

## FOREIGN JURISDICTION CLAUSES AND THE MARITIME JURISDICTION OF THE FEDERAL HIGH COURT\*

### Abstract

*As part of the doctrine of freedom of contract, parties to a contract may freely agree to the law applicable to their contract in the event of a dispute. At common law, such agreement will, except for good reason, and subject to the discretion of the court be respected and enforced by the court. In Nigeria, section 20 of the Admiralty Jurisdiction Act has departed from this common law position, mandating the Federal High Court in maritime matters and causes to assume jurisdiction over contractual disputes notwithstanding foreign jurisdiction clauses contained in such contracts, provided such contracts have some connection to Nigeria. This paper examines the nature of foreign jurisdiction clauses at common law, the position under Nigerian law and the changes introduced by section 20 of the Admiralty Jurisdiction Act. It argues that beyond having a connection to Nigeria in accordance with section 20 of the Admiralty Jurisdiction Act, once a maritime contract involves a Nigerian registered ship, the Federal High should assume jurisdiction to entertain and determine disputes arising therefrom irrespective of the existence of a foreign jurisdiction clause in the maritime contract. It suggests that the changes made under section 20 of the Admiralty Jurisdiction Act should be extended beyond maritime contracts to all other contracts having some connection to Nigeria in respect of which jurisdiction was by the contract of parties vested in a foreign forum.*

**Keywords:** Foreign Jurisdiction Clauses, Maritime Jurisdiction, Federal High Court, Nigeria

### 1. Introduction

In the law of contract, parties are allowed the liberty to contract as they wish and deem fit,<sup>1</sup> provided they do not contract to commit a crime, or to perpetuate an illegal act such as fraud, duress and misrepresentation.<sup>2</sup> This is the whole essence of the doctrine of freedom of contract. When parties to a contract have freely and lawfully agreed on the terms of their contract, the court does not, ordinarily, make a practice of interfering therewith. It will respect the terms freely agreed by the parties. On their part, the parties are not permitted to deviate or resile from the terms freely entered into by them under their contract in line with the principle of *pacta sunt servanda*. An integral component of the doctrine of freedom of contract is the freedom of parties to a contract to choose or select in their contract, the law which shall apply and govern their transaction. This freedom is no different from and no less important than the freedom to agree on other terms of the contract. As Briggs once put it, there is indeed ‘no distinction in principle between a contract to sell and a contract to sue.’<sup>3</sup> Parties to a contract are, therefore, not confined to the law of their countries, that of the place where the contract is made or executed, or the law of the place of breach as the law applicable to their contract. They could select the law of any other country other than their own countries as the law applicable to their transaction. The clause in the contract stipulating a foreign law applicable to the contract is what is referred to as foreign jurisdiction clause. A jurisdiction clause contained in a contract therefore states that the parties have agreed to the court of a named country taking jurisdiction over any disputes that may arise from their transaction.

The Federal High Court<sup>4</sup> is vested with jurisdiction to hear and determine all maritime matters in Nigeria. Accordingly, all disputes arising from or connected with maritime contracts in Nigeria are amenable to the maritime jurisdiction of the Court. But in view of the legal implications of foreign jurisdiction clauses, their insertion in maritime contracts in Nigeria is bound to have jurisdictional consequences for the Federal High Court. This paper examines the legal effect of foreign jurisdiction clauses on the maritime jurisdiction of the Federal High Court. The paper proceeds in four main parts.

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<sup>1</sup> *Unilife Development Company Ltd. v. Adeshigbin* (2001) 2 SC 43.

<sup>2</sup> *ACB Ltd v. Alao* (1994) 7 NWLR (Pt. 358) 614; *JFS Investment Ltd v. Brawal Line Ltd. & Ors* (2010) 12 SC (Pt. 1) 110.

<sup>3</sup> A. Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press 2009) 195.

<sup>4</sup> The Court was established as the Federal Revenue Court by the Federal Revenue Court Act No. 13 of 1973. The Court was renamed the Federal High Court by section 228 of the CFRN, 1979.

It examines in the first part the maritime jurisdiction of the Federal High Court. In the second part, the paper discusses the legal nature of foreign jurisdiction clauses and examines the position at common law. In the third part, the paper critically examines the legal effect of such clauses in maritime contracts under Nigerian law and argues for an extension of the grounds upon which the jurisdiction of the Nigerian court would be invoked to entertain a contractual dispute notwithstanding the presence of a foreign jurisdiction clause in the contract.

## **2. Maritime Jurisdiction of the Federal High Court**

Maritime jurisdiction is conferred on the Federal High Court<sup>5</sup> under the Constitution of the Federal Republic of Nigeria, 1999 (as amended), the Admiralty Jurisdiction Act, 1991<sup>6</sup> and the Federal High Court Act, 1973<sup>7</sup>. In conferring exclusive maritime jurisdiction on the Federal High Court, Section 251(1) (g) of the 1999 Constitution provides:

Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil cases and matters ...  
any admiralty jurisdiction, including shipping and navigation on the River Niger or River Benue and their affluent and on such other inland waterway as may be designated by any enactment to be international waterway, all Federal ports, (including the constitution and powers of the ports authorities for Federal ports) and carriage by sea.

