

## A Review of Judicial and Legislative Approach of Nigeria to Discretionary Jurisdiction over Foreign Causes.<sup>1</sup>

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The writ rule, which applies in Nigeria by virtue of the injunctions on courts to exercise concurrent jurisdiction with English courts,<sup>2</sup> permits suits to be maintained against persons who have no other connection with the Nigerian forum apart from their transient presence here. This makes it easy for a vindictive plaintiff to seek justice mixed with embarrassment against a helpless defendant. The fact that this rule does not require even the plaintiff to be domiciled or resident at the forum makes it possible for a total stranger to take advantage of this rule to commence action at the Nigerian forum, which to the detriment of the defendant, offers him undue advantage.<sup>3</sup> Discretionary jurisdiction by which a defendant applies for a stay of proceeding to terminate an action which was otherwise properly commenced before a court is the solution proffered at common law to mitigate these difficulties. An application for stay demands the exercise by the court of discretion to decline an otherwise mandatory jurisdiction or to put a stop to an action in respect of which the court had originally assumed jurisdiction. An otherwise mandatory jurisdiction may be declined at common law on any of the following three (3) grounds:

1. On the ground of a successful plea of *forum non-conveniens*.
2. On the ground of a contractual ouster of court jurisdiction.
3. Upon a successful plea of *lis alibi pendens*.

A proper review of Nigeria judicial and state practice cannot in our opinion be done without analyzing the recent decisions of Nigerian apex courts touching on discretionary jurisdiction in the light of global trend, the common law which is the undisputed forebear of the Nigerian law in these areas and relevant Nigeria statutes.

There have been relatively few cases decided in Nigeria on the entire subject areas of assumed and discretionary jurisdiction<sup>4</sup>. This paper has set for itself the task of reviewing these decisions and offering suggestions where necessary on the proper or correct approach. In charting a course for the future, the paper also discusses the 2005 Hague Convention on Choice of Court Agreements, which is recommended for accession by Nigeria

### 1. *Forum Non Conveniens*

Hitherto, the English courts were reluctant to accept *forum non conveniens* as a doctrine. Rather, they only considered factors of convenience relevant in deciding whether or not to order service abroad of writ or in the context of granting or refusing a plea of *lis alibi pendens* or a prayer for declining jurisdiction on the ground that same has been excluded by parties' agreement<sup>5</sup>. The position has since changed. The current approach of the English courts in cases not falling under the jurisdiction or authority of the European Union was authoritatively stated by the House of Lords in the 1987 decision of *Spiliada Maritime Corpn. v. Cansulex Ltd.*<sup>6</sup>

Morris summary of the practice of the English courts in the post *Spiliada* era<sup>7</sup> is adapted in the immediate succeeding paragraphs of this paper

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<sup>2</sup> See for example, Section 10, High Court Law, Lagos State

<sup>3</sup> This is known as forum shopping. The advantage may be convenience, such as a faster and less cumbersome procedure; it could be the possibility of tilting the scale of justice in plaintiff's favour such as under the U.S TVPA and ATCA where a wrongful act is dammed not in the light of the *lex loci delicti* but in the light of norms of the "law of nations"

<sup>4</sup> See *Barsoum v Clemessy International* [1999] 12 NWLR (Pt. 632) 516, *Herb & 2 Ors v Devimco*, [2001] 52 WRN 19 (assumed jurisdiction and *forum conveniens*) *Sonnar Ltd & Anor v Partenree Nordwind* 1987 NWLR (Pt. 66) 520, *Nika v Lavinia* [2002] 8 W.R.N 95.C.A; (2008) 10 CLRN 1 S.C (contractual ouster and *forum conveniens*)

<sup>5</sup> See the decision of the House of Lords in the *Atlantic Star* (1973) 2 WLR, 795. to the effect that the plea is only known to Scottish law

<sup>6</sup> [1987] A.C 460; [1986] 3 W.L.R 972; [1986] 3 all E.R 843.

<sup>7</sup> David McClean and Kisch Beevers *The Conflict of Laws* 6<sup>th</sup> Ed. London Sweet & Maxwell, 2005, Pp 122-123. Hereinafter 'Morris'

First, a stay on ground of *forum non conveniens* will only be granted where the court is satisfied that there is another available forum having competent jurisdiction to try the cause of action more suitably and for the interest of all the parties and ends of justice. In other words the defendant must show that another forum was available where the claimant will begin the proceedings as of right either because the case falls within the jurisdiction regularly exercised by the courts of that country or as a result of a jurisdiction selection clause. The cases have however held that it is not sufficient that an action could be brought in the named country on the basis of an undertaking proffered by the defendant to submit to its jurisdiction.<sup>8</sup>

Second, the burden of proof is on the defendant to show not only that England is not the natural or appropriate forum but also that there is another available forum which is clearly or distinctively more appropriate. This contrasts with the question usually asked where *forum conveniens* arises in the context of other bases of discretionary jurisdiction. The question in those circumstances is whether England is clearly inappropriate and not whether it is so in the light of an alternative forum. This means that the English courts were formerly concerned with elements of vexation or oppression.<sup>9</sup>

Third, in deciding whether there is another forum clearly more appropriate, the court will seek to identify the natural forum, that is, the forum which upon the proper identification of localization factors is that which has the most real and substantial connection with the case.<sup>10</sup>

For this purpose the court will examine not only factors affecting convenience or expense but also such matter as the law governing the transaction and places where the parties reside or carry out business. Every case must then turn on its own facts. In the case of *MacShannon v Rockware Glass Ltd*,<sup>11</sup> M was a Scotsman resident in Scotland. He was injured in an accident at work in a factory in Scotland owned by his employers, a company registered in England. On the advice of the English solicitors to his London-based trade union, he brought his action in England and not in Scotland, because his solicitor believed that he would get higher damages in England and that proceedings in Scotland would take longer to come to trial. But when it was shown that medical and other expert witnesses were equally available in Scotland, and that the expense of trial in England would be appreciably greater than those of a trial in Scotland, the House of Lords unanimously ordered the English action to be stayed.

This new approach is identical to that of the U.S courts in such cases as *Piper Aircraft Co. v. Reyno*<sup>12</sup> and *Iragorri v. United Techs. Corp*<sup>13</sup>, where the U.S courts have been prepared to uphold the plea once it was shown that the plaintiff sought U.S jurisdiction because it offers him advantage in terms of the substantive law to be applied in resolving the dispute.

Fourth, if there is another forum which prima facie is clearly more appropriate, the court would ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should not be granted. The burden of establishing that, shifts to the claimant.

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<sup>8</sup> Lubbe v. Cape Plc [1999] I.L.Pr. 113 (claim arising out of operations of defendant's subsidiaries in South Africa; defendant company itself not amenable to South Africa jurisdiction in absence of undertakings; stay of English action refused). David McClean and Kisch Beevers *The Conflict of Laws* 6<sup>th</sup> Ed. London Sweet & Maxwell, 2005, P. 121

<sup>9</sup> According to Morris, this is the approach adopted in Australia as can be gathered from such decisions as *Voth v. Manildra Flour Mills Pty. Ltd* (1991) 171 C.L.R. 538; *Regie Nationale des Usines Renault SA v. Zhang* [2002] HCA 10; (2003) 210 C.L.R. 491. Some American decisions arrive at a similar result by stressing the "defence" to be given to the claimant's choice of forum, especially if it is the claimant's "home forum".

<sup>10</sup> See Per Lord Keith in *The Abidin Daver* [1984] A.C. 398 at 415. His Lordship defined natural forum as "that with which the action has the most real and substantial connection. The court would examine not only factor affecting convenience or expense, which should not be fundamentally different from those highlighted by the U.S courts in the trio of *Gilbert*"

<sup>11</sup> (1978) A.C. 795. Reported by Morris Id at 121

<sup>12</sup> 454 US 235 (1981) (clarifying the doctrine and providing clear guide on the relevance of the substantive law of the forum and the alternative forum; the degree of deference to be given to resident as opposed to non-resident plaintiffs choice of the forum for litigation and the importance of keeping the doctrine flexible by weighing all the factors equally. See Helen.B. Mardirosian, *LOYOLA OF LOS ANGELIS LAW REVIEW*, (2005) Vol.37:1643

<sup>13</sup> 274 F.3d 65, 73-74 (2d Cir. 2001)

In the case of *The Jalakrishna*,<sup>14</sup> the plaintiff was able to discharge that burden by showing that a trial in India, the clearly more appropriate forum will result in an anticipated delay of 5 years which would greatly prejudice the claimant grievously mutilated in an accident and in urgent need of financial help. In the case of *Connely v. R.T.Z Corp. Plc*,<sup>15</sup> the plaintiff also discharged the burden by establishing that in Namibia the otherwise natural forum, the plaintiff will not enjoy legal aid to litigate his action.

