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TEMPLARS ThoughtLab

Fundamental Considerations Before Entering into Cross-Border Contracts

Introduction

In an increasingly globalised world, characterised by the establishment of common markets, economic communities, and continental free trade areas like the African Continental Free Trade Area, there has been a significant increase in the number of cross border agreements entered into by private parties. Nigerians are not left out. This is not surprising because, as one of the largest economies in Africa and the most populous black nation on earth, Nigeria undoubtedly represents a prime market for cross-border trade and investment.

Three questions always arise, in relation to international commercial contracts: (i) what laws govern the respective obligations of the contracting parties; (ii) if a dispute arises under the contracts, what mechanism of dispute resolution can the parties have recourse to; and (iii) at the end of the process, will the resulting decision be recognised and enforced in other jurisdictions especially the ones where the losing party has sufficient assets to satisfy the decision. These are three fundamental questions with which Private International Law primarily concerns itself.[1]

For inexplicable reasons, a significant percentage of Nigerians enter into cross-border contracts without paying adequate regard to these questions until a dispute arises, at which point it is usually too little too late. However, with the rapid increase in the volume of cross-border contracts entered into by Nigerians, it has become necessary as a matter of enlightened self-interest to rethink this attitude. It is against the foregoing backdrop that this publication highlights, from a dispute resolution perspective, the factors that contracting parties should bear in mind before entering into cross-border contracts.

[1] As Tobi JCA (as he then was) stated in Nahman v. Wolowicz (1993) 3 NWLR (Pt. 282) 443 at 459 paras H–A, "[t]he basic aim of Private International Law is to resolve conflicts of municipal or domestic laws at the international law. It is good law that all sovereign nations zealously guide and guard their sovereign status or sovereignty in international law. But because no country can operate in isolation or on an island of its own, international diplomacy and international trade and commerce necessitate the formulation of rules of Private International Law, to resolve any conflict in the different municipal laws".

Cross Border Contracts

Cross-border contracts are legally binding agreements made by two or more parties in different countries or legal jurisdictions. Like general contracts, cross-border contracts set out the terms and conditions that govern the business transactions between the parties as well as their rights, obligations, and expectations.[2]

Contracts come in different sizes and forms. In some cases, the contracts are contained in substantial documents running into dozens of pages and in others, the contracts are merely evidenced by sparce legal documents such as commercial invoices, waybills, bills of lading, etc. The restricted nature of these later category of contracts does not, however, detract from the binding nature of the contract as long as the basic elements of a contract are present. In such cases, the courts must make recourse to the applicable conflict of laws rules to determine the outstanding provisions of the contract.

Cross-border contracts typically present various complexities that set them apart from domestic agreements. For example, and by their very nature, cross-border contracts involve parties who are subject to different legal systems, and this leaves the parties with different legal principles, court systems and dispute resolution mechanisms potentially leading to legal uncertainty and disputes.[3] International commercial contracts also often involve parties from different language and cultural backgrounds which can lead to misunderstandings and miscommunication and require compliance with varying regulatory frameworks, trade and tax laws which add another layer of complexity to the contracts. Crucially too, the potential involvement of multiple currencies in cross-border transactions pose exchange rate risks can potentially affect the financial outcome in terms of the financial loss or gain for the parties involved.[4] For these and other reasons, it is not advisable to enter into cross-border contracts without the benefit of sound legal advice.

By way of illustration, when parties from one legal system enter into a contract for the sale and purchase of goods and a dispute arises between the parties owing to a disagreement over the fitness of the goods for the purpose for which it was purchased, it would be very easy for the court, which is called upon, to resolve such dispute, to apply the relevant Sale of Goods legislation applicable in that legal system. On the contrary, if a dispute arises between contracting parties from two or more legal systems, in relation to goods to be supplied under a contract of carriage of goods by sea from one country to another, before addressing the substance of the dispute, the court must first resolve preliminary questions such as whether it has jurisdiction to resolve the dispute and if it has, which system of law must govern the dispute. It is in this regard that this publication seeks to highlight the three fundamental considerations before entering into cross-border contracts. We begin with the governing law.