The Court is accordingly conferred with jurisdiction in respect of all matters pertaining to shipping and navigation in the Niger and Benue rivers and their affluent as well as carriage in international waterways and carriage by sea. Its jurisdiction also encompasses the operation of, and maritime activities in all ports in Nigeria. Section 1(1) of the Admiralty Jurisdiction Act vests the Court with exclusive jurisdiction in all admiralty matters contained under the section as well as on all criminal matters arising out of the matters in respect of which the Court is vested with admiralty jurisdiction. The section contains a list of matters over which the admiralty jurisdiction of the Court extends.<sup>8</sup> They include questions relating to a proprietary interest in a ship or aircraft; any action relating to a cause by a ship owner or aircraft operator or any other person under the Merchant Shipping Act,<sup>9</sup> or any other enactment for limitation of the amount of his liability connected with shipping or the operation of aircraft; any claim for liability incurred for oil pollution damage; any matter arising within a federal port or national airport and its precincts; banking or letters of credit transaction involving the importation or exportation of goods to or from Nigeria in a ship or aircraft; all matters from the constitution and powers of all ports authorities, airport authority or National Maritime Authority (now Nigeria Maritime Administration and Shipping Agency); and any criminal cause or matter arising from any of the matters with which the Court is conferred with jurisdiction. In addition to the forgoing, all agreements or purported agreements, monetary or otherwise connected with or relating to carriage of goods by sea, whether such contract is executed or not shall come within the jurisdiction of the Federal High Court.<sup>10</sup>

Under section 7(g) of the Federal High Court Act, the Court is also vested with jurisdiction over admiralty matters including shipping and navigation on the Niger and Benue rivers and their affluent, other inland waterways designated by law to be international waterways, all federal ports and carriage by sea. The Act, therefore, confers maritime jurisdiction on the Court in much the same wordings as section 251(1)(g) of the 1999 Constitution. In fact, considering the sameness in the wordings of section 7(g) of the Federal High Court Act and section 251(1)(g) of the 1999 Constitution, it would appear that the latter is a reproduction of the former by the draftsman.

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<sup>5</sup> The Court is now established under section 1 of the Federal High Court Act, 1973.

<sup>6</sup> Cap A5, LFN, 2004 (Revised in 2010).

<sup>7</sup> Cap F12, LFN, 2004 (Revised in 2010)

<sup>8</sup> See section 1(1) of the Act.

<sup>9</sup> Cap M11, LFN, 2004 (Revised in 2010).

<sup>10</sup> Section 1(3) Admiralty Jurisdiction Act.

With respect to carriage of goods, it is clear that the jurisdiction of the Court commences from the point where cargo is loaded on the ship and continues throughout the voyage. There, however, seems to be some conflict in judicial opinion as to when the maritime jurisdiction of the Federal High Court terminates with regard to carriage of goods by sea. While authorities exist to the effect that the maritime jurisdiction of the Court is limited to the point when the cargo is still in the ship and does not extend to when it has been discharged at the harbor or delivered to the port of destination, there are yet others which hold that the Court's jurisdiction extends to and covers the point of discharge at the harbour or delivery to the port of destination. In *Aluminum Manufacturing Co. (Nig) Ltd v. Nigeria Ports Authority*,<sup>11</sup> the Supreme Court, in interpreting the Administration of Justice Act, 1956 observed, *orbiter*, that for loss or carriage of goods to come under admiralty jurisdiction, it had to relate to a ship. This would appear to limit the Court's maritime jurisdiction to cargo on board ship. As already said, this observation was made by the apex court *orbiter* and while interpreting the Administration of Justice Act, 1956. The case was also decided prior to the enactment of the Admiralty Jurisdiction Act. In *Brawah Shipping (Nig) Ltd v. Aphrodite (Nig) Ltd*,<sup>12</sup> it was held that the admiralty jurisdiction of Federal High Court cannot be invoked once the goods on board ship have been discharged on the harbour or delivered to the port of destination of the cargo. This means that the jurisdiction of the Court could only be invoked so long as the cargo is still in the ship. In *Panalpina World Transport (Nig) Ltd. v. Glenyork (Nig) Ltd.*,<sup>13</sup> however, the Court of Appeal, Lagos Division, relying on section 1(2) of the Admiralty Jurisdiction Act held that the admiralty jurisdiction of the Federal High Court extended beyond the off-loading of the cargo to cover claims for damages to goods after they had been off-loaded from the ship. Salami JCA (as he then was) explained the point in the following connection:

It is an extension of admiralty jurisdiction by section 1(2) from where it previously ended when goods are off-loaded from a ship to a position to include claims for damages to goods occurring between off-loading the goods from ship and delivery at consignee's premises that took cognizance of goods going to places like Niger Republic, Chad and hinterland of Nigeria from Lagos, Port Harcourt and Calabar ports. The sub-section informed the current concept of dry ports in Ibadan, Kano, Aba, Bauchi, Katsina, Gombe, and Jos. Indeed, damage to goods off-loaded from ships in transit to the consignee on camels still qualifies as matter within the admiralty jurisdiction of the Federal High Court.<sup>14</sup>