The majority in the House of Lords led by Lord Goff, reasoned that ordinarily, absence of legal aid is not decisive since many countries cannot afford a system of legal aid and it was a relatively recent development even in England. However, the reality in the instant case is that the plaintiff will not be able in the absence of legal aid to litigate his case in the alternative forum. For this reason the majority refused stay<sup>16</sup>

In his dissenting opinion, Lord Hoffman, influenced by considerations that appear more like those categorized as public interest factors by the U.S court in the case of *Gulf Oil Company v. Gilbert*<sup>17</sup> opined that the effect of the majority decision is that the action of a rich man would be stayed while the action of a poor claimant on the same facts would not: the more speculative and difficult the more likely it would be to proceed in England with the support of public funds. In his words, “/s/uch distinctions will do the law no credit”<sup>18</sup>

Again, the English court in *Mohammed v Bank of Kuwait*<sup>19</sup> where the plaintiff, an Iraqi citizen sued in England to claim arrears of his salary for the period of Iraqi invasion, accepted the plaintiff’s excuse for suing in England instead of the natural forum, that there is or will be racial or political discrimination against him in Kuwait-the natural forum of action. But in *Askin v. Absa Bank Ltd*<sup>20</sup> the English Court of Appeal refused a stay despite allegations that the defendant bank was mounting a hate campaign in South Africa, the natural forum and that this include threat of assassination.

These seeming contradictions led Morris to say that the awkward truth is that distinctions do have to be drawn.<sup>21</sup> Truly, both the U.S and English courts have developed the doctrine in such a way that precedent cannot be relied upon as each case must turn upon its facts. Whether in the U.S or in England an application for stay on the *forum non conveniens* plea involves intense consideration of private and public interest factors and it is difficult to find two cases throwing up the same set of private and public interest factors. Never-the-less the principle or approach of both courts are identical and can be followed to decide justly whether or not to reject a plea of *forum non conveniens* in each case.

Finally, the English courts just like the U.S courts, have held that the mere fact that the claimant has a legitimate personal or juridical advantage in proceeding in England cannot be decisive.<sup>22</sup> In *Re Harrods (Buenos Aires) Ltd (No.2)*<sup>23</sup> a stay was granted despite the fact that the particular remedies sought by the claimants, minority shareholders in the company, were not available in Argentina, the natural forum.

Nigerian courts have applied *forum conveniens* largely in the context of an application for stay in respect of an action commenced in Nigeria upon service of claim form or other originating process outside Nigeria<sup>24</sup> or an action commenced in breach of an exclusive jurisdiction clause selecting a forum other than Nigeria.<sup>25</sup>

<sup>14</sup> [1983] 2 Lloyd’s Report, 628

<sup>15</sup> [1998] A.C. 854

<sup>16</sup> Id at Pp.873-874

<sup>17</sup> 330 US 501 (1947)

<sup>18</sup> Id at P.876.

<sup>19</sup> (1996) 1 W.L.R 1483

<sup>20</sup> [1999] I.L.Pr.471

<sup>21</sup> Morris, Id at P.123

<sup>22</sup> See Per Lord Goff in *Connely v RTZ Corp. Plc* (1998) A.C. 854,872:

If a clearly more appropriate forum overseas had been identified, generally speaking the plaintiff will have to take that forum as he finds it, even if it is in certain respects less advantageous to him than the English forum. He may, for example, have to accept lower damages, or do without the more generous English system of discovery. The same must apply to the system of court procedure, including the rules of evidence applicable in the foreign forum

<sup>23</sup> (1992) Ch.72 Cf. Piper

<sup>24</sup> See *Barsoum v Clemessy International* [1999] 12 NWLR (Pt. 632) 516, *Herb & 2 Ors v Devimco*, [2001] 52 WRN 19

<sup>25</sup> See *Sonnar Ltd & Anor v Partenree Nordwind* 1987 NWLR (Pt. 66) 520, *Nika v Lavinia* [2002] 8 W.R.N 95.C.A; (2008) 10 CLRN 1S.C; (2008) 16 NWLR (Pt.1114) 509.

In *Barsoum v Clemessy International*,<sup>26</sup> the plea became an issue when the Lagos High Court was requested to order a stay of an action commenced by service out of Nigeria of the writ of the Lagos High Court. The Court of Appeal had held that the foreign court is the *forum conveniens* because the foreign law is the proper law of the contract which is sought to be enforced before the Lagos High Court. The Court of Appeal also reasoned that evidence would be more readily available at the foreign court.

*Forum non conveniens* consideration also cropped up in the case of *Herb v. Devimco*.<sup>27</sup> The Court of Appeal in refusing to grant a stay held that Nigeria was the *forum conveniens* as the action was for inducement of the breach of a contract that was made in Nigeria and the breach also occurred in Nigeria.

Again in *Sonnar Ltd & Anor v. Partenre Nordwind*,<sup>28</sup> the ultimate decision of the Supreme Court permitting the Lagos High Court to assume jurisdiction despite the choice of a different forum by the parties agreement had turned upon its consideration of several factors of convenience including the presence of the witnesses to be called in Nigeria, the fact that the action is statute barred in the selected forum and the fact that the selected court may for some other reasons decline jurisdiction.<sup>29</sup>

In the case of *Nika v Lavina*,<sup>30</sup> the Supreme Court adopted the Brandon test formulated in the case of *Eleftheria*,<sup>31</sup> paragraph 4 and 5 of which essentially enjoin the court's discretion to be exercised on bases of such convenience factors as the forum where evidence of the issues in fact is situated, the proper law, the connection of either party with the competing forums, whether the defendant is merely seeking procedural advantages, possibilities of prejudice to the plaintiff by such possibilities as his being deprived of security for the claim or being unable to enforce any judgment obtained, or being faced with a time bar not applicable in England or being unable for political racial religious or other reasons to get a fair trial.<sup>32</sup>

As stated earlier, the burden is on the plaintiff, in cases where *forum conveniens* becomes relevant only in the context of other grounds for stay, to establish that the forum of action is clearly the more appropriate forum. But where the jurisdiction is formed as of right, and none of the other grounds for stay except the plea of *forum non conveniens* itself is invoked, the burden lies on the defendant not only to show that there is an alternative forum but also that the alternative forum is the clearly more appropriate forum.

The Nigeria apex courts are yet to decide any case of discretionary jurisdiction exclusively on the basis of the plea of *forum non conveniens*. The only case which would have given the court that golden opportunity is the case of *Resolution Trust Corporation v. F.O.B Investment and Properties Ltd & Anor*.<sup>33</sup> The Court of Appeal however resolved that case partly on the basis of the venue rule of the civil procedure rules and- though not very clear-the alleged basis or condition for exercise of personal jurisdiction.

The facts of the case are briefly as follows:

*The 1<sup>st</sup> Respondent, that is, F.O.B Investment and Properties Ltd had instituted action in the Lagos High Court against the Appellant a U.S company appointed by the U.S Government as a receiver of a failed saving bank into which shares the 2<sup>nd</sup> Respondent had just one year before the savings bank failure procured the 1<sup>st</sup> Respondent by a contract made in Nigeria to subscribe. The 1<sup>st</sup> Respondent in its statement of claim at the High Court had contended that the Appellant as the receiver of the failed savings bank was under obligation to protect its right under the contract which the 2<sup>nd</sup> Respondent on behalf of the failed savings bank had entered into with the 1<sup>st</sup> Respondent especially after the Appellant had entered into an arrangement with a new Central Federal Savings Bank for the latter bank to assume the liabilities of the failed savings bank.*

<sup>26</sup> [1999] 12 NWLR (Pt. 632) 516

<sup>27</sup> [2001] 52 WRN 19

<sup>28</sup> 1987 NWLR (Pt. 66) 520

<sup>29</sup> See discussion infra. See also Agbede Id at Page 277.

