CONTRACTUAL OUSTER OF COURT'S JURISDICTION IN INTERNATIONAL COMMERCIAL AGREEMENT

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ABSTRACT

The article examined the Contractual Ouster of Court's Jurisdiction in International Commercial Agreement given the controversy it engendered and the varying interpretation given to it by the court. The principle that parties could freely agree on the terms of their contract is true. It is also correct that no parties by their contract could bind a third party. The doctrine of the principle of privity of contract is that contracts are private between parties to it and non-admissive of the meddlesome interloper. If this is the case that parties cannot bind a third party, the innuendo then is that a party ought not to bind a court from exercising its jurisdiction. The paper identified three schools of thought concerning an international commercial agreement in the Law of Carriage of Goods by sea. The paper stressed and emphasized the Ingenuity of the Nigerian Supreme Court in the Case of Sonner Nigeria Ltd. and Anor v Partenreedri M.S. Norwind and Anor.

Keywords*:* Contractual, Ouster, Courts, Jurisdiction, International, Commercial, Agreement

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RESEARCH METHODOLOGY

In this study, reliance was placed on the primary and secondary sources of information. The primary source includes the relevant statutes on the Law of Carriage of Goods by Sea of 1958, the Hague Rule, important common law decisions, and the principle of equity. The secondary source include Journals / Articles and books by eminent authors. Data obtained from these sources were subjected to content analysis.

REVIEW OF LITERATURE

There is a growing trend in International Commercial Arrangements involving foreign parties to insist on a choice of a foreign jurisdiction. With this, forum selected in the agreement becomes the venue for the determination of disputes that arose between the contracting parties. The issue of forum selection is, therefore, at the insistence of foreign counterparts. The rationales for encountering foreign jurisdiction clause in International Commercial arrangement were stated by Azikwe and Onyia as; the fear that the local courts of their contracting parties might not hold their partner bound to their agreement, the prevalent unpredictability and non-efficient nature of the country's legal system on the perceived risk for investment, distrust of the home country legal system of contracting parties; lack of familiarity with the host country's legal system, fear that the local court would favour a counterparty and the fear that the host court might not ensure adjudicative neutrality. The above explains and promoted the foreign jurisdiction clause which has the effect of ousting the jurisdiction of the courts in International Commercial Arrangement.

Keyes[i] in her perspective considered the fact that optional choice of court's agreement, also referred to as permissive selection clauses, rather than non-exclusive clauses have since attracted the attention of legislatures and commentators. This aspect is very crucial for Nigeria's court's position in that the clause is only permissive but not in itself exclusive as reiterated in this paper from case law decisions. The author engaged in a critical analysis of the optional clause and pinpointed that the treatment of the optional choice of courts differs between the legal systems of the countries selected for her study.

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Meanwhile, few authors worked on different schools of thought on this topical issue. More hiatus is the fact that the ingenuity of the Nigerian court has not been given the required attention as per the position of the apex court in on the Interest of Justice School. This paper tends to attend to void areas and the consequent legislative response through the Admiralty Jurisdiction Act (AJA).

INTRODUCTION

It is one of the fundamental principles of the law of contract that parties are bound by their agreement. Once the parties agreed in minds, they are bound by their agreement. This is what in Latin maxim we called *consensus idem*. The rationales for the above principle are as follows:

i. Parties are band by their agreement freely entered into as a result of the overriding principle of freedom of contract.
ii. The law frowned at a situation whereby non-contracting parties would substitute their wish with that of the contracting parties. This is in line with the principle that contracts are private between contracting parties and henceforth there is no room for any meddlesome interloper.
iii. No one has a right to rewrite the terms agreed upon by contracting parties. Allowing that would be to impose the wish of others on the contracting parties.
iv. The court would not re-write the agreement freely entered into by parties to it.

Meanwhile, despite this overreaching principle, there are situations where the court may wade into the terms freely entered into by parties to the agreement, most especially where parties are of unequal bargaining strength, and on just and equitable grounds at common law. Some salient issues were more to the fore in a contractual agreement of this nature

i. The intention of the parties must be clear.
ii. The terms of the agreement must be clear and unambiguous.
iii. There is the presumption that the parties meant what was reasonable in their agreement.
iv. It is not the duty of the court to verify whether the term is reasonable or not.

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v. The court must ascertain and give effect to the terms of the contract freely entered into by the parties.