In *G & C Lines Ltd. v. Hengrace (Nig) Ltd*,<sup>15</sup> the plaintiff's container arrived at Lagos, Nigeria from Tilbury U.K. but was held by the defendants due to which the container was not delivered to the owners. The plaintiff commenced this proceeding in the Lagos State High Court for waiver of demurrages and release of the container. The defendant filed an application praying that the suit be dismissed or struck out on the ground that the Federal High Court not the Lagos State High Court had jurisdiction to entertain the dispute. The High Court ruled in favour of the defendants that it had jurisdiction to entertain the matter. On appeal, the Court of Appeal held that the jurisdiction of the Federal High Court extended from the time the goods were placed on board the ship for the purpose of shipping to the time the goods are delivered to the consignee or whoever is to receive them whether or not the goods were transported on land during the process. This can only be the correct position of the law in view of the express provision of sub-section 2 of section 1 of the Admiralty Jurisdiction Act which extends the jurisdiction of the court to the time of delivery of the goods to the consignee. The subsection provides:

The admiralty jurisdiction of the Court in respect of carriage and delivery of goods extends from the time the goods are placed on board a ship for the purpose of shipping to the time the goods are delivered to the consignee or whoever is to receive them, whether the goods are transported on land during the process or not.

The Federal High Court therefore has jurisdiction beyond causes and matters arising from the carriage of goods by sea to also such causes and matters that may arise from the time the goods arrive and are

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<sup>11</sup> (1987) 18 NSCC (Pt. 1) 224

<sup>12</sup> (2004) 9 NWLR (Pt. 879) 462. See also *N.M.S. Ltd v. J.P. Enterprises Ltd* (2006) 5 NWLR (Pt. 972) 127

<sup>13</sup> (2009) All FWLR (Pt. 455) 1793

<sup>14</sup> *Ibid.*, at 1806–1807.

<sup>15</sup> (2001) 7 NWLR (Pt. 711) 51

offloaded from the ship at the port of destination, through their carriage on road or air until their eventual delivery to the consignee. It is important to point out that this does not mean that the contract of carriage of goods between the shipper and the ship owner extends beyond the delivery of the goods to the port of destination. It only means that disputes and matters arising from, relating to or connected with the transportation of the goods from the port of destination, by whatever mode of transportation, to the consignee still come within the admiralty jurisdiction of the Court. With respect to ships, the jurisdiction of the Court applies irrespective of where the ship owner is resident or domiciled.<sup>16</sup> Thus, what confers jurisdiction on the Court over ships is not the Nigerian residence or domicile of the owner, but the presence of the ship in Nigerian waters. Once the ship enters Nigerian waters it comes within and becomes subject to the jurisdiction of the Court. It is immaterial that the owner thereof is neither resident in Nigeria, nor has a Nigerian domicile. It is imperative to mention here that the ship needs also not be a Nigerian ship before the Court's jurisdiction would apply. Irrespective of the flag it flies, while within Nigerian waters, the Court's jurisdiction could be invoked over and in respect of a ship. Where the court exercises its jurisdiction and orders the sale of a ship or other maritime property, it also has jurisdiction to hear and determine any question as to title to the proceeds of sale.<sup>17</sup>

In much the same way, the jurisdiction of the Federal High Court applies in all maritime claims irrespective of where the cause of action arose. To be cognised by the Court, therefore, a maritime claim needs not arise in Nigeria; it could arise anywhere but the Court's jurisdiction shall apply to such claim in so far as the ship entered Nigerian territorial waters. The only exceptions are warships and non-commercial ships in the service of a foreign sovereign. Such ships are not amenable to the municipal jurisdiction of any foreign state. Warships enjoy immunity from the jurisdiction of any state other the state whose flag they fly.<sup>18</sup> Non-commercial ships in the service of a foreign sovereign are also immune from municipal jurisdiction and accordingly will not come under the jurisdiction of the Federal High Court.<sup>19</sup> The most a state could do with regard to such ships is to make an international claim against their flag-states because their flag-states are internationally responsible for damages caused by such ships.<sup>20</sup>

### 3. Foreign Jurisdiction Clauses

Parties to a contract may in their contract give jurisdiction to a foreign court for various reasons. Firstly, it affords some certainty, as between the parties, the law the court will have to apply to the transaction in the event of a dispute. The parties or one of them may insist on the choice of a particular forum the law of which he is conversant with as a precondition for entering into the contract. Secondly, the parties may choose a foreign court in the contract for the purpose of adjudicating disputes between them where the law of the country which ordinarily would apply to their contract is not only uncertain but also historically, liable to frequent changes and therefore unpredictable. Thirdly, the parties may avoid the laws and courts of the country which ordinarily should apply to their contract if they are apprehensive that, due to political, religious or other discriminatory considerations justice may not objectively and dispassionately be done. The decision to choose a foreign jurisdiction may also be informed by the need to be able to easily enforce the judgement of the court as well as the availability of the other party's properties that could be attached in enforcement of the judgement. Due to the cross-border nature of most maritime contracts, it does not happen infrequently to have maritime contracts in which the parties insert jurisdictional clauses which provide for the country (other than their own countries) the court of which shall adjudicate between them in the event of a dispute.<sup>21</sup> Where this is the case, the laws of other countries are excluded and the jurisdiction of their courts ousted irrespective of the existence of some connection between the parties or the contract with any other country.