<sup>30</sup> [2002] 8 W.R.N 95.C.A.; (2008) 10 CLRN 1S.C; (2008) 16 NWLR (Pt.1114) 509.

<sup>31</sup> (1969) 1 Lloyds L.R, 237

<sup>32</sup> See also *Adesanya v Palm Line* (1967) 2 NSC 118; (No remedy in the selected forum), *Laura Ubani v Jeco Shipping Lines & Anor.* (1989) 3 NSC 500; (Action statute barred in selected forum), *Inlaks Limited vs. Polish Ocean Lines* (1989) 3 NSC 588;(Action statute barred in selected forum and witnesses and evidence in Nigeria).

<sup>33</sup> (2001) 6 NWLR (Pt.708) 246

In the High Court, the Appellant preliminary objection against jurisdiction was refused *inter alia* because the court was of the view that at Private International Law and in the light of Section 10 of the High Court Law of Lagos which conferred concurrent jurisdiction on the High Court as it is exercised by the High Courts of England, the Court could exercise jurisdiction over the Appellant and the 2<sup>nd</sup> Respondent notwithstanding their residence and carrying on of business in the U.S. In overruling the High Court, the Court of Appeal *inter alia* held, relying on local venue rules, that under the relevant Civil Procedure Rules of the High Court of Lagos, action could only be instituted at the judicial division where the contract was made, or the defendant resides or the defendant carries on business.<sup>34</sup> The Court also held that jurisdiction when used in the sense of proper venue signifies the limit of territorial jurisdiction of a court and that in making a choice of forum convenient for trial, the court has to avert to the principle of effectiveness and submission in assuming jurisdiction.<sup>35</sup>

Although it is difficult to understand exactly what the lead judgment of the Court of Appeal said was wrong with the reasoning of the lower court that the ordinary fact that the Appellant and the 2<sup>nd</sup> Respondent are U.S residents and or companies did not deprive it of mandatory jurisdiction at common law<sup>36</sup>, it is very clear that the Court of Appeal decision in so far as it relies on local venue rules to decide whether or not to exercise jurisdiction in a private international law matter only fell into a common error of the Nigerian apex courts to determine jurisdiction in private international law by reference to a local rule of venue.<sup>37</sup> It is clear that both the High Court and the Court of Appeal failed to appreciate that the only issue before them was not that of mandatory jurisdiction which the Lagos High Court was very correct in holding that it possessed<sup>38</sup> but whether in the circumstances the case was one that could be stayed on the ground of the plea of *forum non conveniens*<sup>39</sup>. The same factors which the Court Of Appeal had relied upon<sup>40</sup> in holding that the Lagos High Court did not have personal jurisdiction could have been relied upon to hold (1) that the U.S is an alternative forum for litigating the matter and (2) that the U.S is clearly the more appropriate venue upon consideration of all factors of convenience; and therefore to grant stay on the basis of *forum non conveniens*<sup>41</sup>.

<sup>34</sup> Id at P. 262-263 Paras H-C

<sup>35</sup> Id at P. 262 Paras F-G. But the principle of effectiveness and comity as understood by English courts merely require that the defendant should be served with the writ in England in an in personam action such as this or that he should submit voluntarily to the court's jurisdiction. It does not imply that action must be instituted at the locus actum as suggested by this decision.

<sup>36</sup> See Id at P. 260-261 Paras C-H, A-B.

<sup>37</sup> See for example, Kraus Thompson Org. Ltd. V. Unical (2004) 9 NWLR (Pt.879) 631 where the Court of Appeal said:

“ In order to determine the venue in which an action can be brought against a University in respect of a contract , consideration must be given to where the contract was made, or was performed or to be performed or where the University resides”. The Court ruled that the University of Calabar could not be sued in Lagos in respect of a contract not concluded in Lagos, applying the rules of venue contained in Order 2 of the High Court of Lagos Civil Procedure Rules instead of the Sherriff and Civil Process Act. See also FBN PLC v, Tsokwa (2004) 5 NWLR (Pt.866) 271 at P.302-303.

The correct position was however succinctly put by the same Court of Appeal in respect of inter-state dimension of Conflict in Ogunsola v. A.P.P (2003) 9 NWLR (Pt.826) 462 at P.480, thus:

“Where the dispute as to venue is not between one division or another of the High Court of a State or between one division or the other of the High Court of the Federal Capital Territory, Abuja, but as between the High Court of one State and the High Court of another State of the Federation of Nigeria, or between the High Court of one State in the Federation and the High Court of the Federal Capital Territory, Abuja, as in the present case, then the issue of the appropriate or more convenient forum is one to be determined under the rules of private international law formulated by courts within the Federation. Therefore, Order 10 of the High Court of the Federal Capital Territory, Abuja, (Civil Procedure) Rules, 1990 which helps to determine which of the judicial divisions or districts of the High Court of the Federal Capital Territory, Abuja is the proper venue to try a case which the High Court of the FCT, Abuja is vested with jurisdiction to try, is not relevant to the instant case.”

<sup>38</sup> It is safe to assume so because the Law Report was silent on how the writ of the Lagos Court was served. If the writ of the Lagos Court was served outside Nigeria on the U.S defendants the correct basis for challenging the proceeding is to pray for a stay on the ground that the court improperly exercised its discretion in granting leave to serve outside Nigeria as was done in Barsoum and Herb cases, discussed in part 1 of this chapter.

<sup>39</sup> Counsels did not also help the court as they premised their arguments and counter arguments on municipal law ignoring the main private international law issue that has arisen for consideration. Appellant counsel should simply have applied for a stay instead of filing preliminary objection.

<sup>40</sup> At P.263 of the Report

<sup>41</sup> The factors on which basis the court said “there can be no difficulty whatsoever in acknowledging and indeed concluding that the proper forum for trial of the instant matter is in the United States...” are

## 2. Contractual Ouster Of Jurisdiction

### i. Anglo-Nigerian judicial approach

It is usual for international agreements to contain a jurisdiction selection clause by which the parties to the agreement select the forum for litigating dispute that may arise from their agreement. Such a clause may or may not be exclusive<sup>42</sup>.

An exclusive forum jurisdiction selection clause provides that only the court of the selected forum could entertain disputes arising from the parties' agreement. Where however the clause does not exclude the possibility of the parties litigating their dispute at some other forum, such a clause is not regarded as an exclusive jurisdiction selection clause and bears no consequence on the forum selected by a party to litigate dispute arising from the agreement.

An exclusive forum or jurisdiction selection clause has the effect of ousting the jurisdiction of any other court other than the selected court. At common law, it is the rule that private parties cannot by their own stipulation oust the jurisdiction of a court. Consequently, common law courts do not ordinarily regard themselves bound by a foreign jurisdiction selection clause. This position has been adopted by the courts in England<sup>43</sup> and Nigeria<sup>44</sup>.

The full implication of this is that the common law courts simply disregard the mandatory nature of the parties' choice and apply *forum non conveniens* considerations in deciding whether or not to order a stay. In **The Eleftheria**, Lord Brandon formulated the guiding principles in deciding whether or not to order stay in deference to an exclusive foreign jurisdiction clause as follows:

- I. Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has the discretion whether to do so or not.
- II The discretion should be exercised by granting a stay unless strong cause for not doing it is shown.
- III The burden of proving such strong cause is on the plaintiffs.
- IV In exercising its discretion the Court should take into account all the circumstances of the particular case.
- V In particular, but without prejudice to (IV), 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 English and foreign courts.
  - (b) Whether the law of the foreign court applies and, if so, whether it differs from English 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.

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(1) All the defendants are domiciled in the United State of America.

(2) The business of the 2<sup>nd</sup> defendant/appellant is carried on in the U.S and has no connection to Nigeria or presence in Nigeria.

(3) The Central Saving Bank was located in the State of New York. It had no branches, operations or contacts with Nigeria.

(4) The investment which the plaintiff alleged it would make was in the U.S.

