiction of the High Court of Cross Rivers State, and asked for a stay of proceedings on the basis that there was an exclusive choice of court agreement in favour of England. The 1st claimant/respondent in a counter affidavit stated mainly at the trial court that he was critically ill, and the 2nd claimant/respondent (the employer of the 1st claimant/respondent) had serious financial difficulties in paying the 1st claimant/respondent's salaries, so in the interest of justice a stay should not be granted.

Both opposing parties were in agreement throughout the case that it was the Brandon test,[2] as applied by the Nigerian Supreme Court[3] that was applicable in this case to determine if a stay should be granted in the enforcement of a foreign choice of court agreement. Now the Brandon test (named after an English judge called Brandon J, who formulated the test) as applied in the Nigerian context is as follows:

“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 reported cases where the plaintiff(s) have successfully relied on the Brandon test to oppose the enforcement of a foreign jurisdiction clause are where their claim is statute barred in the forum chosen by the parties.[4] Indeed, the burden is on the plaintiff to show strong cause as to why Nigerian proceedings should be stayed in breach of a choice of court agreement; if not, Nigerian courts will give effect to the foreign choice of court agreement.[5]

The High Court (Ayade J) relying on the Nigerian Supreme Court’s decision on the application of the Brandon tests declined to uphold the exclusive choice of court agreement in the interest of justice. It is fair to say that the trial judge applied a very flexible approach on the issue of whether the exclusive English choice of court agreement should be enforced. Indeed, he was very focused on substantial justice (rather than the strong cause test), thereby stretching the criteria

provided in the Brandon test.[6] Ayade J's judgment is worth quoting thus:

"This Court is fully aware of the principles of party autonomy, freedom and sanctity of contract, the doctrine that parties should be held to their contract (pacta sunt servanda) and this puts the burden on the plaintiff to show why the proceedings should continue in Nigeria inspite of the foreign jurisdiction clause, which in the opinion of this Court, the plaintiff has rightly done."[7]

He also interestingly remarked that:

"Let it be remarked that this Court is not unmindful, and there is no doubt that in an area of globalization, the issue of foreign jurisdiction clause and the subject of conflict of laws has a future and one of growing importance, see MORRIS: The conflict of laws, 7th Edition, Sweet and Maxwell, 2010 page 16. This is reflected in the expanded membership of the specialist international bodies such as the Hague Conference on Private International Law: Rome Convention on Contractual Obligations 1980, Convention on Choice of Court, 1965, Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, 1971, Convention on International Access to Justice, The Brussel Convention and the Lugano Convention, Convention on the Law Applicable to Contractual Obligation, Organization for the Harmonization of Business Law in Africa (OHADA), and the various efforts at Harmonization and Unification of Law are still in the inchoate stage in this part of the world. We shall get there at a time when there shall be one law, one forum and one world.
It is for the above reasons that I am of the view that the current attitude of the Nigerian Courts to foreign jurisdiction clauses remains as stated in the Norwind. Thus, I am inclined to agree that Courts are not bound to stay its proceedings on account of a foreign jurisdiction clause in a Court."[8]

In the final analysis, he held as follows:

"Applying the law as declared above to the instant case and after due consideration of all the circumstances of this case, and in the exercise of discretion as to whether or not to do so in this case and this Court, which

endeavoured always to do substantial justice between the parties. The sole issue raised by the claimants/respondents is therefore resolved in their favour against the defendant/applicant. Accordingly, this application is hereby dismissed."[9]

On appeal, the defendant/appellant argued that in reality the test the High Court (Ayade J) applied was one of balance of convenience, and did not properly follow the strong cause test as stipulated by the Nigerian Supreme Court in applying the Brandon test.

The claimant/respondent brilliantly filed a respondent's notice to justify the High Court's decision on other grounds. The core argument was that the action will be statute-barred in England if the action was stayed before the Nigerian Court. This argument was clearly supported by the Brandon test as applied by the Nigerian Supreme Court.[10]

The Court of Appeal unanimously dismissed the appeal. Shuaibu JCA in his leading judgment held that:

"In exercising its discretion to grant a stay of proceedings in a case filed in breach of an agreement to refer disputes to a foreign country, the Court would take into consideration a situation where the granting would spell injustice to the plaintiff as where the action is already time barred in the foreign country and the grant of stay would amount to permanently denying the plaintiff any redress."[11]

In analysing the Brandon test, as applied by the Nigerian Supreme Court he held that:

"It is imperative to state here that the Brandon Test is basically a guideline to judges in exercising their discretionary power to order a stay of proceedings where as in the present case, there is a foreign jurisdiction clause in the contract. It is to be noted however that like every discretion, the judge must exercise it judicially and judiciously based on or guided by law and discretion according to sound and well considered reason. Perhaps, the most noticeable guideline which I consider more novel is that the Brandon Test enjoins Court to exercise its discretion in favour of the applicant unless strong cause for not doing so is shown which places the burden of showing such strong cause for not granting the application

on the respondent (claimant)."[12]

