Online Symposium on Recent Developments in African PIL (IV) – Party Autonomy, Genuine Connection, Convenience, Costs, Privity, and Public Policy: The Kenyan High Court on Exclusive Jurisdiction Clauses

As part of the second online symposium on ***recent developments in African private international law****, we are pleased to present the fourth contribution, kindly prepared by* ***Anam Abdul-Majid (Advocate and Head of Corporate and Commercial Department, KSM Advocates, Nairobi, Kenya)*** **and** ***Kitonga Mulandi (Lawyer, KSM Advocates, Nairobi, Kenya)****, on* ***Party Autonomy, Genuine Connection, Convenience, Costs, Privity, and Public Policy: The Kenyan High Court on Exclusive Jurisdiction Clauses***

I. Introduction

Kenya has emerged as a regional and global hub for the development of private international law, positioning it as one of Africa's leading jurisdictions through progressive judicial reasoning and landmark decisions. Kenyan jurisprudence has not only shaped domestic private international law but is also frequently relied upon by courts in other African jurisdictions, particularly East Africa, as persuasive authority. Given the consistent and dynamic evolution of this field by Kenyan courts, it is essential to take account of recent decisions that have engaged with and developed key private international law concepts.

One such relatively recent decision is *Maersk Kenya Limited v Multiplan Packaging Limited (Civil Appeal E181 of 2022) [2024] KEHC 8462 (KLR) (Civ) (8 July 2024) (Judgment*), which engages with several core doctrines of private international law and therefore warrants closer analysis.

This case is significant for four interrelated reasons. First, it examines the limits of exclusive jurisdiction clauses in maritime contracts where both parties are Kenyan entities and the alleged breach occurred within Kenyan territory. Second, it clarifies the operation of the doctrine of privity of contract in the context of agency relationships under bills of lading, particularly by recognising that consignees who were not original contracting parties may nonetheless have standing to sue carriers on the basis of rights conferred by the carriage documents. Third, it articulates important public-policy considerations capable of overriding contractual forum-selection agreements, especially where such clauses would impose insurmountable barriers to access to justice, contrary to Article 48 of the Constitution of Kenya. Finally, the decision reinforces procedural discipline in jurisdictional challenges by holding that parties who enter an unconditional appearance and substantively participate in proceedings waive any subsequent right to contest the court's jurisdiction or to rely on an exclusive forum-selection clause.

II. Facts

The facts of the case centred on whether Kenyan courts had jurisdiction to hear and determine the dispute, notwithstanding that the contract forming the subject matter of the proceedings contained an exclusive jurisdiction clause conferring jurisdiction on the English High Court in London. The dispute arose out of a

maritime contract of carriage relating to the Respondent's shipment of cargo from Mombasa, Kenya, to Juba, South Sudan.

The contractual arrangement involved a composite mode of performance: sea carriage to Mombasa (the transit port), inland storage at Mombasa, and subsequent road transportation to the final destination in South Sudan. This contractual structure generated performance obligations across multiple jurisdictions. Under Kenyan customs regulations, goods in transit are subject to the provision of security bonds to ensure compliance with fiscal obligations. The Respondent's failure to meet this requirement triggered the dispute, ultimately leading to the Appellant's decision to trans-ship the goods to Dubai, acting on instructions from Maersk Egypt A/S.

The application was further complicated by a layered agency relationship. The shipper was alleged to be acting as an agent of the Respondent (the consignee), while the Appellant, Maersk Kenya Limited, acted as an agent of Maersk Egypt A/S, which itself acted as agent for another entity within the Maersk corporate structure. The Court characterised this arrangement as an "agents-of-agents" scenario, raising difficult questions of privity of contract and whether the Respondent, as consignee under the bill of lading, could maintain an action against Maersk Kenya Limited in the absence of direct contractual privity.

Although the Court acknowledged that no direct contractual agreement existed between the parties, it placed decisive weight on the fact that both parties were Kenyan companies and that the alleged breach occurred in Kenya. These connecting factors proved determinative in the Court's forum analysis. While recognising that Clause 26 of the Terms of Carriage constituted a standard-form English exclusive jurisdiction clause in maritime contracts also governed by English law, the Court nevertheless held that such a boilerplate provision could not operate to oust the jurisdiction of Kenyan courts. In the Court's view, the practical realities of the dispute disclosed no genuine connection to the English forum beyond the bare contractual designation.