(5) The alleged breach for which plaintiff is suing occurred in the U.S

(6) The law governing the affairs of the parties is the Financial Institutions Reform Recovery and Enforcement Act 1989 (FIRREA), a statute of the United States congress.

(7) The documents necessary to resolve the dispute are located in the United States.

<sup>42</sup> A typical exclusive jurisdiction clause is that usually inserted in bills of lading thus: "Any dispute arising under this Bill of Lading shall be decided in the country where the "carrier" has his principal place of business...". An example of a non exclusive jurisdiction clause is a clause which merely permits an action to be instituted in a forum which would not have been the natural forum or the forum conveniens. The validity of a jurisdiction selection clause as well as its interpretation especially so as to determine whether it is exclusive or otherwise is a matter for the proper law of the contract. See *British Aerospace Plc v Dee Howard Co.* [1993] Lloyd's Rep.368; *Sobio Supply co v Gasoil (USA) Inc* [1989] 1 Lloyd's Rep.588.

<sup>43</sup> See *The Eleftheria* (1970) P. 94; *The Fehmarn* (1958) All E.R 333 @ 335

<sup>44</sup> See *Adesanya v Palm Line* (1967) 2 NSC 118; *Sonnar Ltd & Anor v Partenree Nordwind* 1987 NWLR (Pt. 66) 520, *Laura Ubani v Jeco Shipping Lines & Anor.* (1989) 3 NSC 500; *Inlaks Limited vs. Polish Ocean Lines* (1989) 3 NSC 588; *Nika v Lavina* [2002] 8 W.R.N 95.C.A; (2008) 10 CLRN 1S.C; (2008) 16 NWLR (Pt.1114) 509.

- (e) 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 England;
  - (iv) for political, racial, religious or other reasons be unlikely to get a fair trial<sup>45</sup>.

These principles have been followed religiously by Nigerian courts<sup>46</sup>.

In contrast, the U.S courts do not plainly disregard the exclusive jurisdiction clause. The old U.S authorities on the subject are the duo of *The Bremen v. Zapata Off-Shore Co.*<sup>47</sup> and *Bonny v. Society of Lloyds*.<sup>48</sup> In *Bremen*, the parties chose London as their forum. This choice was reasonable, both in terms of the certainty it brought to the international transaction and the forum's ability to handle the litigation with neutrality and expertise.<sup>49</sup> *Zapata* contested the London forum as inconvenient, but, as *Zapata* had agreed to the clause, any inconvenience that would result from litigating in the "contractual forum ... was clearly foreseeable at the time of contracting."<sup>50</sup> To "escape" litigation in the contractual forum, parties who freely contracted for the forum must show that litigation in that forum "will be so gravely difficult and inconvenient that [the parties] will for all practical purposes be deprived of [their] day in court."<sup>51</sup> Otherwise, holding parties to their bargain would not be "unfair, unjust, or unreasonable."<sup>52</sup>

The *Bonny* case was later to recognize some exceptions to the rule formulated in the *Bremen's* case otherwise known as the *Bonny* factors. These exceptions hold that the forum selection clause is valid and enforceable unless the party opposing the enforcement of the clause shows any of the following:

- (1) That the clause is included in the contract as a "result of fraud, undue influence, or overwhelming bargaining power."<sup>53</sup>
- (2) That the "selected forum is so gravely difficult and inconvenient that [the complaining party] will for all practical purposes be deprived of its day in court."<sup>54</sup>
- (3) That the clause is contrary to a "strong [statutory or judicially declared] public policy of the forum in which the suit is brought."<sup>55</sup>

Conflicting decisions of the 7<sup>th</sup> and 2<sup>nd</sup> Circuits have interpreted the presence of the mandatory forum selection clause to mean different things in the context of the forum non conveniens analysis. In the case of *A.A.R Inter, Inc. v. Nimelias Ent. S.A*<sup>56</sup> the 7<sup>th</sup> Circuit held that the two prong *forum non conveniens* analysis does not apply where the parties contracted for a mandatory forum. A party who agrees to a "mandatory forum selection agreement" waives all objections to the chosen forum based on convenience or cost.<sup>57</sup>

<sup>45</sup> See also per Lord Bingham in *Donohue v Armco Inc* [2001] UKHL 64; [2002] 1 ALL E.R 749:

If contracting parties agreed to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum.

<sup>46</sup> See *The Fehmarn* (1958) All E.R 333 @ 335; *Adesanya v Palm Line* (1967) 2 NSC 118; *Sonnar Ltd & Anor v Partenree Nordwind* 1987 NWLR (Pt. 66) 520, *Laura Ubani v Jeco Shipping Lines & Anor.* (1989) 3 NSC 500; *Inlaks Limited vs. Polish Ocean Lines* (1989) 3 NSC 588; *Nika v Lavina* [2002] 8 W.R.N 95.C.A.; (2008) 10 CLRN 1S.C.; (2008) 16 NWLR (Pt.1114) 509.

<sup>47</sup> 407 U.S 1 (1972)

<sup>48</sup> 3. F. 3d 156 (7<sup>th</sup> Cir. 1993)

<sup>49</sup> *The Bremen v. Zapata Off-Shore Co.*, 407 U.S 1, 18 (1972)

<sup>50</sup> *Id.* at 17-18

<sup>51</sup> *Id.* at 18

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 525 (quoting *Bonny*, 3 F.3d at 160)

<sup>54</sup> *Id.* (alteration in original) (quoting *Bonny*, 3 F.3d at 160)

<sup>55</sup> *Id.* (quoting *Bonny*, 3 F. 3d at 160)

<sup>56</sup> 250 F.3d. at 525-526

<sup>57</sup> *Id.* at 526 (citing *Northwestern Nat'l. Ins. Co. v. Donovan*, 916 F.2d 372, 375, 378 (7<sup>th</sup> Cir. 1990)

Rather, the initial determination the court must make is whether the forum selection clause is enforceable under the criteria set forth by the United States Supreme Court in *Bremen*.<sup>58</sup> The forum selection clause does not “oust” the reviewing court’s jurisdiction to determine if the clause is enforceable, but “absent a strong showing” that enforcing the clause would be “unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching,” the contractual forum will control.<sup>59</sup>

However, the Second Circuit in *Evolutions Online Systems, Inc. v. Koninklijke PTT Nederland N.V.*<sup>60</sup> was “persuaded” that the clause “eliminates” the defendant’s burden to show that the convenience factors weigh strongly in favour of litigation in the alternate forum.<sup>61</sup> The removal of such a burden translates into a “level playing field,”<sup>62</sup> and the court no longer presumes that the plaintiff chose the forum for the sake of convenience.<sup>63</sup> However, the First Circuit in *Royal Bed & Spring Co., v. Famossul Industria e Comercio de Moveis Ltda*<sup>64</sup> construed the relationship to be that a mandatory forum selection clause does not preempt the application of *forum non conveniens*. Rather it is “simply one of the factors” that a court should consider in conducting the Piper balancing test.<sup>65</sup>

As stated earlier, the Nigerian apex courts have religiously applied the Brandon test formulated in *the Eleftheria* and followed in other English cases. The consequence of this is that in four out of five reported cases that this essay has reviewed, only the very last of the five cases, that is *Nika Fishing Co. Ltd v. Lavina Corporation*<sup>66</sup> ended in the grant of a stay. Even in that case, the ultimate decision of the Supreme Court overruling the two Lower Courts had turned upon the technical point that the respondent as plaintiff in the High Court did not file a counter affidavit to establish the burden placed on him under rule 3 of the Brandon test to prove that “there is a strong cause for not exercising the court’s discretion to grant a stay”. The two lower courts in refusing to grant a stay had relied on the statement of claim and concluded without evidence that the witnesses to prove the case are all in Nigeria, the issue of fact is situated and more readily in Nigeria and that the defendant does not genuinely desire trial in the foreign country but is only seeking a procedural advantage.