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<sup>16</sup> Section 3(a) Administration of Criminal Justice Act.

<sup>17</sup> Section 5(6) of the Admiralty Jurisdiction Act.

<sup>18</sup> Article 95 United Nations Convention on the Law of the Sea (UNCLOS), 1982.

<sup>19</sup> Article 96 *ibid.*

<sup>20</sup> Article 31 *ibid.*

<sup>21</sup> *Vita Foods Products Inc. v. Unus Shipping Co. Ltd* (1939) A.C. 277; S. M. Knight, 'Avoidance of Foreign Jurisdiction Clauses in International Contracts' (1977) 26(2) *The International and Comparative Law Quarterly*, 664.

At common law, where parties to a contract have in their contract stipulated that a particular court should have jurisdiction over any dispute arising from their contract, the English court would, ordinarily, hold the parties to their bargain. In *The Chaparral*,<sup>22</sup> the English Court of Appeal, per Willmer L.J, summarised this common law position as follows:

The law on the subject, I think, is not open to doubt, and I do not think that it is really to cite the authorities to which we have been referred. It is always open to the parties to stipulate (as they did in this case) that a particular court shall have jurisdiction over any dispute arising out of their contract ... Prima facie, it is the policy of the court to hold parties to the bargain into which they have entered. ... I approach the matter, therefore, in this way, that the court has a discretion which, in the ordinary way and in the absence of strong reason to the contrary, will be exercised in holding parties to their bargain.<sup>23</sup>

At common law, therefore, where the court is called upon to entertain and hear a contractual cause or matter in spite of a jurisdictional clause, the court has discretion either to hold the parties to their bargain and proceed to entertain the matter, or to stay the proceeding after taking various factors into consideration. In the *Eleftheria*,<sup>24</sup> plywood was shipped from a port in Romania to Hull, England on board the *Eleftheria*, a Greek ship. Though the cargo was to be carried to Hull, it was discharged at Rotterdam. The bill of lading provided that disputes arising from the contract should be resolved in Greece in accordance with Greek law. The plaintiff, an English company, brought an action against the ship in England but the defendant applied for stay of proceeding on the ground that there was a valid foreign jurisdiction clause in the parties' contract. Brandon J. laid down the factors the court would take into account in deciding whether, as against the jurisdiction clause, it should entertain the case. These factors, which became known as the 'Brandon Test' are as follows:

- i. where is the evidence available to prove the case?
- ii. does the law in the foreign country differ from English law in fundamental respects?
- iii. with what countries are the parties connected and how closely?
- iv. do the defendants genuinely desire the case to be heard in the foreign court?
- v. would the plaintiffs be prejudiced in the foreign court?
- vi. would the plaintiffs be deprived of security for their claim if the claim was heard in the foreign court?
- vii. would the plaintiffs be unable to enforce any judgement they may obtain in the foreign court?
- viii. would the plaintiffs face a time bar in the foreign jurisdiction which they will not face under English law?
- ix. would the plaintiffs, for political, racial, religious or other reasons be unlikely to get a fair trial in the foreign jurisdiction?

The court pointed out that any of these factors could warrant the assumption of jurisdiction by the English court, the foreign jurisdiction clause notwithstanding. The court in that case however ordered stay of the proceedings in the action commenced in the English court for the reason that Greek law on the issue differed in fundamental respects from English law. It follows from the above that where parties have in their contract made a choice of jurisdiction, they would be bound by it in line with the doctrine of *pacta sunt servanda* except there is sufficient reason to the contrary. This position of the law has been accepted by the English Court of Appeal<sup>25</sup> and the House of Lords,<sup>26</sup> and represents the position of English jurisprudence on the point. In *Donohue v. Armco Inc.*,<sup>27</sup> Lord Bingham explained this position of the law in the following connection:

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<sup>22</sup> *Unterseeer Rederei G.m.b.H V. Zapata Offshore Co.* (1968) Loyd's Rep. 158.

<sup>23</sup> *Ibid* at 162.

<sup>24</sup> (1969) 1 Lloyds L. R. 237

<sup>25</sup> See *The El Amiva* (1981) 2 LR 119

<sup>26</sup> *Trendtex Trading Corporation v. Credit Suisse* (1982) AC 679

<sup>27</sup> (2002) 1 ALL ER 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 proceeding 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 in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum.*<sup>28</sup>