III. Summary of the Judgment Delivered by the High Court of Kenya

This case is particularly relevant because it does not engage with a single isolated issue, but rather addresses a constellation of interrelated doctrines, each of which

contributes to greater doctrinal clarity in private international law.

Although the contract contained an exclusive jurisdiction clause, the Court found that the contractual arrangement comprised distinct segments, one of which concerned the transportation of the Respondent's cargo from Mombasa to Juba, South Sudan, with Mombasa functioning as a transit port for offloading and interim storage prior to onward road transportation. Owing to the Respondent's failure to pay the requisite bond-in-transit charges, the goods were subsequently trans-shipped to Dubai on the instructions of the first applicant.

The application was further grounded in complex agency relationships: the shipper was alleged to be acting as an agent of the Respondent, while the Appellant acted as an agent of Maersk Egypt A/S, which itself acted as agent for another entity within the corporate structure. The Court observed that there was no direct contractual agreement between the parties. Nevertheless, it placed decisive weight on the fact that both parties were Kenyan companies and that the alleged breach occurred within Kenya.

Against this background, the Court articulated several important principles:

- (a) where parties operate as "agents of agents", they are properly characterised as third parties, with the consequence that no privity of contract exists between them;
- (b) there is no principled basis for two Kenyan companies to litigate their dispute in London in the absence of a genuine connecting factor to that forum;
- (c) disputes between Kenyan companies arising from breaches occurring in Kenya should, as a matter of public policy, be adjudicated by Kenyan courts;
- (d) Kenyan courts may override exclusive jurisdiction clauses where the circumstances of the dispute demonstrate that the matter ought properly to be heard in Kenya;
- (e) a party seeking to challenge territorial jurisdiction must do so at the earliest opportunity and must refrain from taking substantive steps in the proceedings. By entering an unconditional appearance, filing multiple affidavits, and applying for the release of the goods, the Appellant was held to have submitted to the Court's jurisdiction and thereby waived any subsequent right to contest it; and

- (f) contractual clauses purporting to oust the jurisdiction of Kenyan courts may be contrary to public policy unless there is a clear and substantive connection between the dispute and the chosen foreign forum. In the absence of such a connection, referral of a dispute of this nature to London was held to be unjustified.

IV. Comments

The judgment represents a sophisticated attempt to reconcile competing values in private international law, namely party autonomy and access to justice. Notably, the Court did not override the jurisdiction clause on the basis of abstract or generalised appeals to injustice; rather, it arrived at that conclusion through the following considerations:

(a) Presuming Validity of Clause 26:

The Court began from a presumption in favour of the validity and enforceability of exclusive forum-selection clauses. Its reasoning was that this presumption is at its strongest where: (1) the clause is negotiated by sophisticated commercial parties; (2) the designated forum has a genuine connection to the transaction; (3) the costs of litigating in that forum are proportionate to the value and nature of the dispute; and (4) the parties are subject to reciprocal obligations to litigate exclusively in the chosen forum. In such circumstances, the clause ought, in principle, to be enforced.

(b) Rebuttable Presumption:

The Court held that the presumption of validity attaching to exclusive forum-selection clauses may be rebutted where their enforcement would create insurmountable barriers to access to justice, particularly in the context of standard-form contracts concluded between parties of unequal bargaining power—a consideration that goes to the very root of genuine consent.

Applying this reasoning, the Court concluded that Clause 26 did not bind the

Respondent because it was not a party to the contract. Relying on the doctrine of privity of contract, the Court emphasised that the Respondent, as consignee, played no role in negotiating the shipping agreement between Maersk Line A/S and the shipper and could therefore not be bound by its forum-selection clause.

Crucially, the Court was careful to avoid conflating layered agency relationships—described as an "agents-of-agents" structure—with contractual privity. It rightly held that the Respondent, as consignee, could not be taken to have consented to the Terms of Carriage, which constituted a contract exclusively between the shipper and the carrier.

(c) Waiver of the Right to Enforce:

The Court's finding of submission to jurisdiction through conduct is well grounded and consistent with established jurisprudence, which recognises that a party may waive its right to rely on a forum-selection clause, or otherwise submit to the court's jurisdiction, by its conduct. In such circumstances, the forum-selection clause is rendered inoperative.