Mohammed JSC reacted sharply to these findings of the two lower courts in his lead judgment when he said:

*These finding of the trial court was not based on any evidence brought by the respondent as plaintiff as no counter-affidavit was filed by it in response to the application filed by appellant supported by an affidavit.... The fact that all the witnesses in the case are in Nigeria or that the circumstances of the matter shows that the case is more connected with Nigeria than Argentina as found by the courts below are not contained in the appellant’s affidavit in support of his application. This is where the circumstances of this case differs significantly from the case of Sonner (Nig.) Ltd. v. Nordwind (Supra) relied upon by both parties in which the plaintiff promptly reacted to the defendant application for stay by filing a counter-affidavit exhibiting documents showing why and how the plaintiff would be prejudiced if their suit were to be heard in Germany in accordance with the agreement where the suit is already status bared.*

It can therefore be safely concluded that the Nigerian apex courts have continued to apply factors of convenience in determining whether or not to grant a stay even in the face of an exclusive choice of court agreement selecting a different forum from Nigeria.

<sup>58</sup> Id. at 524-25

<sup>59</sup> *The Bremen v. Zapate Off-Shore Co.*, 407 U.S 1, 12,15 (1972).

<sup>60</sup> 145 F.3d 505 (2d Cir. 1998).

<sup>61</sup> Id. at 510-11.

<sup>62</sup> Georgene M. Vairo, Problems in Federal Forum Selection and Concurrent Federal State Jurisdiction: Supplemental Jurisdiction; Diversity Jurisdiction; Removal; Preemption; Venue; Transfer of Venue; Personal Jurisdiction; Abstention and The All Writs Acts, in 1 ALI-ABA COURSE OF STUDY MATERIALS: CIVIL PRACTICE AND LITIGATION TECHNIQUES IN FEDERAL AND STATE COURTS 221, 382 (2003), WL SH0631 DCI-ABA 221, at 382.

<sup>63</sup> *Evolution Online Sys.*, 145 F.3d at 511

<sup>64</sup> 906 F.2d 45 (1<sup>st</sup> Cir. 1990)

<sup>65</sup> Id. at 525 (quoting *Royal Bed & Spring*, 906 F.2d at 5)

<sup>66</sup> (2008) 10 CLRN 1S.C; (2008) 16 NWLR (Pt.1114) 509. See the section of this essay on application of forum non conveniens in Nigeria for the outcome of the other cases, that is *Adesanya v Palm Line* (1967) 2 NSC 118; *Sonnar Ltd & Anor v Partenree Nordwind* 1987 NWLR (Pt. 66) 520, *Laura Ubani v Jeco Shipping Lines & Anor.* (1989) 3 NSC 500; *Inlaks Limited vs. Polish Ocean Lines* (1989) 3 NSC 588

In our own view, the American position accords with the modern trend of according party autonomy the pride of place in every international agreement. Like the U.S courts have said, if a party bargaining at arm's length without being unduly influenced or deceived, enters into an exclusive choice of court agreement, it is difficult to understand the justice behind disregarding any clause contained in that agreement as the Anglo Nigerian courts have done.

On the other hand, the Bonny test formulated by the U.S courts strikes at the fairness and enforceability of the exclusive jurisdiction clause itself and does offer a more just ground for disregarding it.

## ii. Choice of Court Agreements and the Nigerian Admiralty Jurisdiction Act

Section 20 of the Admiralty Jurisdiction Act has significantly eroded the discretion hitherto exercised by the courts when confronted with clauses ousting their jurisdiction. The section provides that the Nigerian court must ignore the clause and assume jurisdiction in admiralty causes whenever

- (a) the place of performance, execution, delivery, act or default is or takes place in Nigeria; or
- (b) any of the parties resides or has resided in Nigeria; or
- (c) the payment under the agreement (implied or express) is made or is to be made in Nigeria; or
- (d) in any admiralty action or in the case of a maritime lien, the plaintiff submits to the jurisdiction of the court and makes a declaration to that effect or the *res* is within Nigerian jurisdiction; or
- (e) it is a case in which the Federal Government or a State of the Federation is involved and the Government or State submits to the jurisdiction of the Court; or
- (f) there is a financial consideration accruing in, derived from, brought into or received in Nigeria in respect of any matters under the admiralty jurisdiction of the Court; or
- (g) under any convention for the time being in force to which Nigeria is a party the national court of a contracting state is either mandated or has a discretion to assume jurisdiction; or
- (h) in the opinion of the Court, the cause, matter or action should be adjudicated upon in Nigeria.

This provision is a piece of inelegant drafting. Plaintiffs do not submit to jurisdiction; rather they invoke the jurisdiction of a court. Could paragraph (d) have intended to confer jurisdiction either on the basis of the presence of the *res* or of the claimant in Nigeria? Whereas jurisdiction is formed as of right in an *in rem* action on the basis of the presence of the *res*, it is inconceivable that *in personam* jurisdiction will be obtained on the basis of the presence or submission of the claimant instead of the defendant.

Paragraph (e) could only have made any sense if it is saying that the Federal or a State Government can only be sued in Nigeria irrespective of any foreign jurisdiction clause, but the phrase “*and the Government or State submits to the jurisdiction of the Court*” may convey a different meaning. It is absurd to base the mandatory jurisdiction of the court on submission by the party who is being protected. This provision clearly limits the exercise of discretion only to a situation where none of the events listed in (a) to (g) has occurred. Ouster is not limited to choice of court clauses but also extends to arbitration clauses couched in a manner that ousts jurisdiction.<sup>67</sup>

Contrary to the view that it merely enacts the principles in the Brandon test as adopted by Nigerian courts<sup>68</sup>, this provision does away with the need to engage in any balancing of convenience factors on the part of both parties where the plaintiff is able to show any one of the events in (a) to (g). Consequently, it confers mandatory and not discretionary jurisdiction in all admiralty causes where any of the events listed in (a) to (g) has been satisfied.

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<sup>67</sup> See *M.V. Panorama Bay v Olam Nig Plc* (2004) 10 CLRN 77; (2004) 5 NWLR (pt.865) 1 (section 20 overrides Sections 4 and 5 of Arbitration and Conciliation Act). It is not all arbitration clauses that oust jurisdiction of courts and it is doubtful whether the clause in that case actually ousts jurisdiction of Nigerian or any other court.

<sup>68</sup> This is the view of Omolola Ikwuagwu (Mrs.), LL.M, ACI Arb. (U.K.), Senior Associate Aluko & Oyebo in a paper she presented at the Annual Seminar of the Nigerian Maritime Law Association held at the Shell Hall, MUSON Centre, Lagos on 13th and 14th May 2003. The paper is published on the web. See [www.aluko-oyebode.com/uploads](http://www.aluko-oyebode.com/uploads). The author however concludes and we agree with her that the Federal High Court does not have the discretion to decline jurisdiction, present any of the events listed in (a)-(g). The problem is that the Brandon test merely weighs balance of convenience. It does not consider one or any convenience factor overriding as does Section 20 of the AJA

Nigeria is not alone in either rejecting exclusive jurisdiction clauses in bills of lading or severely restricting it. Clauses invoking foreign jurisdiction may be without effect by the terms respectively of local Hague or Hague/Visby legislation of Australia<sup>69</sup>, New Zealand<sup>70</sup> and South Africa<sup>71</sup>. Such clauses have also been restricted in France<sup>72</sup>, China<sup>73</sup> and Canada<sup>74</sup>.

However, exclusive foreign jurisdiction clauses in bills of lading are enforceable in the U.S.<sup>75</sup>, England<sup>76</sup> and under the European Regulation<sup>77</sup>

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<sup>69</sup>For example, sect. 11 of the Australian Carriage of Goods by Sea Act 1991,25 as amended by the Carriage of Goods by Sea Regulations 1998, reads:

“11 (1) All parties to: (a) a sea carriage document to which, or relating to a contract of carriage to which, the amended Hague Rules apply, relating to the carriage of goods from any place in Australia to any place outside Australia or (b) a non-negotiable document of a kind mentioned in subparagraph 10(1)(b)(iii),relating to such a carriage of goods; are taken to have intended to contract according to the laws in force at the place of shipment.  
(2) An agreement (whether made in Australia or elsewhere) has no effect so far as it purports to:  
(a) preclude or limit the effect of subsection (1) in respect of a bill of lading or a document mentioned in that subsection; or  
(b) preclude or limit the jurisdiction of a court of the Commonwealth or of a State or Territory in respect of a bill of lading or a document mentioned in subsection (1); or  
(c) preclude or limit the jurisdiction of a court of the Commonwealth or of a State or Territory in respect of:  
(i) a sea carriage document to which, or relating to a contract of carriage to which, the amended Hague Rules apply, relating to the carriage of goods from any place outside Australia to any place in Australia; or  
(ii) a non-negotiable document of a kind mentioned in subparagraph 10 (1)(b)(iii) relating to such a carriage of goods.”