#### 4. The Position in Nigeria

The common law position on foreign jurisdiction clauses has been followed by the courts in Nigeria. The Nigerian court would exercise its discretion in favour of a plaintiff who approached it where, despite a foreign jurisdiction clause in a contract, one or more of the factors laid down in the *Eleftheria* case exist. In *Sonar Nigeria Ltd v. Partenreedi M.S. Nordwind (Owners of MV Nordwind)*,<sup>29</sup> the defendants were, under a contract of affreightment, to deliver parboiled long grain rice from Bangkok to Lagos on board the *M.V. Nordwind*. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants were based in Germany, Liberia and Thailand respectively and carry on business in those countries. Under clause 3 of the bill of lading evidencing the contract of carriage of goods, it was agreed that ‘any dispute arising under the bill should be decided in the country where the carrier has its principal place of business and according to the law of such country.’ Despite the jurisdiction clause contained in the bill of lading, the plaintiffs instituted this action in the Federal High Court in Nigeria. The defendants brought an application challenging the jurisdiction of the Nigerian court. It was held that based on the jurisdiction clause contained in the bill of lading, the proper court to entertain the matter was the German court in accordance with German law. On appeal to the Court of Appeal, the decision of the Federal High Court was affirmed and the appeal dismissed. On further appeal to the Supreme Court, the apex court considered the factors laid down in the *Eleftheria* case and held that the Nigerian court could entertain the claim in view of the fact the case was already statute barred in Germany but not in Nigeria. In *Adesanya v. Palm Line Ltd*,<sup>30</sup> in declining to give effect to a jurisdiction clause, Adefarasin J. held that, ordinarily, the parties having chosen a particular law to govern their transaction, that law remained the proper law of contract but that the surrounding circumstances of the case must be taken into consideration in deciding whether to assume or decline jurisdiction. Similarly, in *Herb v. Devimco*,<sup>31</sup> there was a breach in Nigeria of a contract meant by the parties to be executed in Nigeria. The parties, however, inserted a jurisdiction clause in their contract giving jurisdiction to a foreign court. The Court of Appeal refusing an application to stay the proceedings held that the Nigerian court could hear the matter since the contract was not only meant to be executed in Nigeria, but was also breached in Nigeria. In *Inlaks Limited v. Polish Ocean Lines*,<sup>32</sup> the court refused to grant stay of execution of the proceedings because the claim had become statute barred in the forum selected by the parties in their contract.

It could, therefore, be safely concluded from the judicial authorities that the court would assume jurisdiction and entertain the cause if the evidence with which the cause would be tried is in Nigeria; or where the court vested with jurisdiction under the contract cannot try the matter because it is time barred; or where, on the balance of convenience, it is better for the Nigerian court to exercise jurisdiction over the matter. The Nigerian court would also assume jurisdiction if the applicant does not, in all genuineness, want the matter to be tried by a foreign court, but would prefer to take procedural advantages in Nigeria; or where a stay of proceedings would occasion injustice on the plaintiff, such as where the cause is already time-barred in the foreign jurisdiction but is not in Nigeria.<sup>33</sup> Maritime

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<sup>28</sup> Ibid at 750. Emphasis added.

<sup>29</sup> (1987) 4 NWLR (Pt. 66) 520

<sup>30</sup> (1967) 1 NSL 118

<sup>31</sup> (2001) 52 WRN 19; *Laura Ubani v. Jeco Shipping Lines & Anor* (1989) 3 NSC 500

<sup>32</sup> (1989) 3 NSC 588

<sup>33</sup>For a more in-depth study of jurisdiction clauses and forum selection, see O. D. Godson, ‘Forum Selection in Maritime Disputes: The Approach of the Nigerian Courts’ (2017) 1(1) *Unilag Law Review*, 83-106; H. A. Olaniyan, ‘A Review of

contracts are contracts relating to or connected with maritime transactions. They include all contracts connected with transactions in respect of which claims could be made in Nigeria under section 2 of the Admiralty Jurisdiction Act. They include, but are not limited to contracts of carriage of goods by sea; contracts for services rendered to a ship such as pilotage, salvage, towage, stevedoring, and lighterage services; contracts in respect of the construction and the alteration, or the repair and equipping of a ship; contracts of employment of the shipmaster or crew; and maritime insurance contracts.<sup>34</sup> With respect to maritime contracts in Nigeria, legislation has resulted in a departure from the common law position on foreign jurisdiction clauses. The question as to what would be the approach of the Nigerian court when called upon to entertain an action arising from a maritime contract in which the jurisdiction of the Nigerian court has been ousted by a jurisdiction clause in the contract has now been resolved with certainty by the Admiralty Jurisdiction Act. Under section 20 of the Act, any agreement by which the parties to any cause or matter seek to oust the admiralty jurisdiction of the Federal High Court shall be null and void if the cause or matter relates to any admiralty matter falling under the Act, and if the cause or matter has any connection to Nigeria.

Thus, unlike at common law, the maritime jurisdiction of the Federal High Court is incapable of being ousted by a foreign jurisdiction clause provided the contract has some connection to Nigeria. The cause or matter would have a connection to Nigeria in the following circumstances:<sup>35</sup>

- i. if the place of performance, execution, or delivery is in Nigeria, or the act or default giving rise to the cause or matter takes place in Nigeria; or any of the parties resides in Nigeria;
- ii. or, in the case of a contract, payment is made or is to be made in Nigeria;
- iii. or the plaintiff submits to the jurisdiction of the Federal High Court and makes a declaration to that effect;
- iv. or the *res* is within Nigeria;
- v. or the Federal Government or the Government of a State of the Federation is involved and submits to the jurisdiction of the Court;
- vi. or there is financial consideration accruing in, derived from, brought into or received in Nigeria in respect of any matter under the admiralty jurisdiction of the court;
- vii. or 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;
- viii. or in the opinion of the court, the cause, matter or action should be adjudicated upon in Nigeria.