Governing Law

The first question to be determined in the context of international commercial agreements relates to the question of which system of law governs the validity, scope, interpretation, or performance of the contract. Governing law or choice of law clauses are of critical importance in cross-border contracts.[5]

[2] Henry Indriyati et al, 'The Development of the Principles of Agreement in Cross Border Amid COVID-19 Outbreak' in M. K. bin Abdullah et al. (eds.), Proceedings of the International Seminar on Border Region (INTSOB 2023), Advances in Social Science, Education and Humanities Research 823.
[3] Henry Indriyati et al, note 2 above.
[4] Abor, J.: Managing foreign exchange risk among Ghanaian firms. The Journal of Risk Finance 6(4), 306-318 (2005).
[5] Adewale Atake, 'Pacta Sunt Servanda' Templars Publication (2004) available at https://www.templars-law.com/app/uploads/2015/05/Pancta-Sunt-Servanda.pdf

The circumstances under which the courts are called upon to determine the governing law of a cross-border contract include: (i) where the parties expressly choose a governing law, (ii) where the parties failed to expressly choose but their choice may be inferred from a holistic reading of their contract, or (iii) where the parties failed to choose, and their choice cannot be inferred from the contract. In some instances, the parties may not have realised the need to select a governing law and in other cases, the parties may have simply failed to arrive at a common ground in terms of the governing law. This calls to mind an illuminating passage drawn from the English High Court case where Mann J. stated that:

"The evidence before me showed that each of the parties was overtly adamant that it did not wish to accept the other's jurisdiction or governing law and could reach no agreement on any other jurisdiction or governing law. As a result, [the relevant agreement] contains no governing law clause and no jurisdiction clause. In addition, neither party wanted to give the other an advantage in terms of where the agreement was finalised. If their intention in doing so was to create obscurity and difficulty for lawyers to debate in future years, they have succeeded handsomely." [6]

Another unhelpful situation is where the parties decide to stipulate different laws to govern different aspects of their contract. As noted elsewhere[7], "[t]he practice of stipulating different laws to govern different aspects of an agreement ("dépeçage"), while an apparently effective negotiating tactic and definitely within the parties' rights, is a risky one and can ultimately prove counterproductive especially when done without much thought and just for the sake of it. Parties are advised to make things easy for themselves by expressing their choice of governing law(s) but are encouraged to restrict the number of such law(s) they select."

Put differently, the governing law question determines which of the competing systems of national laws governs a contract. The starting point of the analysis is to look at the instances where the parties have expressly selected a governing law.

In *Enka v. Chubb*[8], the UK Supreme Court stated that where an English court has to decide which system of national laws governs a contract, the court will apply the rules developed by the common law for determining the law governing contractual obligations. Those rules are that a contract (or relevant part of it) is governed by: (i) the law expressly or impliedly chosen by the parties; or (ii) in the absence of such choice, the law with which the contract is most closely connected.[9] Although the Nigerian rules of conflict of laws are still largely undeveloped, by reason of the provisions of section 45(1) of the Interpretation Act pursuant to which the Common Law of England, the Doctrine of Equity together with the Statutes of General Application that were in force in England on the 1st day of January 1900, were received into Nigeria, the situation is the same where a court in Nigeria has to answer the same question.

[6] Apple Corps Ltd v Apple Computer Inc. [2004] EWHC 768 (Ch).

[7] See Orji A. Uka 'Resolving the age-long controversy over how to determine the Law governing the Arbitration Agreement - An Analysis of the UK Supreme Court Decision in Enka v. Chubb and some Lessons for Nigeria.' Available at Resolving The Agelong Controversy on the Determination of the Law Governing an Arbitration Agreement: An Analysis of the UK Supreme Court Decision In Enka v Chubb and Some Lessons for Nigeria – LCA Journal of Arbitration and Dispute Settlement. (ljads.org.ng).

[8] Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb [2020] UKSC 38. Similar rules apply under the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) applicable in the European Union.

[9] See Dicey, Morris & Collins on The Conflict of Laws, 15th edn. (2012) rule 64(1). See also See also the dictum of Lord Simmons in Bonython v. Australia [1951] AC 201, 219-220.

Thus, under Nigerian law,[10] the general rule is that contracting parties are free to choose the law that will govern their contractual rights and obligations, and their transaction. Consequently, an express choice of law clause in a contract should be honoured as long as the choice is bona fide and not against public policy.[11] There are however exceptions to this general rule, and Nigerian courts will not enforce the choice of foreign law as the governing law of a transaction under certain circumstances, such as: (i) where the chosen law is against Nigeria's public policy or (ii) where mandatory rules of Nigerian law forbid the choice of a law other than Nigerian law to govern a transaction, in whole or in part.