<sup>70</sup> See New Zealand’s Maritime Transport Act 1994, No. 104 of 1994, sect. 210(1) and (2), which preclude the ouster of New Zealand jurisdiction by foreign jurisdiction clauses in bills of lading, similar documents of title or nonnegotiable documents covering shipments to and from New Zealand, although that statute does permit arbitration of cargo claims outside, as well as inside, New Zealand, thus being slightly more liberal than the corresponding Australian statute which allows only Australian arbitration.

<sup>71</sup>See South Africa’s Carriage of Goods by Sea Act 1986, Act 1 of 1986, sects. 3(1) and 3(2), which permit any person carrying on business in the Republic, as well as the consignee or holder of any bill of lading, waybill or like document for the carriage of goods inbound to South Africa, to bring an action on the bill, waybill or document before the competent court in the Republic, “[n]otwithstanding any purported ouster of jurisdiction, exclusive jurisdiction clause or agreement to refer any dispute to arbitration”. See generally Tetley, “Arbitration & Jurisdiction in Carriage of Goods by Sea and Multimodal Transport – Can we have international uniformity?” [1998] ETL 735

<sup>72</sup>Under art. 48 of France’s Nouveau Code de procédure civile, jurisdiction clauses in bills of lading may only be invoked against merchants and these clauses must figure prominently in the bills. The court selected must be clearly identified in the bill and, although the requirement that the shipper sign the bill was repealed in 1987, it must nevertheless be proven that cargo genuinely consented to the clause, the burden of making such proof resting with the carrier.

<sup>73</sup>See, for example, the Civil Procedure Law 1991 of the People’s Republic of China, adopted by the Fourth Session of the Seventh National People’s Congress of the People’s Republic of China on April 9, 1991, at art. 244, which permits both parties, in a case concerning contract disputes or disputes over property rights involving foreigners (including maritime contract disputes), to agree in writing to trial by the court at the place that has an actual connection with the dispute. The word “court” in this context, however, would seem to mean the court of the P.R.C. having an actual connection with the case, although the article does not expressly preclude selection of a foreign forum. Nevertheless, foreign jurisdiction clauses in ocean bills of lading are recognized by Chinese maritime courts only where the foreign country concerned recognizes Chinese (P.R.C.) jurisdiction clauses in bills of lading. As of 1997, only Dutch and German jurisdiction clauses were recognized in the P.R.C.’s maritime courts. See Zhang Jinxian, *China’s Maritime Courts and Justice*, I.C.C. International Maritime Bureau, Witherby Publishers, London, 1997, para. 7.2 at p. 48. In practice, therefore, the autonomy of parties to agree on a foreign jurisdiction for litigating their cargo claims is severely restricted. Art. 257 of the Civil Procedure Law 1991 is more liberal as regards foreign arbitration, however.

<sup>74</sup> Sec. 46 of the Canadian Marine Liability Act, provides the marine cargo claimant with the option of suing or arbitrating in Canada, despite the presence in the bill of lading of a foreign jurisdiction or a foreign arbitration clause, under certain conditions, viz:

(a) the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada;  
(b) the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or  
(c) the contract was made in Canada.

<sup>75</sup> The U.S. Supreme Court held in *Bremen* that a foreign jurisdiction clause in a freely negotiated, international contract should be enforced, unless the claimant could show convincing evidence that the clause was unjust or unreasonable or was the product of fraud or overreaching or was contrary to a strong public policy of the forum. See 407 U.S. 1 at p. 15, 1972

It is in recognizing the attitude of some states to exclusive jurisdiction clauses that the 2005 Convention on Choice of Court Agreements specifically excluded international carriage of goods and liability for maritime claims<sup>78</sup> from its purview.

The Nigerian provision is comparatively the most unfriendly of all the state laws rejecting choice of jurisdiction clauses. It has clearly exceeded the scope or limit of effectiveness and comity. From the perspective of private international law the major problem with provisions such as this is the enforceability of the judgment obtained here if and when the assets of the defendant/judgment debtor is located elsewhere. Where a party to a jurisdiction or arbitration clause or agreement requiring suit or arbitration in one country institutes legal or arbitral proceedings in another country contrary to his contractual bargain the courts of the selected forum may also grant the party seeking to enforce the clause an anti-suit injunction which diminishes the force of a judgment obtained from such proceeding even in third forums<sup>79</sup>. When he eventually obtains a judgment or award from the Nigerian Court, the decision may be refused recognition and enforcement in the contractual forum, on the ground that it violates public policy.<sup>80</sup> Where service was effected not within the forum of the court that assumed jurisdiction, enforcement could also be resisted on grounds of lack of (international) jurisdiction of the court or tribunal that rendered the decision or on grounds of public order.<sup>81</sup>

### iii. The Hague Convention on Choice Of Court Agreements.

On June 30, 2005, the Final Act of the Twentieth Session of the Hague Conference on Private International Law was signed on behalf of the Member States of the Conference in the Peace Palace at The Hague.<sup>82</sup> The Final Act includes a new multilateral treaty, the Convention on Choice of Court Agreements.<sup>83</sup> This new Hague Convention is perhaps most easily understood as the litigation counterpart to the New York Arbitration Convention.<sup>84</sup>

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<sup>76</sup> See the decision in such cases as *Eleftheria, Fehmarn* cases discussed earlier. The parties in the *Bremen* case had instituted cross actions in both the U.S and England and both forums arrived at the same conclusion that the action should be heard in England-the selected forum.

<sup>77</sup> See Art 23(1) to (3) of the E C Regulation 44/2001. Prof. William Tetey concludes on the basis of this provision and E U precedent that: European law thus accepts jurisdiction clauses in bills of lading and other contracts, where those provisions reflect a genuine, mutual consent between the contracting parties to sue in a determined or determinable forum, and whether or not that forum has any connection with the dispute or the parties. See <http://tetley.law.mcgill.ca/>

<sup>78</sup> Art 2 (f) and (g)

<sup>79</sup> See discussion *infra* under *Lis Alibi Pendens*

<sup>80</sup> See, for example, the Brussels Convention 1968 at art. 27(1). See also EC Regulation 44/2001, art. 34(1), corresponding to art. 27(1) of the Brussels Convention 1968. See also *Phillip Alexander Securities and Futures Ltd. v. Bamberger* [1997] I.L.Pr. 73 at p. 115 (C.A.) and *The Hari Bhum* [2004] 1 Lloyd's Rep. 206 at p. 215, endorsing the use of public policy as a ground for denying recognition and enforcement in England to a judgment rendered by a foreign court in another E.U. State contrary to an anti-suit injunction issued in England in support of an English arbitration clause. See also Briggs and Rees, *Civil Jurisdiction and Judgment*, 3 Ed., 2002, para. 5.49 at pp. 391-392. There is no reason to suggest that the position will be different if the judgment had been obtained outside the E.U.

<sup>81</sup> See, for example, the Québec Civil Code 1994, art. 3155(1) (lack of jurisdiction) and (5) (manifest inconsistency with public order as understood in international relations). For France, see the basic criteria of recognition and enforcement of foreign judgments set forth by the Cour de Cassation in its famous decision in the *Munzer* case, *Clunet* 1964.302, note Goldman. For the U.K., see the *Civil Jurisdiction and Judgments Act* 1982, U.K. 1982, c. 27, sect. 32(1) in cases not subject to either the Brussels Convention 1968 or the E.C. Regulation 44/2001. In cases subject to the Convention or the Regulation, lack of jurisdiction may not be invoked to refuse recognition to a judgment rendered in another Member State (Brussels Convention, art. 28, third para., and E.C. Regulation, art. 35(3)), but such refusal may be supportable on grounds that the foreign judgment rendered in a Member State disregarding a choice of forum clause calling for suit in a non-Member State violates public order/public policy contrary to the Convention's art. 27(1) or the Regulation's art. 34(1). See Briggs & Rees, *Civil Jurisdiction and Judgments*, 3 Ed., 2002, para. 7.11 at p. 439

<sup>82</sup> The text of the Final Act of the Twentieth Session, and a documentary history of the Choice of Court Convention project, are available on the Hague Conference website at: [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=98](http://www.hcch.net/index_en.php?act=conventions.text&cid=98)

<sup>83</sup> The Final Act also contained amendments to the Hague Conference Statute that will allow the European Community, and similar Regional Economic Integration Organizations, to become members of the Hague Conference and parties to its conventions.

