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Jurisdiction: A Catalyst to International Business Transaction Enforcement and Development in Nigeria

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Abstract

Jurisdiction is the inherent power of a competent court to adjudicate on matters brought before it. Where a court lacks jurisdiction whether on domestic or international transactions, any action or inaction taken amounts to nullity and all those actions are void ab initio meaning such judgment if any are not capable of enforcement. Library and online legal materials are the main sources of this paper. The paper is divided into twelve subtopics as follows; introduction, contextual clarifications, a brief history of the World Trading System, the World Trade Organization, Nigerian approach to trans-border jurisdiction, jurisdiction agreements in Nigerian courts, mandatory statutes in Nigeria, *forum non conveniens*, the absence of governing law clause, including the Federal jurisdiction in Canada, conclusion and recommendations based on findings. Unlike the US and Canada, the choice of law rules is subject to the discretion of the court, and Nigerian courts usually guide their jurisdiction jealously against any one attempting to invoke foreign choice of law by attempting to exclude the jurisdiction of Nigerian Courts in the contract agreement. But there cannot be meaningful socio-economy development without the certainty of the position of the Nigerian law on jurisdiction in international business transactions. Nigerian courts should contribute to economy development of the Nation by affirming the principle of sanctity of contract and choice of law especially in international business transactions.

Keywords: Jurisdiction, International business transactions, Judgment, enforcement, trans-border transactions, choice of forum

Introduction

Jurisdiction is the bedrock of any action in any judicial proceedings irrespective of whether the issues before the Court are purely domestic or decorated with international flavour or element[1]. Obtaining judgment in any judicial proceedings is not the end itself but a means to an end, and ultimately enforcement of the judgment especially at the international level would be impossible where the court acted without jurisdiction. It is apposite to understand the intricacies of jurisdiction before engaging in business transaction across boarder to prevent been cut on the wrong side of the law. Nations also must realize that the world is a global village and increasingly becoming sophisticated with advancement in technology and financial technology driving the economy, therefore there is the need for liberalization of commercial transaction laws in the country since the jurisdiction of court depends on choice of law[2] by the parties.

Contextual Clarifications

Papers of this nature are usually dedicated in a small part to conceptual clarifications which I consider appropriate here in order to understand the key words and the context in which I am going to address this topic. Hence I shall undertake a brief description, and not definition, of the following words, namely 'jurisdiction', 'catalyst' and 'international business transaction',

Considering the natural tendencies for inaccuracy in the meanings of words as explained by Niki Tobi, JSC of blessed memory[3] I will not define any words but explain the context usage of such words in this paper.

Jurisdiction

Jurisdiction has been defined by Webster Dictionary[4] as the power, right or authority to interpret and apply the law. According to Black's Law Dictionary[5] it is "a court's power to decide a case or issue a decree". It should be noted that the jurisdiction of a Court of law cannot be assumed or implied. It is generally donated by the Constitution or the enabling statute that established the court. Jurisdiction of a court is a fundamental and threshold issue in a proceeding and as such, it can

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[1] Ernest Young, 'Foreign Law and the Denominator Problem' (2005-2006) Vol. 119 Harvard Law Review p.148

[2] Hague Conference on Private International Law (2015), 'Principles of Choice of Law in International Commercial Contract' art 2 rule 1 https://assets.hcch.net/docs/5da3ed47-f54d-4c43-aaef-5eafc7c1f2a1.pdf'accessed 06 October 2021.

[3] *Olafisoye v FRN* (2004) 4 NWLR (Pt. 864) 580 at 647, [paras E].

[4] Webster Dictionary: https://www.merriam-webster.com/dictionary/jurisdiction accessed 06 October 2021.

[5] Bryan Garner, 'Black's Law Dictionary' (9th ed. West Publishing) 2009.

be challenged at any time or stage even for the first time at the Supreme Court[6]. With reference to this, the court in *Oloba v. Akereja*[7] had these to say:

"The issue of jurisdiction is very fundamental as it goes to the competence of the court or tribunal. If a court or tribunal is not competent to entertain a matter or claim or suit, it is a waste of valuable time for the court to embark on the hearing and determination of the suit, matter or claim. It is, therefore, an exhibition of wisdom to have the issue of jurisdiction or competence determined before embarking on the hearing and determination of the substantive matter. The issue of jurisdiction being a fundamental issue can be raised at any stage of the proceedings in the court of first instance or in the appeal courts."

Catalyst

Catalyst is someone or something that causes something to vary or happen[8]. It is a source of change or for the purposes of this paper; development.