In *Sonnar (Nig) Ltd v Partenreederi MS Nordwind*[12] the Nigerian Supreme Court held that a choice of law is only effective where the choice is "real, genuine, bona fide, legal and reasonable." The Court departed from the general rule and rejected the express choice of German law as the governing law of a transaction between a Nigerian shipper and a Liberian shipowner on the basis that the choice was "capricious and unreasonable" because the chosen law had little or no connection with the parties or their transaction.

Whether a court in Nigeria will give effect to an express choice of law clause in a cross-border contract in any given case is therefore a fact-specific determination and thus depends on a number of factors.

Where, on the other hand, the parties have failed to expressly select a governing law, and such choice may not be presumed from a holistic reading of the contract, Nigerian courts generally adopt the *Jurisdictional Selecting* or *Proper Law* approach by carrying out a balancing act to determine the law which has the closest and most real connection with the contract, as the governing law of the contract.[13]

The determination of the applicable law in the absence of choice therefore involves a balancing exercise, but not a mechanical one that necessarily involves the counting of factors that connect a contract with a country or legal system. In carrying out this balancing act, the factors which the courts consider include: the place where the contract is made; the place of performance of the contract; the domicile, nationality or place of business of the parties; the location of the subject matter of the contract; the currency of payment; the language of the contract; etc.[14] In this regard, the court considers the circumstances as a whole but accords more weight to factors such as the place of performance of the contract.[15] Once again, the foregoing underscores the imperativeness of seeking legal advice before entering into cross-border contracts, however simple they appear on the face.

[10] See generally Chukwuma Okoli and Richard Oppong, Private International Law in Nigeria Hart Publishing: Oxford, (2020).
[11] See Vita Foods Products Inc v. Unus Shipping Co Ltd [1939] AC 277 (PC); JFS Investment Ltd v. Brawal Line Ltd (2010) 18 NWLR (Pt. 1225) 495 at page 531 paras D-E; Beaumont Resources Limited v DWC Drilling Limited (2017) LPELR-42814 (CA).
[12] Sonnar (Nig) Ltd v Partenreederi MS Nordwind (1987) 4 NWLR (Pt. 66) 520 ('The Nordwind').
[13] Some authors have suggested a second approach known as the *Better Law* approach which attempts to do substantial justice by considering which of the laws (in the absence of choice) would result in substantive justice in the contractual transaction between the parties). This is a result-oriented approach which considers the intention of the parties. see Chukwuma Okoli and Richard Oppong, note 11 above.
[14] See generally Cheshire, North & Fawcett on Private International Law 15th edn. (2017) Oxford University Press pg. 681.
[15] See Cold Containers (Nig) Ltd v. Collis Cold Containers Ltd (1977) NCLR 97, 119.

Choice of Court Agreement

A related but clearly distinct question faced by Nigerian courts when resolving disputes with a foreign element is to ascertain the applicable dispute resolution clause.[16] This may come in the form of an arbitration clause, or a jurisdiction clause also referred to as a forum selection clause.

Just like the choice of law rule under Nigerian law, the general position of the law is that Nigerian courts will give effect to the express choice of parties to submit to the exclusive jurisdiction of the courts of a foreign country as the court with jurisdiction to determine their dispute. This also flows from the concept of party autonomy and the general rule that parties are bound by their contracts.[17] In some cases, however, Nigerian courts will assume jurisdiction in cases commenced in breach of a foreign jurisdiction clause, regardless of the parties' choice.[18]

In *The Nordwind case*, the Supreme Court held that where a plaintiff sues in Nigeria in breach of a foreign jurisdiction clause, and the defendant applies for a stay, the Nigerian court is not bound to grant a stay but has a jurisdiction whether to do so or not. The Court adopted the test laid down by Brandon J. in *The Eleftheria*[19] and held that Nigerian courts will generally uphold the parties' agreement and decline jurisdiction unless the plaintiff who commenced the action before Nigerian courts in breach of a foreign jurisdiction agreement shows "strong cause" why the court should not uphold the parties' bargain.[20]

The circumstances that the Nigerian courts typically consider in exercising its discretion to determine whether to assume jurisdiction even in the face of a foreign jurisdiction agreement include: the location of the evidence; whether the party seeking to stay proceedings in the Nigerian court is only seeking procedural advantages; whether the law of the foreign court applies, and if so, whether it differs from the domestic law in any material respects; with what country either party is connected, and how closely; and whether the plaintiff in the Nigerian court would be prejudiced by having to sue in the foreign court because they would be deprived of security for their claim; or be unable to enforce any judgment obtained; or be faced with a time bar not applicable to the Nigerian court; or for political, racial, religious or other reasons be unlikely to receive a fair trial.