<sup>84</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 ["New York Convention"], available at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html)

Like the New York Convention, it will establish rules for enforcing private party agreements regarding the forum for the resolution of disputes, and rules for recognizing and enforcing the decisions issued by the chosen forum. The Convention on Choice of Court Agreements concluded more than a decade of negotiations that began in 1992 with a request from the United States for the negotiation of a convention on jurisdiction and the recognition and enforcement of foreign court judgments. The original effort resulted in a Preliminary Draft Convention prepared in October 1999, which was further revised during a Diplomatic Conference in June 2001. The 2001 text left many problems unresolved. It became clear that some countries, particularly the United States, could not agree to the convention being considered, and efforts were redirected at a convention of more limited focus<sup>85</sup>. The new Hague Convention requires *two* ratifications or accessions to enter into force<sup>86</sup>. So far, only Mexico has acceded to the Convention, and no State has ratified it. If either the EC or US ratify it (having already signed it), or a non-signatory State accedes to it, or another Hague member state signs and ratifies it, then the Convention will enter into force

The Convention is designed inter-alia to promote international trade and investment through enhanced judicial co-operation.<sup>87</sup>The Convention applies to international business to business agreements containing exclusive choice of court agreements except where the parties are resident in the same Contracting State and all other elements relevant to the dispute are connected only with that state.<sup>88</sup>It will also not apply to agreements that include a consumer as a party<sup>89</sup> and a host of other exclusions<sup>90</sup>

An “exclusive choice of court agreement” is defined as any written agreement<sup>91</sup> between two or more parties designating the court or courts of one Contracting State to the exclusion of the jurisdiction of any other courts for the resolution of any legal disputes, unless the parties have expressly provided otherwise. Furthermore, an exclusive choice of court agreement is an independent or severable term if it forms part of a contract, and cannot be contested solely on the ground that the contract itself is invalid<sup>92</sup>.

The Convention sets out three basic rules:

- (1) The court chosen by the parties in an exclusive choice of court agreement has jurisdiction;<sup>93</sup>
- (2) If an exclusive choice of court agreement exists, a court not chosen by the parties does not have jurisdiction, and must decline to hear the case;<sup>94</sup> and
- (3) A judgment resulting from jurisdiction exercised in accordance with an exclusive choice of court agreement must be recognized and enforced in the courts of other Contracting States (other countries that are parties to the Convention).<sup>95</sup>

Through a declaration process, the Convention offers an optional fourth rule. Contracting States may declare that their courts will recognize and enforce judgments given by courts of other Contracting States designated in a non-exclusive choice of court agreement.<sup>96</sup> This provision recognizes that, once the parties have agreed that a tribunal is acceptable, there is value in the free movement of its judgment. It is a response to discussions during the negotiations indicating that a significant number of industries rely on non-exclusive choice of court clauses. If Contracting States exercise this declaration option, it will substantially expand the recognition and enforcement benefits of the Convention.

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<sup>85</sup> Ronald .A.Brand, ‘The New Hague Convention on Choice of Court Agreements’ available at [www.asil.org/insights050726.cfm](http://www.asil.org/insights050726.cfm). See also Christian Schulze, ‘The 2005 Hague Convention on Choice of Court Agreements’, (2007) 19 SA Merc LJ 140-150; Antonin I. Pribetic, ‘The Hague Convention on Choice of Court Agreements’ The Globetrotter, Vol 10 No.1 also available at [http://www.papers.ssrn.comsol3papers.cfmabstract\\_id](http://www.papers.ssrn.comsol3papers.cfmabstract_id)

<sup>86</sup> Art 31(1).

<sup>87</sup> See Preamble to the Convention

<sup>88</sup> Art 1(2)

<sup>89</sup> Art 2(1)(a)

<sup>90</sup> Listed in Art 2(1)b-employments and collective agreements and Art 2(2)a-p

<sup>91</sup> Art 3(1)a &b. Such Agreements must however be documented in writing or preserved in some other permanent form of communication-Art 3(1)( c)

<sup>92</sup> Art 3(1)d

<sup>93</sup> Art 5

<sup>94</sup> Art 6

<sup>95</sup> Art 8

<sup>96</sup> Art 22

The Hague Choice of Court Convention however contains a few important (albeit limited) escape clauses. It allows courts not chosen to ignore a choice of court agreement, if under the law of the chosen court, the agreement is null and void or is otherwise not enforceable; one of the parties lacks capacity; giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to public policy of the forum, or where the chosen court has declined to hear the case.<sup>97</sup>

The ultimate aim being to ensure the adoption of uniform rules for enforcement of judgment, the Convention mandates high contracting parties to recognize and enforce judgments obtained from a court exercising jurisdiction in line with the Convention. However, under Article 9, the chosen court may refuse recognition or enforcement, on traditional grounds of fraud, denial of natural justice and public policy.

Article 11 of the Convention also allows refusal of recognition and enforcement of a judgment “if, and only to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.”

Truly, some jurisdictions, like the U.S are noted to confer certain litigational advantages including the award of punitive or exemplary damages. A defendant may object to litigation in such jurisdictions even when they have been exclusively selected because of the undue comparative advantage their legal systems confer. However, it is never a ground to refuse enforcement of judgments obtained from such forums in any common law jurisdiction that they awarded punitive or exemplary damages. In fact in the Supreme Court of Canada decision in *Beals v. Saldanha*, Justice Major for the majority, held that:

*The public policy defence is not meant to bar enforcement of a judgment rendered by a foreign court with a real and substantial connection to the cause of action for the sole reason that the claim in that foreign jurisdiction would not yield comparable damages in Canada.*<sup>98</sup>

The Convention must then be deemed to oblige its high contracting parties to create new head of public policy. There are some 65 state members of the Hague conference cutting across major legal systems. Nigeria is not one of them, but that does not stop her from acceding to the Convention as Mexico did. Although the Convention on Choice of Court Agreements appear elitist, originating as it did from the initial efforts of the U.S, its general contents especially on jurisdiction appear harmless. Ignoring an exclusive jurisdiction clause for no better reason than that the jurisdiction of an Anglo-Nigerian court cannot be ousted by private agreement may appear unjust and difficult for defendants connected with other legal systems to accept. An approach that focuses on the justice and fairness of the clause in deciding whether or not to honour it is likely to be more acceptable across board than the present approach of the common law legal systems.

Besides, the collateral advantage of uniform judgment enforcement rules in respect of judgments given in exercise of jurisdiction conferred by parties’ agreements is an allurements not worth ignoring<sup>99</sup>.

### 3. The Plea of *Lis Alibi Pendens*

Actions may be instituted in more than one forum in respect of the same facts or cause of action. Such multiple actions may be cross<sup>100</sup> or concurrent.<sup>101</sup> Parties affected in different ways by an event involving another or other parties may simply sue it or them at different forums depending on their (the affected parties) convenience.<sup>102</sup> At common law one of the two or more concurrent or cross actions may be stayed by the plea of *lis alibi pendens*.<sup>103</sup>

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<sup>97</sup> Art 6

<sup>98</sup> *Beals v. Saldanha* [2003] 3 S.C.R. 416 at 453 (S.C.C.) per Major, J. (McLachlin C.J., Gonthier, Bastarache, Arbour and Deschamps JJ. concurring)

<sup>99</sup> Since Nigeria ratified the New York Convention on Enforcement of awards by International Arbitration Institutions, it is only logical that it should subscribe to the Hague Convention on choice of Court Agreements which is its litigation counterpart. An arbitration clause like an exclusive choice of court agreement confers jurisdiction on the arbitral tribunal and so a country which subscribes to it should have no qualms subscribing to another convention which provides for the like enforcement of judgment of courts chosen by parties’ agreements.