It is the writer's view that the provision of section 20 of the Admiralty Jurisdiction Act has effectively done away with the court's discretion when faced with a matter in respect of which the parties had, by their contract, given jurisdiction to a foreign forum. It is clear from the provision that once any of the circumstances stated therein is the case, the court will mandatorily assume jurisdiction and entertain the claim. This is a departure from the doctrine of freedom of contract under which parties are free to agree on the terms of their contract and the court will not interfere therewith.<sup>36</sup> The legislative intent of section 20 of the Admiralty Jurisdiction Act would appear to be twofold. Firstly, where the subject matter of the contract is connected with Nigeria, or the Government of Nigeria or that of a federating state is involved, it would amount to curtailment of the sovereign powers of Nigeria to exclude the jurisdiction of her courts by agreement of parties. Under section 6(6)(b) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), the judicial powers of the Federation of Nigeria is expressly vested in

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Judicial and Legislative Approach of Nigeria to Discretionary Jurisdiction over Foreign Causes' (2012) 3(12) *International Journal of Business and Social Science*, 204-218.

<sup>34</sup> See section 2(3)(a)-(u) *ibid*.

<sup>35</sup> Section 20 Admiralty Jurisdiction Act.

<sup>36</sup> *Afrotech v. M.I.A. & Sons Ltd* (2000) 12 SC (Pt. II) 1; *Owoniboye Tech. Services Ltd. v. U.B.N Ltd* (2003) 13 NWLR (Pt. 844) 545; *Nimanteks Associates v. Marco Construction Company Ltd* (1991) 2 NWLR (Pt. 174) 411; *African Reinsurance Corporation v. Fautaye* (1986) 1 NWLR (Pt. 14) 113.

the courts established under the Constitution for the federation and shall extend to ‘all matters between persons, or between government and authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of the parties.’ So long, therefore, as the civil rights and obligations of any person in Nigeria is in issue, the judicial powers of the Federation of Nigerian vested in Nigerian courts under the supreme law of the land cannot be lightly curtailed. Secondly, in the negotiation of contracts, the parties, (one of whom may be a Nigerian), do not always negotiate from the same background due to which a party bargaining from a weaker background may accept terms unfavourable to him. In fact, a lot of such contracts are usually in standard form due to which there are usually no negotiations. The Act may by the provision have enabled such party to resile from the agreement to oust the jurisdiction of the Nigerian Court.

It should be pointed out that section 20 of the Admiralty Jurisdiction Act does not nullify the whole maritime contract containing the jurisdiction clause; it only renders null and void the jurisdiction clause contained in the contract. Due to the inelegance in the drafting of the section, one could quite easily conclude that the whole contract containing the jurisdiction clause is, by reason of the clause, nullified under the section.<sup>37</sup> Thus, the jurisdiction clause contained in the contract is severable from the rest of the contract and nullified, while the rest of the contract remains good and enforceable. While a jurisdiction clause vesting jurisdiction in a foreign court could be overridden by a Nigerian court in maritime causes and matters in view of section 20 of the Admiralty Jurisdiction Act, it is doubtful if an arbitration clause could also be so overridden. Where the parties had by their own agreement elected to submit disputes arising from their transaction to arbitration, their agreement to resort to arbitration shall be irrevocable except by agreement of the parties or leave of the court or a judge.<sup>38</sup> This is because an agreement to resort to judicial proceedings is different from one to resort to arbitral proceedings. While the former could oust the jurisdiction of a court, the later only has suspensory effect on judicial adjudication. In *Owners of MV Lupex v. Nigerian Overseas Chartering and Shipping Ltd*,<sup>39</sup> the parties had by their agreement elected to subject disputes arising from their contract to arbitration in London. In breach of the arbitration clause, the respondent instituted these proceedings in Nigeria claiming a total of US\$ 853,585.20 against the appellants. The appellants brought an application praying the court, among others, for an order staying the proceedings *sine die*. The trial court declined to stay proceedings in the matter. The appellant pursued the matter up to the Supreme Court, the Court of Appeal having dismissed its appeal to that court. The Supreme Court held that an arbitration agreement merely postpones the rights of the disputing parties to resort to litigation where they had elected under their contract to resort to arbitration, and that an arbitration clause does not oust the court’s jurisdiction. The court then stayed the proceedings instituted in Nigeria pending the conclusion of arbitral proceedings in London. In *Felak Concept Ltd. v. A.-G., Akwa Ibom State*,<sup>40</sup> under a consultancy contract between the parties, the appellant was to render project consultancy services to the respondent in respect of phase 3 of the Akwa Ibom State Deep Seaport Project. The contract contained an arbitration clause under which disputes arising from the contract were to be submitted to arbitration. Subsequently, the respondent attempted to appoint another Consultant/Transaction Adviser in respect to the same project and the appellant placed adverts in some national newspapers raising a caveat against the attempt to appoint another consultant by the respondent. On becoming aware of the adverts, the respondent caused a writ of summons to be issued against the appellant and by motion *ex parte* obtained interim injunctive reliefs against the appellant. The respondent’s contention was that its contract with the appellant had a lifespan of 16 weeks which had expired without being renewed.