It is against the above background that this paper addressed issues relating to whether the principle of freedom of parties to enter into contractual terms out of their own volition allows them to oust the jurisdiction of the court in choosing the proper forum in case of disagreement between them, most especially in international commercial agreements bothering in maritime matters[ii].

EMERGING SCHOOLS

It is a prominent feature of international commercial arrangement for parties to agree that in case a dispute arises between them concerning their contract, recourse would be had to a foreign court. This has the effect of ousting the Jurisdiction of other country's court. However, whether the court should consider this arrangement as binding on them has been a subject of controversy and three schools of thought have emerged in this regard viz:

i. The Nullity School

ii. The Absolutely Binding School

iii. The Interest of Justice School.

The Nullity School was of the view that any clause whatever that tend to oust the jurisdiction of the court is a Nullity. The Indomitable Lord Denning M.R. argued this point admirably in Nigeria case of *The Fehmarn*[iii]thus;

> ....But I do say that English Courts are in charge of their own proceedings and one of the rules which they apply is that stipulation that all disputes should be judged by a tribunal of a particular country is not absolutely binding. Stipulation; is a matter to which the court in this country pay much regard and to which they will normally

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> give effect, but it is subject to the overriding principle that no one by his private stipulation can oust our courts of their jurisdiction in a matter that properly belongs to them.

This view of the Master of the Rolls had been judicially approved by some decisions from the Australian Courts. *See Golden Acres Ltd v Collas*[iv] and *Freehold Land Investment Ltd v Queensland Estate Ltd*[v]. All these cases affirm the principle that the foreign law chosen by the parties as the proper law of contract must have some relationship to and must also be connected with the realities of the contract considered as a whole. Thus, a choice of the proper law by the parties according to this school should not be considered by the court as conclusive ouster for their jurisdiction. This position represents the judicial attitude in America.

The second school of thought is "the absolutely binding school". The school was of the view that parties are bound by their agreement. Members of this school bandied about so freely the maxim *'Pacta Sunt Servanda'* which means that contracts are to be kept'. A better and more incisive maxim that better explains their position is *'Pacta Conveta quae neque contra Leges neque dolo malo inita sunt Omni modo observanda sun;* meaning agreements which are neither contrary to the law nor fraudulently entered into should be adhered to in every manner and every detail'. There is no doubt according to them that parties to a contract are allowed within the law to regulate their rights and their liabilities themselves[vi]. According to this school, the courts need not make contracts for the parties. The court must only give effect to the intention of the parties as it is expressed in and by their contract[vii].

The courts in Nigeria have rejected the position of the above schools. Our courts believed that a contract that tends to oust the court of its jurisdiction need not be a nullity and also that a party needs not to be bound by their agreement to determine the proper law of their contract. But for a choice of law by parties to be considered effective, it must be real, genuine, bonafide, legal, and reasonable. This view accord with the test laid down by Brandon J. in the *Eleftheria*[viii] where the Lordship enunciated the following principles:

i. Where a plaintiff sues in breach of an agreement to refer a dispute to a foreign court and the defendants apply for a stay, the court assuming the claim to be otherwise with the jurisdiction is not bound to grant a stay but has a discretion

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whether to do so or not.

ii. The discretion should be exercised by granting a stay unless the strong cause for not doing so is shown

iii. The burden of proving such a strong cause is on the plaintiffs.

iv. In exercising its discretion, the court should take into account all the circumstances of the particular case.

In particular, but without prejudice to (4) above, the following matters, where they arise, may be properly regarded:

i. In what country the evidence on the issue of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the forum court and the foreign courts?

ii. Whether the law of the foreign court applies and, if so, whether it differs from the law of the place where the action is presently brought in any material respect.

iii. With what country is either party connected and how closely?

iv. Whether the defendants genuinely desire trial in a foreign country or only seek procedural advantages.

v. Whether the plaintiffs would be prejudiced by having to sue in the foreign court 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 court where the action is or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

THE INGENUITY OF THE NIGERIAN COURT

The Nigerian Supreme Court displayed her ingenuity in the case of *Sonner (Nig) Ltd. & Anor. Partenreedri m.s. Norwind* & *Anor*[ix]; where the issue before the Supreme Court is: What should be the attitude of the court in Nigeria where there has been a foreign jurisdiction clause inserted in a contract between parties which tends to oust our court from exercising its jurisdiction in a case before them?.