The Court's conclusion that the Appellant's entry of an unconditional appearance, coupled with the obtaining of interim relief for the release of the cargo, amounted to submission to jurisdiction is sound. This approach not only accords with the underlying rationale of the doctrine—namely, the protection of rights that have accrued to the opposing party—but also reinforces the principle that a party cannot be permitted to litigate on the basis of approbation and reprobation, a well-established cornerstone of equitable jurisprudence.

(d) Public Policy:

The enforcement of a forum-selection clause in a dispute valued at twenty million Kenyan shillings, where both parties are Kenyan companies, is untenable, unsound, and inconsistent with the underlying principles of private international law. Such an approach disregards a foundational premise of contract law: that parties enter into contractual arrangements with knowledge of, and consent to, their negotiated terms. In the context of exclusive jurisdiction clauses, this logic is

even more compelling, as the very purpose of such clauses is to secure a just, convenient, and—most critically—predictable framework for the resolution of disputes should they arise.

The Court's characterisation of the clause as contrary to "public policy" is not only difficult to reconcile with these long-standing principles but is also problematic in its reasoning. The Court's attempt to define the relevant public policy relies heavily on the Canadian decision in *Uber Technologies Inc v Heller*, using it to support the proposition that where the costs of litigating in the designated forum are disproportionate to the value of the claim, enforcement of the forum-selection clause would offend public policy.

This reasoning sits uneasily with settled authority in private international law, which makes clear that mere inconvenience—including administrative burden and litigation costs—does not, without more, amount to "strong cause" sufficient to displace an exclusive jurisdiction agreement freely entered into by the parties.

V. Conclusion

The Kenyan High Court's decision in Maersk v Kenya Limited v Multiplan Packaging Limited affirms several settled principles: the doctrine of privity of contract, the presumptive validity of exclusive jurisdiction clauses, and the consequence that a party may waive its right to rely on such a clause through submission to the court's jurisdiction. Yet the decision exposes a critical tension in the Court's reasoning. The dispute involved two Kenyan companies, a contract performed in Kenya, and the alleged breach occurring in Kenya, these connecting factors would ordinarily support the exercise of jurisdiction. The difficulty lies in the Court's use of public policy to displace the jurisdiction clause on the bases of cost and inconvenience.

This approach sits at odds with established authority. As articulated in *The Eleftheria (1969) 1 Lloyd's L. R. 237* and subsequent authorities, inconvenience or increased litigation costs do not, without more, amount to 'strong cause', sufficient to displace an exclusive jurisdiction agreement freely entered into by parties. Further the Court's reliance on the Canadian decision in *Uber Technologies Inc v Heller,* upon which the Court premised its analysis, concerned very particular circumstances, of a consumer contract concluded between parties

of profound unequal bargaining power, with the central question being the validity of an arbitration agreement, a related but distinct legal concept for determination. The reliance on public policy in this context is problematic for three reasons: (1) the concept construed widely risks development into an indeterminate tool for judicial discretion; (2) the court has not articulated a coherent test for determining when or how cost and convenience may rise to the threshold to override clear contractual choices; and (3) the broad conception of public policy threatens the essential rationale behind exclusive jurisdiction clauses, being the predictability such offers parties to international commercial contracts and have become accustomed to expect. If jurisdiction clauses may be displaced on grounds of general convenience, parties can no longer rely on their contractual allocations of risk, and the very purpose of such clauses is defeated.

Ultimately, Maersk demonstrates that there ought to be greater comparative engagement and doctrinal grounding while balancing party autonomy and safeguarding access to justice.

Previous contributions:

1. **Online Symposium on Recent Developments in African Private International Law**, *by Béligh Elbalti & Chukwuma S.A. Okoli* (Introductory post)
2. **Recognition and Enforcement of International Judgments in Nigeria**, *by Abubakri Yekini & Chukwuma Samuel Adesina Okoli*
3. **The Recognition and Enforcement of Foreign Judgments within the CEMAC Zone**, *by Boris Awa*
4. **Foreign Judgments in Mozambique through the Lens of the Enforcement of a Chinese Judgment: Liberal Practice in the Shadow of Statutory Rigidity**, *by Béligh Elbalti*