

**ENFORCEMENT OF FOREIGN JURISDICTION
CLAUSE IN INTERNATIONAL COMMERCIAL
AGREEMENTS:**

**A REVIEW OF THE DECISION OF THE
COURT OF APPEAL IN TOF ENERGY CO.
LTD. & ORS. V. WORLDPAY LLC & ANOR
(2022) LPELR-57462(CA)**



LAGOS | ABUJA



INTRODUCTION

Parties to a contract are at liberty to determine the terms of their contract and are to be bound by those terms. In circumstances that a dispute arises from such contracts, Nigerian courts have held that their main duty is to interpret and give effect to the terms agreed by the parties. The court is bound to respect the terms of the contract freely agreed by the parties and lacks the powers to add to or subtract from the terms of the contract.¹ Flowing from the liberty of parties to determine the terms of their contract is the issue of foreign jurisdiction clauses to govern any disputes arising under international contracts.

This Litigation update reviews the attitude of Nigerian courts on the issue of contracts with foreign jurisdiction clauses

BACKGROUND

The 1st Respondent and the 2nd Appellant are companies incorporated under the laws of, and carrying on business in, the United States of America (“USA”). In 2018, these companies entered into a Bank Card Merchant Agreement (“BCMA”) as “processor” and “merchant” respectively. Clause 23 of the BCMA provides that ***“This Agreement shall be governed by and construed and enforced in accordance with, the laws of the State of Ohio without regard to conflicts of law provisions. The parties hereby consent and submit to service of process, personal jurisdiction and venue in the State and Federal Courts in Cincinnati Ohio or Hamilton County, Ohio and select such Courts as the exclusive forum with respect to any action or proceeding arising out of or in any way relating to this Agreement and/or pertaining in any way to the relationship between Merchant and Processor.”*** The 3rd Appellant is the Chief Executive Officer of 2nd Appellant as well as a shareholder and director of 1st Appellant, a private limited liability company incorporated and organised under the Laws of the Federal

Republic of Nigeria, which operates two bank accounts domiciled with Polaris Bank Limited, an entity duly licensed by the Central Bank of Nigeria to undertake the business of banking in Nigeria.

The 1st Respondent alleged that it fell victim of “sophisticated wire transfer fraud” perpetrated by the 2nd Appellant through the direction and at the instance of the 3rd Appellant as transactions processed through 2nd Appellant’s account (as ‘merchant’ under the BCMA) were found to be fictitious and that part of the proceeds of fraud were traced from the 2nd Appellant’s account at Standard Chartered Bank, New York, USA to the 1st Appellant’s two bank accounts domiciled with the Polaris Bank in Lagos, Nigeria. The 1st Respondent consequently initiated this suit against the Appellants and Polaris Bank at the High Court of Lagos State claiming declaratory and monetary reliefs including a declaration that the Defendants fraudulently converted the sum of US\$4,920,500 (Four Million, Nine Hundred and Twenty Thousand, Five Hundred United States Dollars) belonging to the Claimant.

The Appellants filed a joint Statement of Defence to the suit as well as a Motion on Notice seeking for an order dismissing or striking out the suit on the ground that the High Court of Lagos State lacked the jurisdiction to entertain the suit as the BCMA stipulates that any dispute arising from the BCMA is to be resolved by the Court of Ohio, USA. The High Court struck out the Motion on Notice and held that the foreign jurisdiction clause contained in Clause 23 of the BCMA cannot oust the jurisdiction of the Nigerian court from resolving any dispute that may arise from the BCMA.

On appeal to the Court of Appeal, one of the issues submitted for the consideration of the Court was whether the High Court of Lagos State was right in holding that the choice of Ohio State Courts, USA as venue for the resolution of disputes as stipulated in Clause 23 of the BCMA cannot oust the jurisdiction of the High Court of

¹ See Lewis V. UBA Plc (2016) 6 NWLR (Pt.1508) 329



Lagos State to entertain the suit. The Appellants argued that by Clause 23 of the BCMA, it is the Court of Ohio, USA (and not the High Court of Lagos State) that has jurisdiction over disputes arising from the BCMA which was neither entered into or expected to be performed in Nigeria, and that the parties to the BCMA do not have their registered offices in Nigeria or carry on business in Nigeria. The Appellant further argued that parties to a contract are bound by the terms of the contract freely entered into and the Court is not at liberty to re-write same for them. In response, the 1st Respondent contended that the jurisdiction of the lower Court was not ousted or impaired by the BCMA; that, in any event, specific reliefs were sought against the 1st and 3rd Appellants as well as the 2nd Respondent which are not parties to the BCMA and cannot be bound by its terms and conditions; and that the funds, subject matter of the suit, are within the territory of the High Court of Lagos State, which is the proper forum for the resolution of all issues in controversy between all the parties. The Court of Appeal upheld the 1st Respondent's argument and dismissed the Appellants' case.

BASIS OF THE COURT'S DECISION

In deciding whether the High Court of Lagos is vested with the jurisdiction to determine the suit notwithstanding the choice of the Courts of Ohio, USA as the preferred forum for the resolution of any dispute that may arise from the BCMA, the Court of Appeal stated that parties generally have the freedom of contract and are bound by the terms of their agreement and that it is not the preoccupation of the Court to make a contract for the parties or rewrite the one they have made. The Court of Appeal relied on the decision of Supreme Court in the case of ***Sonnar (Nig) Ltd V. Partenreedri M. S. Nordwind (Owners of the N. V. Norwind***². In arriving at its decision, the Court stated that the lower court is not bound to enforce a foreign jurisdiction clause but has a discretion as to whether to enforce the clause depending on the facts and circumstances of each case. The appellate court went on to state that such foreign jurisdiction clauses in commercial contracts are not conclusive and that where proceedings are commenced in breach of an agreement to refer dispute to a foreign court, the Nigerian Courts are not bound to stay its proceedings on account of the foreign jurisdiction clause but will exercise

² [1987] 4 NWLR (Pt 66) 520



its discretion in the matter. In exercising its discretion, the court is to consider on the following principles:

1. ***“Where the Claimant sues in Nigeria in breach of an agreement to refer disputes to a foreign Court, and the Defendants apply for a stay of the proceedings of the Nigerian Court, the Nigerian Court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant the stay of its proceedings but has a discretion whether to do so or not.***
2. ***The discretion should be exercised by granting a stay of proceedings unless strong cause for not doing so is shown.***
3. ***The burden of proving such strong cause is on the Claimant.***
4. ***In exercising its discretion, the Court should take into account 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 Claimant 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 Nigeria; or***
 - (iv) ***for political, racial, religious or other reasons be unlikely to get a fair trial.”***

The Court of Appeal, after applying the above principles, held that the High Court of Lagos State rightly assumed jurisdiction in this case as the alleged fraudulently converted funds has been traced to bank accounts in Lagos, Nigeria and that the 1st and 3rd Appellants as well as the 2nd Respondents who are not parties to the BCMA cannot be bound by the foreign jurisdiction clause contained in the BCMA based on the principle of privity of contract. The Court further held that by filing their Statement of Defence, the Appellant submitted to the jurisdiction of the High Court of Lagos State and cannot challenge the jurisdiction of the court to proceed with the hearing of the suit.

COMMENTARY

Under Nigerian law, a foreign jurisdiction clause in a contract does not in itself oust the jurisdiction of the Nigerian court over matters that are ordinarily within the court’s jurisdiction. Whether a foreign jurisdiction clause should be enforced is, fundamentally, a question for the

Nigerian court's discretion, and the exercise of the discretion is guided by clearly-defined principles

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