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The Supreme Court took cognizance of the fact that in so far as the law of Bill of lading is concerned, these are contracts of high international standard where the parties are at arm's length. They are arrangements, too sophisticated to import an underdog. They are arrangements about high-class contracts and that is why both parties to this case agree that subject to exceptions, the contracts are to be kept.

THE INGENUITY OF THE NIGERIAN COURT

Meanwhile, the ingenuity of the Nigerian Court revolves around three issues;

i. The rejection of public policy argument for the resolution or the problematic nature of this case.
ii. A perusal of what the interest of justice requires for consideration.
iii. Eliciting the requirements for the success of an application for a stay of proceedings when a party sue in breach of a prior agreement choosing a foreign law as the proper law of the contract. These issues would be considered in turn.

In the case under discourse, the learned counsel for the appellant questioned the contractual intention of the parties in this type of contract and suggested to the court to give accord to public policy in arriving at its decision.

However, the Supreme Court rejected the public policy argument put forward by the learned counsel for the appellant am ESO J.S.C. highlighted the anomalies inherent in using public policy argument as a canopy in the following dictum:

> With-respect, attractive and tempting as the submission in regard to public policy is, it is dangerous for a court to base its decision mainly on public policy which indeed would be another means of according the rules, a procedure which governs a matter. Public policy is equated with the public good. To ask a court to decide only as a result of public policy or public good; goes beyond the measure of liberalism in the application of the law

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> or even viewing a matter from the socio-economic context of the law. Who is to determine what constitutes public policy? To rely on public policy or public good simpliciter is to give room for uncertainty in the law. It is a way to beg the question; while it is for the law to find some point of reference which is more universal than its internal question...[x]

The learned Justice stated further that-

> "for while a judge is expected to remain objective, impartial, experience and full of erudition, these attributes cannot be found in one who seeks total sanctuary for its decision in public policy. It is against public policy to produce uncertainty in the law. This is not to say the question of public policy should be wholly excluded, but it is not to be relied upon wholly to fathom a decision.[xi]

Nnamani J.S.C. (of blessed memory) also made a statement to the same effect:

> this appeal must not turn on the nebulous and dangerous basis of public policy ... such a stance could boomerang. But this is a court which has endeavoured. always to do substantial justice between the parties[xii].

While rejecting public policy argument for the resolution of the problem, the Nigerian Supreme Court pitch its stand by the side of what the interest of justice demands of them. Thus, the courts in this country were of the view that in endeavouring to do substantial justice between the parties, it would be naive to consider that a clause ousting the jurisdiction of the court is

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void and also that it would not be a good law to state that parties were bound by their agreement, but, the court must of necessity endeavour to do justice in the case in a way that would not be prejudicial to either of the parties to the agreement.

Conclusively, therefore, the Nigerian Supreme Court advocates the interest of Justice school. One might ask; what does the requirement of justice require for consideration? The Court was or the view that, seeking to satisfy the requirement of justice requires the consideration of the following:

i. The law regarding a clause ousting the jurisdiction of the court.
ii. Grounds of assuming jurisdiction despite a clause ousting the jurisdiction of the court.
iii. A consideration of the demands of the interest of justice. This involves the exercise of the court's power both judiciously and judicially bearing in mind the right of each party to justice.

The court states the law as per a clause ousting the jurisdiction of the court in the case under consideration thus:

> The court has a discretion which in the ordinary way and in the absence of a strong reason to the contrary will be exercised in favour of holding parties to their bargain.

Analyzing the above statement of the law boils down to saying that:

i. In the absence of a strong reason to the contrary, parties would be held bound to their contract freely entered into;

ii. Where there are sufficient reasons to the contrary that to hold parties to their bargain might subject one of the parties to some jeopardy, it would be justifiable for the court to enter the verdict that the parties should not be bound by their agreement to oust our courts of its jurisdiction.

Suffice it to say, the court has the discretion to decide either way depending on which way would foster the course of justice. As per the grounds of assuming jurisdiction despite a clause ousting the jurisdiction of the court, inherent in the judgment of the court is a pointer to the fact that this involves a consideration of all the circumstance of the case before the court and perhaps the question to ask for guidance include the following.

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i. In what country is the evidence on the issue of fact more readily available?
ii. What is the effect of that on the relative convenience and expense of trial between the domestic and the foreign court?
iii. Which of the countries has the closest and the most intimate connection with the transaction in question?
iv. What is the relevance of the foreign law to the transaction in question? All these questions are within the purview of international law. And it is after the consideration of all these questions that the court should consider whether a choice of the proper law by parties ought to be considered binding to such an extent that by this agreement the jurisdiction vested by the constitution in our court ought to be divested from them.