After referring to the counter-affidavit of the claimant/respondent where they mainly alleged at the trial court that the 1st claimant/respondent was sick and had financial difficulties, Shuaibu JCA adopted a similar flexible approach to the Brandon tests as Ayade J. He held that:

"What is discernible from the above is that the evidence on the issues of fact is situated and more readily available, in Nigeria and the lower Court, was therefore right in refusing to adhere to foreign jurisdiction clause on the basis that the case is more closely connected to Nigeria. In effect, the trial Court has taken into account the peculiar circumstances of the case vis-à-vis the guidelines in the Brandon Test and thus exercised its discretion judicially and judiciously in refusing to grant stay of proceedings."[13]

Owoade JCA in his concurring judgment held that:

"In the instant case, more particularly by paragraphs 6, 7 and 8 of the Respondents counter-affidavit in opposition to the Appellant's motion for an order for stay, the Respondents have established that they would suffer injustice if the case is stayed. This is more so in the instant case where the Plaintiffs/1st Respondent action was statute barred in the foreign Court and the grant of stay would amount to permanently denying the Plaintiff/1st Respondent any redress."[14]

It is difficult to fault the decision of the High Court and Court of Appeal in this case, except for Shuaibu JCA's occasional confusion of choice of court with choice of law (a conceptual mistake some Nigerian judges make). An additional observation is that this procedural issue on foreign choice of court agreement took over 5 years to resolve so far. The issue of delay is something to look into in the Nigerian legal system – a topic for another day.

The standard test for determining if a stay should be granted in breach of a foreign jurisdiction clause is the Brandon test as applied by the Nigerian Supreme Court.[15] I am in total agreement with Shuaibu JCA that the Brandon test is a guideline. In other words, it must not be followed slavishly by Nigerian courts or indeed courts of other common law countries in Africa. A judge should be able to

consider the facts of the instant case and decide if there is a strong cause for not granting a stay in breach of a foreign jurisdiction clause. In this case, the fact that the action will be statute-barred was a strong ground not to grant a stay in breach of the exclusive choice of court agreement in favour of England. The financial difficulties and sickness of the claimant/respondent were also factors that could be taken into account in the interest of justice, although they are not as strong as the claim that the action was statute-barred in a foreign forum. Indeed, I have argued elsewhere that the test of the interest of justice should not be excluded from the Brandon test analysis.[16] Of course, I agree this might create uncertainty and undermine party autonomy in some cases, but this problem can be curtailed if the burden is firmly placed at the door steps of the claimant as to why a foreign jurisdiction clause should not be enforced.

Nigeria is a growing economy, and its lawyers, arbitrators and judges should be able to benefit from international commercial litigation and arbitration business like developed countries such as England. Of course, the best way to do this is to make Nigeria attractive for litigation in matters of speed, procedural rules, content of applicable laws, honesty of judges, and competence of judges to handle cases etc. However, Nigerian courts should not blindly apply party autonomy in the enforcement of choice of court agreements despite the certainty and predictability it offers to international commercial actors.

This brings me to an even more important issue. This case involved an insurance contract. The insured party – the 1st claimant/respondent – was obviously the weaker party in this case. The traditional common law in Nigeria has not created a clear exception for the protection of weaker parties in the enforcement of foreign choice of court agreements. The European Union has done that in the case of employees, consumers and insured persons.[17] Nigeria and the rest of common law Africa's legal system is not an island of its own. We can learn from the EU experience and borrow some good things from them. Indeed, the Nigerian Supreme Court had held that there is nothing wrong with borrowing from another legal system.[18] I will add there should be good reasons for borrowing from another legal system especially former colonial powers.

In this connection, it is proposed that in the case of weaker parties such as insured, consumers and employees, a party domiciled or habitually resident in Nigeria should be able to sue in Nigerian courts in breach of a foreign jurisdiction clause. In addition, the common law concept of undue influence could be applied

so that cases where a party is presumably weak in the contractual relationship, such a party should not be bound by the foreign jurisdiction clause. Of course, there is a danger that this could create uncertainty. So I propose that in cases of business to business contracts, Nigerian and African courts should be more willing to enforce foreign choice of court agreements strictly.

Back to the case at hand, it is not unlikely that this case might come before the Nigerian Supreme Court on appeal. The Nigerian Court of Appeal has applied varied approaches to the enforcement of foreign choice of court agreements in Nigeria. Indeed, I noted three inconsistent decisions of the Nigerian Court of Appeal in this area of the law as recent as 2020.[19] On the one extreme hand, there is the contractual approach that strictly treats a choice of court agreement like any ordinary commercial contract.[20] This approach is good in that it promotes party autonomy, but the problem with this approach is that it ignores the procedural context of a choice of court agreement and might spell injustice due to its rigid approach. On the other extreme hand, there is the ouster clause approach that strictly refuses to enforce a foreign choice of court agreement.[21] Though this approach might favour litigation in Nigeria and other African countries, it dangerously undermines party autonomy, and international commercial actors are likely to lose confidence in a legal system that does not uphold party autonomy. The other approach is the middle ground of the Brandon test, which upholds a choice of court agreement except strong reason is demonstrated to the contrary. This is standard approach the Nigerian Supreme Court has applied.[22]

It is recommended that if this case goes to the Nigerian Supreme Court, it should continue its endorsement of the Brandon test. It should also consider the addition of the interest of justice approach as was utilised by some of the High Court and Court of Appeal judges in this case. What is missing in the Nigerian Supreme Court's jurisprudence is a common law test that protects weaker parties like insured, consumers, and employees, as can be utilised in this case to protect the insured party (the 1st claimant/respondent). The time to act is now.