<sup>100</sup> That is the plaintiff in one forum is the defendant in the other forum

<sup>101</sup> That is the same party institutes both action

<sup>102</sup> This is typical of product liability cases. See the facts of the *Societe Industrielle* case discussed hereinafter

<sup>103</sup> That is, ‘there is a pending action elsewhere’

Although it used to be said that a stronger case is required to justify an English court's interference in the cross as opposed to the concurrent action, the grant of a stay in both situations is firmly entrenched at common law.<sup>104</sup> The English courts may instead of staying the English action, restrain the foreign action by granting what is known as anti-suit injunction.<sup>105</sup> Here, the plaintiff in the English suit prays the English court not to stay the English action but to restrain the defendant from proceeding with the foreign action. The English courts have explained that such an injunction is not directed at the foreign court, over which they have no control, but at the other party.<sup>106</sup>

In *Societe Industrielle Aerospatiale v Lee Kui Juk*,<sup>107</sup> actions were commenced both in Brunei and Texas against the manufacturers and operators of an helicopter involved in a crash in Brunei. The Texas courts have jurisdiction over the manufacturers but not over the operators. But the operators would seek contribution against the operators in some other forum. The Privy Council, reversing Brunei lower courts, held that Brunei was the natural forum and consequently granted an anti-suit injunction restraining the claimants in the Texas action from proceeding with the action.

The Privy Council reviewed the English authority on the subject and rejected submission that the same grounds for granting a plea of *forum non conveniens* as formulated in *Spiliada* should be adopted for grant of the anti-suit injunction. Instead, the Court preferred the tests of showing that the foreign action is vexatious and oppressive formulated much earlier<sup>108</sup> reasoning that the plaintiff in the foreign action should not unjustly be deprived of any legitimate advantage.

In the later case of *Airbus Industrie GIE v Patel*<sup>109</sup> the representatives of the victims of an air crash that occurred in India had sued in Texas where they intended to take advantage of strict liability policy of the U.S courts and the probability of obtaining punitive damages. The Indian courts which would require proof of fault had granted an anti-suit injunction which was not enforceable in England where the plaintiffs live. The applicants thus sought another anti-suit injunction. The House of Lords held that in such circumstances an injunction was not available; that this was not an extreme case where the foreign state exercising jurisdiction was such as to be deprived of the respect normally required by comity. Nigerian courts are yet to fully consider the applicability of this plea in Nigeria. Professor Agbede reports two cases, where two different state courts have been approached in respect of the same cause of action<sup>110</sup>. One is a concurrent action<sup>111</sup> and the other is a cross action<sup>112</sup>. In both cases, it was the second court that simply refused to entertain the suit before it. In the latter case the Appellate Court held that the proper step for the lower court to take is to order a stay of proceeding

Related to this plea in the Nigerian context is the concept of abuse of court process. The Nigerian courts have severally held that it is an abuse of court process for a party to institute two or more actions on the same facts and against the same defendants in different courts either within one state or within the Nigerian federation.<sup>113</sup> Where that happens, the second court, upon the application of the defendant simply strikes out the second suit. Incidentally the courts have equally required in order for the second suit to be struck out that the applicant must show that it was instituted with the intention to irritate or annoy the opponent or to interfere with due administration of justice<sup>114</sup>.

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<sup>104</sup> *Bushly v Munday* (1821) 3 Mudd,297; *Beckford v Kemble* (1822) 1S.& St. 7 (Cross action). *McHenry v Lewis* (1882) 22 Ch.D 397. See *McClellan*, (1969) 18 ICLQ 931

<sup>105</sup> See *The Chritianbourg* (1885) 10 P.D.141 at 152-153

<sup>106</sup> *Societe Industrielle Aerospatiale v Lee Kui Juk* [1987] A.C 871

<sup>107</sup> *Id.*

<sup>108</sup> *St. Pierre v South American Stores Ltd* (1936) 1 K.B 582

<sup>109</sup> [1999] 1 A.C 119

<sup>110</sup> *Agbede I O*, 1d at 278-279

<sup>111</sup> *Enwonwu v Enwonwu* (1962) 2 All NLR 239

<sup>112</sup> *Oyagbola v Esso*(1960) 1 All NLR 170

<sup>113</sup> See *N.I.W.A v.S.T.B Plc* (2008) 2 NWLR (pt.1072), 488; *Senator Mamman Ali v. Senator Usman Mbisir & Ors* (2008) 3 NWLR (pt.1073) 94; *Saraki v. Kotoye* (1992) 9 NWLR (pt.264) 156; *Okorodudu v Okorodudu* (1977) 3 SC 21; *Oyagbola v. Esso W.A Inc.* (1966) 2 SCNLR 35;

<sup>114</sup> See *Agwasim v.Ojichie* (2004) 10 NWLR (pt.882) 613 at 622-623; See also *Unifam ind. Ltd v. Oceanic Bank Int'l (Nig) Ltd* (2005) 3 NWLR (pt.911) 83

These conditions are not fundamentally different from the requirement of vexation or oppression by English case law for a successful plea of *lis alibi pendens*.

Although the plea of *lis alibi pendens* is yet to be fully considered it is safe to conclude at least at the inter-state level that a proper application of the concept of abuse of court process will do as much justice as the plea. It is difficult to understand why a court of one state should either directly or indirectly restrain the courts of another state from entertaining a case especially if the said court is the second court. The civil law system also has no provision for anti-suit injunction. Instead it is the second court that decides whether it is proper to entertain the second suit or not.<sup>115</sup>The Nigerian approach therefore tallies with the civil law approach and being more compatible with the principle of comity and effectiveness is preferred by this writer to the English approach.

### **Conclusion**

The foregoing represents the state of Nigerian law, legislative and judicial on discretionary jurisdiction. On *forum non conveniens*, we counsel the courts to exercise their discretion in deserving cases in line with the modern approach of the Anglo-American courts and not to simply decline jurisdiction as they have done in the case of **Resolution Trust Corporation v. F.O.B Investment and Properties Ltd & Anor** on the wrong basis of the venue rules of their civil procedure rules. By heeding this counsel the Nigerian courts would have done like the Kenyan courts<sup>116</sup> which held that the power of a Kenyan court to entertain or decline a foreign cause of action on the basis of *forum non conveniens* is not affected in any way by Kenyan Constitution and internal law.

On contractual ouster, we recommend a departure from the English common law approach which regards the exclusive jurisdiction clause as void and of no effect and simply applies *forum non conveniens* principle. Agreement made by parties should not be disregarded in this manner and the combination of the approach of the U.S courts and the regime formulated in the Hague Choice of Court Convention is preferred. We have also recommended a review of the approach to exclusive jurisdiction clauses in bills of lading and at maritime law. For, although Nigeria is not alone in disregarding such clauses in admiralty actions, the courts of those jurisdictions that honour and give effect to such clauses could always render Nigerian judgments unenforceable by granting anti-suit injunction.

Finally, the paper recommends that Nigerian courts should not follow the English courts to grant anti-suit injunction when a second action has been instituted before them, as in effect such an injunction is beyond the limit of either comity or effectiveness.

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<sup>115</sup> See Morris, Id at P129. See Turner v Grovit [2000] Q.B 345. See Harris (1999) 115 L.Q.R.576

<sup>116</sup> See Raytheon Aircraft Credit Corporation v Air Al-Faraj Limited (Civil Appeal 29 of 1999) Judgment delivered on 8 July 2005 by the Kenyan Court of Appeal. The Kenyan Court of Appeal declined jurisdiction on basis of private international law –discretionary jurisdiction arising from exclusive choice of court agreement and forum non conveniens . See R.F. Oppong, CHOICE OF LAW AND FORUM AGREEMENT SURVIVES A CONSTITUTIONAL CHALLENGE IN THE KENYA COURT OF APPEAL [www.eprints.lanacs.ac.uk](http://www.eprints.lanacs.ac.uk) last visited in May, 2010.