After the consideration of the above, the court must of necessity determine which course would foster the cause of Justice and the decision of the court should be grounded in a manner that would not prejudice either of the parties. To this extent, therefore, where a party sues in this country in breach of an agreement which tends to oust the jurisdiction of our court and the defendant in such a situation brings an application for a stay of proceedings, the court to consider itself incapable of the exercise of its jurisdiction must be satisfied that:

i. The choice of law is real, genuine, bonafide, legal, and reasonable. And this could only be the case if the foreign court and the foreign law chosen by the parties in their contract bear intimate relationships with the realities of the contract considered as a whole.
ii. No party to the contract will suffer untold hardship by the grant of the stay. This is important to do justice in the case before the court.

The ingenuity displayed by the Nigerian Court could best be seen by going through the sequence of events in the case of *Sonnar (Nig) Ltd & Anor v Partenreedri M.S. Norwind & Anor*[xiii] In this case, the appellant claimed general and special damages against the respondent for breach of contract which had arisen out of non- delivery of 25, 322 bags of parboiled long grain rice which were shipped from Bangkok, Thailand to Lagos. In this case, the bags of rice were to be delivered to the plaintiffs in Lagos on the 25th of November 1978 but they were not so

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delivered as at 22nd of November 1979 when the present suit was filed. Thus remaining only three days to make a year of the breach. Now by Article III, Section 6 of the Carriage of Goods by Sea Law, Cap 29 of 1958 which reproduce the Hague Rules, it is stipulated inter alia that:

> ……..in any event, the carrier and the ship shall be discharged from all liabilities in respect of loss or damage unless suit is brought within one year after delivery of goods or the date when the goods have been delivered

However, both the appellants and the respondent entered into an agreement which is evident by the Bill of Lading: Clause 3 of the Bill provides that: "Any dispute arising under this Bill of Lading shall be decided in the country where the "carrier" has his principal place of business and the law of such country shall apply except as provided elsewhere herein"

This matter, therefore, arose by way of an application made by the first respondent for a stay of action against him on the ground that the cause of action arose out of a contract of carriage of goods which is subject to a foreign jurisdiction (namely German Court) as evidenced by the Bill of Lading signed by both parties to the Agreement. Before the Supreme Court, the issue for determination is: What should be the attitude of the court in Nigeria where there has been a foreign jurisdiction clause inserted in a contract between parties. The Supreme Court as we have seen earlier were of the view that:

i The Nigerian Court was not bound by any clause ousting the jurisdiction constitutionally vested in the court.

ii The court in Nigeria has absolute discretion in this regard.

iii And for the court in Nigeria to consider itself being divested of their jurisdiction to grant a stay, two requirements need to be satisfied:

Firstly, the choice of law by parties must be real, genuine, bonafide, legal, and reasonable. It should not be capricious and absurd. The underlying principle being that the foreign law chosen by the parties as the proper law of the contract must bear some intimate relationship to and must be .connected with the realities of the contract considered as. a whole. 'Relating the

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factual situation in this case to this requirement, the court was of the view that this is not so in this case. Justice Oputa (J.S.C.) found as a fact that:

i. The place of supply of the rice was Bangkok, Thailand;
ii. The place of delivery was to be Lagos, Nigeria, and as such Nigeria can be regarded as the place of performance
iii. The place of issuance of the Bill of Lading was Liberia
iv. The only connection with Germany was that the owners of the ship M.V. Norwind which the Liberia Shipping Company-Barbridge shipping Company-used in transporting the rice from Bangkok were residents in and carried on their business as shipowners in Germany.

Then the learned Justice asked: which of these four countries la, Thailand, Liberia or Germany has the closest and the most connection with the claim for non-delivery now r Nigerian Court? The court found as a fact that the whole transaction from beginning to the end has little or nothing to do with Garmany. He then quarried: Why then invoke German law of the contract? Justice Oputa "choosing Germany Law to govern a contract between a Nigeria Shipper and a Liberian shipowner is to my mind capricious and unreasonable"[xiv] Thus it is very safe to conclude that the reason of the court boils down to the statement that the choice of law is not effective and therefore it is not real, genuine, bonafide, legal nor reasonable.