The appellant on its part brought a motion on notice seeking an order setting aside the order of interim injunction granted against it, an order referring the dispute to arbitration, and an order staying the proceedings. The court in its ruling refused the application. Dissatisfied with the ruling, the appellant appealed to the Court of Appeal. It was held that an arbitration clause does not seek to oust the

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<sup>37</sup> See *Owners of MV Lupex v. Nigerian Overseas Chartering and Shipping Ltd* (1993-1995) NSC 182.

<sup>38</sup>Section 2 of the Arbitration and Conciliation Act. An arbitration clause providing in an agreement that disputes arising from the transaction shall be submitted by the parties to arbitration is also referred to as a ‘*Scott v. Avery*’ clause.

<sup>39</sup> *Supra*. See also *Onward Enterprises Ltd v. MV Matrix* (2010) 2 NWLR (Pt. 1179) 530; *Aliyu v. Wakil* (2015) LPELR 25910.

<sup>40</sup> (2019) 8 NWLR (Pt. 1675) 433



jurisdiction of the court or deprive the parties the right or privilege of having recourse to the courts in regard to disputes arising from their transaction. It was further held by the Court of Appeal that a party to an agreement containing an arbitration clause has the option to either submit to arbitration or to have the dispute decided by the court.<sup>41</sup> In *Lignes Aeriennes Congolaises v. Air Atlantic Nig. Ltd*,<sup>42</sup> the Court of Appeal was of the considered view that the parties to an agreement reserve the right to agree to resort to arbitration in the event of a dispute and that an arbitration clause in a contract does not oust the jurisdiction of the court. The parties can still and always have recourse to the courts. Here, the appellant was a Congolese company with an operational office in Lagos. It entered into an aircraft leasing contract with the respondent, a Nigerian company. The respondent was, under the contract, to lease aircraft to the appellant. The parties selected Congolese law as the law of their contract. When the appellant breached the contract by not paying charges due to the respondent, the respondent instituted legal proceedings in Nigeria to recover the amount due. The appellant brought a preliminary objection challenging the jurisdiction of the Nigerian court on the ground that, under the contract of lease, Congolese law was the applicable law. The trial Nigerian court dismissed the objection. Dissatisfied, the appellant appealed to the Court of Appeal. At the Court of Appeal the question turned to whether parties could contract in Nigeria to oust the jurisdiction of Nigerian courts. In dismissing the appeal, the Court of Appeal held that the jurisdiction of the courts is well spelt out under the Constitution and other laws of Nigeria, and that a court of law will not hurry to divest itself of jurisdiction only because parties had, in their private contract, chosen a foreign court and a foreign law.

It is instructive to advert, at this juncture, to sections 4(1) and 5(1) of the Arbitration and Conciliation Act. Under those sections, a court before which an action, the subject matter of an arbitration agreement is brought, shall, if any party so requests, order that the matter be referred to arbitration, provided that the party requesting had not taken any step in the court proceeding. With respect to maritime contracts, it would appear that sections 4 and 5 of the Arbitration and Conciliation Act constitute no bar to commencement and maintenance of judicial action notwithstanding the existence of an arbitration clause in the contract.<sup>43</sup> In *MV Panormos Bay v. Olam Nig Plc*,<sup>44</sup> it was held that section 20 of the Admiralty Jurisdiction Act overrides sections 4 and 5 of the Arbitration and Conciliation Act.<sup>45</sup> Therefore, provided the maritime contract has some connection to Nigeria, a clause in the contract giving arbitral jurisdiction in respect of the contract to a foreign forum does not preclude the right of a party to commence and maintain an action in a Nigerian court. It is submitted, therefore, that in maritime contracts, section 20 of the Admiralty Jurisdiction Act could be relied upon to defeat an application for stay of proceedings brought pursuant to sections 4 and 5 of the Arbitration and Conciliation Act to stay or suspend judicial proceedings in a Nigerian court, provided the admiralty matter or cause has some connection to Nigeria.

While the power of the court to stay proceedings pending arbitration under sections 4 and 5 of the Arbitration and Conciliation Act is overridden by section 20 of the Admiralty Jurisdiction Act in causes and matters arising from maritime contracts, arbitration clauses in all contracts other than maritime contracts remain unaffected. In such other contracts, judicial proceedings would necessarily be stayed pending the conclusion of arbitral proceedings. As earlier said, this is because resort to arbitration where the parties had in their agreement elected to submit their disputes to arbitration does not, like a foreign jurisdiction clause, oust the jurisdiction of the court. In fact, under section 4(2) of the Arbitration and Conciliation Act, where an action was commenced in court in respect of a dispute agreed by the parties to be submitted to arbitration, arbitral proceedings may nevertheless be commenced or continued, and an award may be made by the arbitral tribunal while the matter is pending before the court. While section 20 of the Admiralty Jurisdiction Act commendably did away with the discretion of the court

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<sup>41</sup>See also *Obembe v. Wemabod Estates Ltd* (1977) 5 SC 115; *K.S.U.B.D. v. Fanz Construction Ltd* (1986) 5 NWLR (Pt. 39) 74; *L.A.C. v. A.A.N. Ltd* (2006) 2 NWLR (Pt. 963) 49.