[1]*BUPA Insurance v Chakraverti* & *Anor* (2021) LPELR-55940 (CA).

[2] *The Owners of Cargo Lately Laden on Board the Ship or Vessel ' Elftheria ' v ' The Elftheria ' (Owners), ' The Elftheria '* [1969] 1 Lloyd ' s Rep 237 (Brandon J).

[3] *Sonnar (Nig) Ltd v Norwind* (1987) 4 NWLR 520; *Nika Fishing Company Ltd v Lavina Corporation* (2008) 16 NWLR 509.

[4]*Sonnar (Nig) Ltd v Norwind* (1987) 4 NWLR 520. See also *Hull Blyth (Nig) Ltd v Jetmove Publishing Ltd* (2018) LPELR-44115 (CA).

[5]*Nika Fishing Company Ltd v Lavina Corporation* (2008) 16 NWLR 509. See also *Captain Tony Nso v Seacor Marine* (*Bahamas*) *Inc* (2008) LPELR-8320 (CA); *Beaumont Resources Ltd & Anor v DWC Drilling Ltd* (2017) LPELR-42814 (CA).

[6]Compare *Adesanya v Palm Lines Ltd* (1967) NCLR 133, which is one of the earliest cases where the balance of convenience and interest of justice test was applied in enforcing a foreign choice of court agreement.

[7]Cited in *BUPA Insurance v Chakraverti* & *Anor* (2021) LPELR-55940 (CA) 3.

[8]Cited in *BUPA Insurance v Chakraverti* & *Anor* (2021) LPELR-55940 (CA) 3-4.

[9] Cited in *BUPA Insurance v Chakraverti* & *Anor* (2021) LPELR-55940 (CA) 5.

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

[11]*BUPA Insurance v Chakraverti* & *Anor* (2021) LPELR-55940 (CA).21.

[12]*BUPA Insurance v Chakraverti* & *Anor* (2021) LPELR-55940 (CA).

[13] *BUPA Insurance v Chakraverti* & *Anor* (2021) LPELR-55940 (CA) 28.

[14] *BUPA Insurance v Chakraverti* & *Anor* (2021) LPELR-55940 (CA) 30.

[15] *Sonnar (Nig) Ltd v Norwind* (1987) 4 NWLR 520; *Nika Fishing Company Ltd v Lavina Corporation* (2008) 16 NWLR 509.

[16]CSA Okoli, "Analysis of Choice of Court Agreements in Nigeria in the Year 2020" (2021) 21 *Dutch Journal of Private International Law* 292, 305.

[17]See Article 10 – 23 of Brussels I Regulation Recast (Council Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 [2012] OJ L351/1.). See also recital 19 to Brussels I Regulation Recast.

[18]*Caribbean Trading & Fidelity Corporation v Nigerian National Petroleum Corporation* (2002) 34 WRN 11 (Ayoola JSC, Mohammed JSC (as he then was),

Ejiwunmi JSC).

[19]CSA Okoli, "Analysis of Choice of Court Agreements in Nigeria in the Year 2020" (2021) 21 *Dutch Journal of Private International Law* 292 – 305.

[20] *Damac Star Properties LLC v Profitel Limited* (2020) LPELR-50699(CA). See also *Conoil Plc v Vitol SA* (2018) 9 NWLR 463, 489 (Nweze JSC), 500-501 (Okoro JSC), 502 (Eko JSC).

[21]*A.B.U. v VTLS* (2020) LPELR-52142 (CA). See also *Conoil Plc v Vitol SA* (2018) 9 NWLR 463, 489 (Nweze JSC); *Sonnar (Nig) Ltd v Partenreedri MS Norwind* (1987) 4 NWLR 520, 544-5 (Oputa JSC); *LAC v AAN Ltd* (2006) 2 NWLR 49, 81 (Ogunbiyi JCA as she then was); *Ventujol v Compagnie Française De L'Afrique Occidentale* (1949) 19 NLR 32; *Allied Trading Company Ltd v China Ocean Shipping Line* (1980) (1) ALR Comm 146.

[22]*Sonnar (Nig) Ltd v Norwind* (1987) 4 NWLR 520; *Nika Fishing Company Ltd v Lavina Corporation* (2008) 16 NWLR 509.