The second requirement for the court to stay proceedings in a case pending before it is that if the parties in their contract have chosen a foreign law to guide their contract, thereby intending that foreign law should apply, is that the court must be sure that no party to the contract will suffer irredeemable loss by the stay. Thus, the court in this regard ought to exercise its discretion both judiciously and judicially, bearing in mind the right of each party to justice. In the SONNAR's case, the court found as a fact that: the bags of rice were to be delivered to the plaintiff in Lagos on the 25tn of November 1978 and that they were not so delivered. That by Article III, section 6 of the Carriage of Goods by Sea Law Cap 29. of 1958 which reproduces the Hague rule, the plaintiff has only one year within which to validity file their suit. The suit was filed on the 22nd of November 1979, precisely three days before the action become time-barred. The effect of a stay of proceedings will be to force the plaintiff to take out fresh proceedings in a German court where they will certainly be met with a place that their action had been time-barred: thereby depriving the appellant of their right to justice.

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There is no doubt that the plaintiff/Appellant will be prejudiced by a grant to stay, the court reasoned. While refusing to stay proceedings, Justice Oputa reiterated the dictum that:

> A foreign law or a foreign court will not be chosen where the result will be to shut up a Nigerian plaintiff with a plea of the time bar. A stay of proceedings that will produce such a result must be countenanced by our court. The Nigerian courts should regard the time bar as something fundamental enough to make it disregard the selection of foreign law or foreign court. The protection of the interest of a Nigerian plaintiff and the need to give him a fair hearing should, as a matter of public policy, weigh heavily against a stay of proceeding? in any case[xv].

In conclusion, while adopting in its entirety the reasoning of the Legendary Lord Denning in The Fehmarn[xvi] Justice Oputa stated that what should be the attitude of Nigerian court thus:

> As a matter of public policy, our court 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 contracts choose a foreign forum and a foreign law. courts guard rather jealously their jurisdiction and even where there mere is an ouster of that jurisdiction by statute, it should be by clear and unequivocal words. If that is so as 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

> their 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. "Where a domestic forum is asked to stay proceedings because parties in their contract choose a foreign court and a foreign law to apply it should be very clearly understood by our courts that the power to stay proceeding on that score is not mandatory. Rather it is a discretionary power which in the ordinary way, and in the absence of a strong reason to the contrary will be exercised both judicially and judiciously bearing in mind each parties right to justice.

Another case where the Supreme Court of Nigeria navigates the complex terrain of determining whether to enforce a foreign jurisdiction clause in law of carriage of goods by sea otherwise known as Admiralty Matter was in the case of *Nika Fishing Company Ltd v Lavina Corporation*[xvii].

In that case, there was a chartered party agreement wherein a ship named MU Frio Carribic was chartered to transport a consignment of frozen fish from Mardel Plaza in Argentina to be dislodged or discharged in Apapa Lagos. MU Frio Carribic arrived in Lagos on the 28th day of December 1987 and discharged the cargo. The consignment of the frozen fish delayed in taking delivering within the time agreed by the parties as contained in the Bill of Lading. Consequently, the owner of the ship commenced an action against the consignee in the Federal High Court of Lagos, Nigeria, claiming the amount of 119,339 Dollars incurred in demurrage. The Bill of Lading contained a clause ousting the jurisdiction of our court to the following;

> Any dispute arising under this bill of lading shall be decided in the country where the carrier has his principal place of business and Law of such country shall apply except as provided elsewhere herein.

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In response to the suit, the charterer applied to dismiss the suit, want of jurisdiction. The Federal High Court refused the application for a stay of proceedings, likewise court of Appeal. Upon final appeal to the Supreme Court, the Supreme Court set aside the decisions of both courts and ordered a stay of further proceedings in the matter. The Apex Court stated that the court in Nigeria has disciplinary power as to whether or not to give effect or disallow foreign jurisdiction clause and that the jurisdiction must be exercised judicially and judiciously with regard to the circumstances of the case. The Supreme Court considered the fact that there could be no reason for the refusal to stay proceedings since it became fatal to the case that the chartered failed to file any counter-affidavit to the application for the stay.