The application of the above factors and the answer to the question of whether a Nigerian court will recognise and give effect to a foreign jurisdiction agreement in favour of a foreign court are at the discretion of the court, and that discretion must be exercised judicially and judiciously.

[16] For a detailed discussion of the commonly made errors by Nigerian courts in conflating of governing law with jurisdiction clauses please see C. Okoli and R. Oppong, note 10 above pages 107 - 108.
[17] Adetoun Oladeji (Nig) Ltd v. N.B. Plc (2007) 5 NWLR (Pt. 1027) 415 (P. 433, paras. E-H).
[18] This is a by-product of the settled principle of the Nigerian adjectival legal system that parties cannot by agreement oust the jurisdiction conferred on a court by law or the Constitution.
[19] (1969) 2 All ER 641.
[20] See also Nika Fishing Limited v. Lavina Corporation (2008) LPELR-2035 (SC). What this means is that the burden should not rest with the defendant to show why the court should decline jurisdiction. Rather, the better approach is to impose the burden on the plaintiff to show strong cause why the court should not uphold the choice of court agreement.

Enforcement of Foreign Judgment

The last, but no means the least, factor that a potential contracting party should consider in selecting a governing law or a jurisdiction clause in a cross-border contract is whether and to what extent the judgments of the courts of such country are capable of being recognised and enforceable in the rest of the world.

Under Nigerian law, there are two avenues for enforcing foreign judgments: (i) by an action at Common Law or (ii) by registration of the foreign judgment under statute. In terms of the applicable statute, it is now relatively settled that the two statutes, the Reciprocal Enforcement of Judgment Ordinance 1958 ("the Ordinance") and the Foreign Judgment (Reciprocal Enforcement) Act 1960 Cap F35 LFN 2004 ("the Act") continue to apply under Nigerian law.[21] In practice however, only the Ordinance remains operational owing to the failure of the Minister of Justice to extend the application of the Act to any country. The implication of this is that foreign judgments from English courts and the courts of other commonwealth countries are enforceable in Nigeria by registration under the Ordinance while the judgments of the courts of all other countries are only enforceable in Nigeria by common law actions.

Foreign contracting parties must therefore bear the above in mind in selecting Nigerian courts as the courts with jurisdiction over their disputes. On the flipside, Nigerian parties will require bespoke legal advice on the enforceability of the judgments emanating from the courts of any country to be selected as the court with jurisdiction over disputes arising from their cross-border contracts as well as the grounds under which such judgment may or may not be enforceable.

Concluding Remarks

The foregoing has demonstrated that the choice of governing law and dispute resolution mechanism in cross-border contracts are not abstract questions but have far-reaching implications for the parties. For instance, there are substantial and procedural advantages available in different forums to the exclusion of others. A choice of such forum therefore means that a party is able to take benefit of such advantages, but not otherwise. This explains why discerning parties, or their solicitors, often insist on selecting a particular governing law or forum during the negotiation stage of the contract. It also demonstrates why parties are willing to litigate the question of governing law and forum up to the final court of appeal, usually at huge expense to both parties.

With the increasing frequency with which both private individuals and corporations in Nigeria are entering into cross border agreements in this era of globalisation, and especially with the entry into force of the Agreement establishing the Africa Continental Free Trade Area, it would be imprudent for contracting parties to continue to blindly enter into cross-border contracts without paying due regard to three fundamental questions posed by Private International Law and without the benefit of expert legal advice. Hopefully, this publication has succeeded in laying bare the need to prevent future occurrences for all those who come into contact with it.

[21] Macaulay v R.Z.B Osterreich Akiengesell Schaft of Austria [2003] LPELR-1802(SC); Grosvenor Casinos Ltd v Ghassan Halaoui (2009) 10 NWLR (Pt 1149) 309; and VAB Petroleum Inc v Momah (2013) 14 NWLR (Pt 1374).