<sup>42</sup> (2006) 2 NWLR (Pt. 963) 49.

<sup>43</sup> Ikenga Oraegbunam, Meshach N. Umenweke & Chienye Okafor, 'Appraisal of the Legal Regime for Maritime Industry and Arbitration in Nigeria: Recipe for Economic Growth', *International Journal of Business and Law Research* 3(2):61-72, April-June 2015. <http://seahipaj.org/journals-ci/april-june-2015/IJBLR/abstract/IJBLR%206.html>.

<sup>44</sup> (2004) 10 CLRN 77.

<sup>45</sup> Cap A18, LFN, 2004 (Revised in 2010).

when faced with a foreign jurisdiction clause in maritime contracts touching on Nigeria, it is the writer's view that this is not enough. The mere fact that the parties to the contract are in Nigeria and therefore entitled to rights and subject to liabilities under Nigerian law should be sufficient to invoke the jurisdiction of the Nigerian court. Even where only a party to the contract is in Nigeria and thus subject to Nigerian law, the Nigerian court should not be willing to divest itself of jurisdiction since such party comes within the penumbra of 'any person in Nigeria' under section 6(6)(b) of the Constitution. In *Lignes Aeriennes Congolaises v. Air Atlantic Nig. Ltd.*,<sup>46</sup> for example, where the parties were both in Nigeria, it would have been preposterous for the court to decline jurisdiction on the basis of the foreign jurisdiction clause contained in the parties' contract. This, it is submitted, would still be so if the contract had no other connection whatsoever to Nigeria. It would even be the more preposterous if the contract involved a Nigerian registered ship having legal personality under Nigerian law. All ships plying the seas are required, under international law, to be registered to one country at a time<sup>47</sup> to ensure effective jurisdictional oversight and to 'notify the international community what state has jurisdiction over them.'<sup>48</sup> Once registered, ships become entitled to fly the flag of the country of registry and have the nationality of the country whose flag they are entitled to fly.<sup>49</sup> By their nature, ships are considered part of the territory of a country with vessel registration serving as a bridge between the ship and the mainland.<sup>50</sup> The fact that a ship flies the Nigerian flag, in the absence of any other connection to Nigeria, should suffice to activate the jurisdiction of the Nigerian court in a dispute arising from a maritime contract when the ship is within the territory of Nigeria, a foreign jurisdiction clause contained in the contract notwithstanding.

## 5. Conclusion

The jurisdiction of a court is the power of that court to entertain and adjudicate over matters brought before it for adjudication. It determines the *vires* of a court to entertain and determine a matter presented before it.<sup>51</sup> Jurisdiction is therefore the foundation of judicial adjudication. In view of the importance of jurisdiction to the adjudicatory powers of the court, courts guard their jurisdiction jealously.<sup>52</sup> Not even the agreement of parties can vest a court with jurisdiction if it does not have jurisdiction, or divest it of jurisdiction if it is vested with jurisdiction. While foreign jurisdiction clauses deserve, like other terms of a contract, to be enforced between parties by the courts, they should not be permitted to be slave masters manacled the hands of Nigerian courts where the contract in issue has connections to Nigeria. It is for this reason that the provision of section 20 of the Admiralty Jurisdiction Act which has done away with the court's discretion to defer or not to defer to a foreign jurisdiction clause in a maritime contract is commendable. It is hoped that this mandatory assumption of jurisdiction by the Federal High Court in admiralty matters connected to Nigeria irrespective foreign jurisdiction clauses in a maritime contract would in future be extended to all other contracts having some connection to Nigeria.

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<sup>46</sup> *Supra*.

<sup>47</sup> A ship is not permitted to be registered in two or more states at a time and shall not change its flag while on a voyage or while in a port of call, except in the case of transfer of ownership or change of registry. See article 92(1) UNCLOS, 1982; article 4(5) United Nations Convention on Conditions for Registration of Ships, 1986.

<sup>48</sup> T. Shaughnessy and E. Tobin, 'Flags of Convenience: Freedom and Insecurity on the High Seas' <<http://www.law.upenn.edu.pdf>> accessed 11 June 2019.

<sup>49</sup> Article 91(1) United Nations Convention on the Law of the Sea, 1982; Article 4(2) United Nations Convention on Conditions for Registration of Ships, 1986.

<sup>50</sup> A. Odeke, 'An Examination of Bareboat Charter Registries and Flag of Convenience Registries in International Law' (2004) 35 *Ocean Development and International Law*, 118.

<sup>51</sup> See *State v. Onagoruwa* (1992) 2 NWLR (Pt. 221) 33 at 57.