Meanwhile, with the introduction of the Admiralty jurisdiction Act AJA, exceptions have been introduced by the exercise of discretion by the Nigerian Court per it jurisdiction on agreement ousting the jurisdiction of the court S. 20 of the Admiralty Jurisdiction Acts State as follows;

> *S. 20 Any agreement by any person or party to any cause, the jurisdiction of the Court shall be any admiralty matter falling under this Act and if*
>
> *S. 20 (a) the place of performance, execution, delivery, act*
>
> *on default is or takes place in Nigeria;*
>
> *S. 20 (b) any of the parties resides or resided in Nigeria;*
>
> *or*
>
> *S.20 (c) the payment under the agreement (implied or expressed) is made or is to be made in Nigeria; or*
>
> *S.20 (d) or if any Admiralty action or in the case of a Maritime Lien, the plaintiffs submits to the jurisdiction to the court and makes a declaration to the court to that effect or the rem is within Nigeria jurisdiction; or*

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> S.20 *(e) under any convention, for the time being, in force to reach Nigeria is a party, the national court of a contracting state is either mandated or ask a discretion to assume jurisdiction; or*
>
> S. 20 *(f) in the opinion of the court, the course matter or action should be adjudicated upon in Nigeria.*

With this statutory backing, the Nigerian Courts are not bound by any clause ousting its jurisdiction Law. It should be noted that S. 20 (a-f) is assumed jurisdiction provided that; the first the placed of performance, execution or delivery, act or default of Nigerian or any of the party resides or resided in Nigeria. Here the word resided should not be interpreted to mean taking Nigeria as a place a party domiciled in the past; but it should be interpreted to mean a permanent resident. We also submitted that it should apply to somebody or a person or company resident in Nigeria for the performance of a contractual obligation.

Furthermore, the court jurisdiction against an ouster clause in maritime contractual relations could also be activated where the payment in respect of the agreement is made in Nigeria or to be made in Nigeria, or if any admiralty action in a case of Maritime Lien where the plaintiff submits to jurisdiction is before it, and he made a declaration as per willingness to assume responsibilities for the case; or jurisdiction arising as a result of the convention to which Nigeria is a signatory and in respect of which any of the contracting party is a national of Nigeria. In this respect, the Nigerian Court is mandated conferred with discretionary power to assume jurisdiction dehors the ouster clause. Most importantly, Section 20 (g) in an omnibus clause that gives the court in Nigeria the power to assume jurisdiction if, in the opinion of the court, the cause or matter should be adjudicated upon clothed with the statutory powers, the Nigerian court is not bound by the ouster clause in International Commercial Agreement. Hence, the statute is a legislative response concerning the foreign jurisdiction ouster clause in international contractual relations.

Interestingly, the statutory provisions of the AJA arise for examination in the Nigerian courts. One of these cases examined in this paper is the case of *Lignes Aerienns Congoliases v. Air Atlantic Nigeria Limited*[xviii]. In that case, the parties in the appeal had entered into an aircraft lease agreement which by Article 7 thereof was to be governed by the Congolese Positive Law.

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The parties under Article 8 of the agreement chose residence at their respective head offices for any usual notifications.

The respondent as is a Nigerian Company with its head office at 4B Mobolaji Bank Anthony Way, Ikeja, and Lagos Nigeria. As the plaintiff in the lower court, the respondent claimed inter alia, the sum of U$169,794 (One hundred and Sixty-Nine Thousand, Seven hundred and Ninety-four United States Dollars), being consideration for the lease of Cargo Aircrafts to the defendant/appellant. The civil summons, as well as all other processes in the suit, were addressed and served at the Murtala Mohammed International Airport, Ikeja, Lagos, been the operational office of the appellant. In response to the processes served on it in Lagos, the appellant filed a preliminary objection to the claims by the respondent on the ground that by their lease agreement, the parties had chosen the Congolese law to apply to their relationship and so the lower court lacked jurisdiction to entertain the suit. The preliminary objection was dismissed.

Being dissatisfied with the dismissal of its preliminary objection, the appellant filed a notice of appeal containing three grounds as that 1: The learned trial judge erred in law when he held that the provisions of Articles 7 and 8 of exhibit OL2, as well as other provisions in the same exhibit, brought the agreement (i.e. exhibit OL 2) within the contemplation of the provisions of section 20 of the Admiralty Jurisdiction Act, 1991. Particulars: Exhibit OL2 is titled Aircraft Lease Agreement, Article 7 thereof which titled: Legislation and Jurisdiction provide that the present agreement shall be governed by Congolese Positive Law. Any dispute relating to the execution, the interpretation and/or the termination of the present agreement shall be settled in a friendly way between the parties. If they fail to do so, the dispute shall be referred to arbitration by both Presidents of Kinshasa and Lagos Bars. Article 8: Choice of Resident provides; For any usual notification: the parties have chosen residence at their respective head offices as mentioned in the preamble to the present agreement. In the preamble, the plaintiff/respondent, Air Atlantic Nigeria Limited (AAN) has its Head Office at 4B Mobolaji Bank Anthony Way, Ikeja, Lagos, Nigeria, and the defendant/appellant. Lignes Aeriennes Congolaises (LAC) has its Head Office at 4, Avenue Du Port Kinshasa/Gombe, Democratic Republic of Congo. The agreement was made at Kinshasa, DRC, on April 30th, 1998.

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Ground 2:

The appellant also canvassed that the learned trial judge erred in law when he impliedly held that the *Nordwind case (Sonnar (Nig.) Ltd. & Anor v. Partenreedri M.S. Nordwind & Anor*[xix]. (Supports the plaintiff/respondent's argument, that is to say; that in the protection of the jurisdiction conferred on it by the constitution, the court must discountenance any ouster of that jurisdiction by any contract or agreement. He argued further that particulars of Article 7 of exhibit OL2 provide as follow: "The present agreement shall be governed by Congolese Positive Law". The agreement was entered into at Kinshasa, Democratic Republic of Congo, Ground 3: Based on the above premises, he submitted that the learned trial judge erred in law, when he tacitly ignored an issue made by the defendant's/appellant's counsel about the impropriety of serving the defendants with the court process at their office at Murtala Mohammed International Airport, Ikeja, Lagos. He stressed that by the particulars under Article 8 of their agreement, the parties expressly chose their address for service, each party chose its own Head Office address as shown in the preamble to the agreement, and the plaintiff/respondent ignored this provision and served the defendant/appellant at their office in Lagos. Counsel for the defendant made an issue of this anomaly which he argued the subsequent ruling of the lower court did not refer to it.

Brief of arguments were later filed and exchanged by counsel with appellant's counsel, formulating the following three issues; first, what is the interpretation of section 20 of the Admiralty Jurisdiction Act, 1991 (hereinafter referred to as AJD) concerning the jurisdictional provision of the agreement between the appellant and the respondent? Second, does the Nordwind case support the interpretation given to section 20 AJD by the learned trial judge? And third, was the service of the court process on the appellant at Lagos, not an irregularity which impaired the competence of the summons? On his part, the learned respondent's Counsel said at page 1 of his brief of argument that the only issue that stands out for determination from the 3 grounds of appeal is thus whether the lower court had jurisdiction to determine the case before it". Without much ado. However, the crux of the grievance or complaint of the appellant in the preliminary objection in the court below was that the agreement between it and the respondent is governed by Congolese Law and so that court lacked jurisdiction to entertain the suit filed by the respondent. Essentially, therefore, the complaint was as to the competence of

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the lower court to entertain claims arising out of an agreement governed by the laws of the Democratic Republic of Congo.

The respondent counsel raised an interesting point on demurrer action and the condition precedent in activating it while urging the Court of Appeal to discountenance the submission of appellant's counsel in paragraph 4.4, 5.1 and 5.2 and appellant's brief on the ground that they have no bearing on the issues for determination as formulated by the parties, on the respondents notice It was submitted by learned Counsel that an application brought under Order 27 of the Federal High Court (Civil Procedure) Rules, 1976, is a demurrer application whereby the applicant is asking the court to dismiss the action based on law or that the action cannot be maintained, even if all the facts alleged were admitted by the defendant. He emphasized that the procedure presupposes that the plaintiff had fully set out the facts of his case in a statement of claim. According to the counsel, the endorsements in the writ of summons do not reveal sufficient facts as to what the respondent's claim contains in its entirety. It was further contended that under the procedure, a statement of claim has to be filed before an objection could be brought for examining or giving consideration to any other documents such as the lease agreement in arriving at a decision. He flew the kite that since the respondent had not filed a statement of claim, the preliminary objection by appellant ought to have been dismissed on the ground that same was premature under the procedure provided by Order 27[xx]. On demurrer action, the court reasoned that:

> My firm view is that the step taken by the appellant was not premature or strictly a demurrer proceeding because he did not challenge the claims, but the jurisdiction of the lower court to entertain them. If the respondent had not filed the motion asking for the orders against the appellant but rather had proceeded to pursue the claims in the summons, it may be hard to bring in demurrer proceeding when appellant attempted to have the suit dismissed under Order 27 before the filing of pleadings on grounds other than want of jurisdiction. The filing of that motion entitled the

> appellant to react the way it did to forestall rendering any legal defence it conceived to the respondent's suit, stillborn or worthless.

With due respect, this declaration by the court has been overtaking by the Federal High Court Civil Procedure Rule 2020 which cancelled demurrer proceedings and provides proceedings in lieu of demurrer. It is further submitted that an application of preliminary objection to oust the jurisdiction of the court is a demurrer action. Presently, by statute, an application like the appellant's application would be premature.

i. The Court of Appeal finally held that from the findings, the lower Courts was right in ruling that it processes the requisite statutory jurisdiction to entertain the respondent's suit.
ii. The real intention and combined effect of Articles 7 and 8 of the aircraft lease agreement entered by the parties to this was and remains, to oust the jurisdiction of the lower court in respect of disputes arising from the said agreement.
iii. The decision of the lower court is right that the agreement comes within the contemplation of the provision of section 20 of the Admiralty jurisdiction Decree, 1991, which renders it null and void.
iv. That the crux of the other ground, that the appellant's preliminary objection was premature since the respondent had not filed a statement of claim because the application was brought under Order 27 of the Federal High Court (Civil Procedure) Rules known as demurrer proceedings is not correct
v. Accordingly, the court dismisses the respondent's notice and dismisses the appeal and decides that no merit could be found in the appeal. Garba JCA delivering the lead judgement stated that; *the sum appeal therefore fails and is dismissed. The decision of the lower court is hereby affirmed with the award of the of ₦7,000.00 assessed as costs in favour of the respondent.*

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FINDINGS AND CONCLUSION

Findings revealed that first, there are three schools of thoughts on the attitudes of the courts to the jurisdiction clause, and second, that the courts frown at any agreement that aimed at divesting the courts of its jurisdiction, third, that the courts are jealous of its jurisdiction since it was constitutionally given. In conclusion, the Nigeria Supreme court reaction to the parties' choice of jurisdiction clause is that in Nigeria, the parties' choice of court is not conceived in any absolutist categorical sense as the courts have the discretion to decline to give effect to it. The statement of the law is echoing the school of thought to which Nigerian Supreme Court belongs namely: The interest of Justice School proper" Nigeria can in fact boast of learned judges blessed with the wisdom of Lord Denning that the judiciary needs to be more assertive in the discharge of her duties as the third estate of the realm. It became apparent, that, the Nigerian courts have continuously applied the principles laid down by the Supreme Court in Norwind case as well as the tests in Brandon case.

ENDNOTES

[i] Azikwe U. Onyia, F (2017) "The Growing Trend Of Foreign Jurisdiction Clauses" retrieved on the 10th day of September 2020 from www.uuno.org ; Keyes, M.(2015) Optional Choice of Court Agreements in Private International Law, *Global Studies in Comparative Law* volume 37;
[ii] Supra
[iii] (1958) 1 ALL E.R. 333 at p. 335.
[iv] (1871) ST.R.QD 75.
[v] *(1970) 123 C.L.R. 418.*
[vi] per Earle J. in Gott v Grandy 2 E & B 845 at p 847.
[vii] See Bramwell B. in *Stadhard v Lee* 3 B & S 364 at p 372.
[viii] (1969) vol. 1 Lloyds L.R. 237
[ix] (1987) All N.L.R. p. 548
[x] Supra
[xi] Supra
[xii] Supra
[xiii] (Supra)
[xiv] At p. 575
[xv] Supra
[xvi] (1958) 1 AI E.R. 333 at p 335
[xvii] (2008) 16 NWLR (Pt.1114) p. 509.
[xviii] Federal High Court, Lagos in Suit No. FHC/L/CS/1155/98; (2005) LCN/1794 (C.A)
[xix] (1987) 4 NWLR (Pt. 66) 520; (1987) 1, All N.L.R. 548)
[xx] *The Gold Coast & Ashanti Electric Power Dev. Corp. Ltd. v. A.G. of The Gold Coast (*1937) 4 WACA 217. See *all S.E.S. Ltd. v. Maersk (Nig). Ltd.* (2001) 17 NWLR NWLR (Pt. 719) 572 and *Brawal Shipping (Nig.) Ltd. v. F.I. Onwadike CO. Ltd*. (2001) 9 NWLR (Pt. 678) 387 at 407, were cited as authorities.