International business transactions

Business is any work done to satisfy human wants. Any business that has a foreign element is refer to international business. The most common sorts of international business transactions are contracts for the sale of products, the supply of services (including employment), or the licensing of property[9]. All of these activities and their associated agreements are common in transactional business. There are more complex contracts as well, such as those involved in the transfer of a business from an owner in one country to an owner in another country, or an international project financing arrangement. Transactions briefly, represent the foremost direct way through which international business gets done. Although law of nations may govern some aspects of such cross-border agreements, cross-border business transactions also are governed by the laws of one (1) or more specific states.

A brief history of the World Trading System

During the European colonial era, most European powers imposed high import duties, established exclusionary trading relationships with their colonies, subsidized manufacturing and exports, and therefore the aggressively accumulated

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[6] *Madukolu v Nkemdilim* (1962) 2 All NLR 581.

[7] *Oloba v Akereja* (1988) 3 NWLR (PART 84) 508 @ 520 C-E Per Obaseki JSC, see most recently Rahman Brothers Ltd. v NPA (2019) LCN/4801 SC.

[8] Macmillan Online Dictionary https://www.macmillandictionary.com/dictionary/british/catalyst accessed October 12, 2021.

[9] Aron X. Fellmeth, 'Introduction to International Business Transactions', (Edward Elgar Publishing Limited, Cheltenham 2020) p.1.
https://books.google.com.ng/books?id=DSbsDwAAQBAJ&printsec=frontcover&dq=meaning+of+international+business+transaction&hl=en&sa=X&ved=2ahUKEwj26dGi3sTzAhUBzIUKHUBECi0Q6AF6BAgIEAI#v=onepage&q=meaning%20of%20international%20business%20transaction&f=false accessed 12 October 2021.

gold and silver[10]. Technological advances in navigation and refrigeration had made international shipping much more profitable, but it was used relatively between the colonizing powers. The theory that an empire best served its own interest by high exports, few or no imports, and the accumulation of precious metals came to be known as mercantilism, and it dominated economy policy until the liberal theories of Adam Smith and Ricardo gained ascendency.

In the mid-nineteen centuries, these theories and the necessity of solving the famine in Ireland influenced the United Kingdom to repeal many import tariffs and liberalized trade. The UK also began to negotiate free trade treaties with France, Germany and other European countries. At the conclusion of negotiations in Uruguay in 1994, the contracting parties had established a revolutionary change to the world trading system. The package of agreement was more diverse and elaborate than any that had preceded it, and most importantly, it included a treaty establishing a supervisory institution for future trade negotiations- the World Trade Organization (WTO)- and a robust enforcement mechanism.

The world Trade Organization

The WTO is an intergovernmental organization, headquartered in Geneva Switzerland. It was created by a multilateral treaty, the Agreement establishing the World Trade Organization. All WTO members are parties to the present treaty. The WTO provides a forum for states to negotiate new trade agreements and discuss the interpretation and enforcement of those currently in force. As of year 2020, the WTO Agreements have 164 parties, including almost every major economy in the world and Nigeria[11] is not left out.

Nigerian approach to trans-border jurisdiction

The concept of jurisdiction in Nigerian conflict of laws is best examined with the most recent decision of the Court of Appeal on the matter i.e. *Attorney General of Yobe State v. Maska* & *Ano*r[12] where the claimant instituted an action for summary judgment against the defendants at the High Court of Katsina State for breach of contract. The claimant alleged that the defendants purchased some trucks of maize with a promise to pay for it. It was also the allegation of the Claimant that the defendants failed to pay for the goods as agreed. It was undisputed that the place of delivery (or performance) was in Kastina State, the claimant's place of business, where the defendants took delivery of the goods. However, the defendants challenged the jurisdiction of the Kastina State High Court to hear the case on the ground that the contract was concluded in Yobe State, where it claimed the cause of

[10] Ibid p. 31

[11] Ibid p. 32.

[12]Attorney General of Yobe State v Maska & Ano*r (2021) 7 NWLR (Pt. 1776) 535.*

action arose, which it argued was outside the jurisdiction of Kastina State. On this basis the defendants argued that the court of Yobe State had exclusive jurisdiction. The High Court of Kastina State assumed jurisdiction and rejected the argument of the defendants. The defendants appealed but it was not successful. The Court of Appeal held that the concept of territorial jurisdiction for breach of contract is based on any or a combination of the following three factors
– (a) where the contract was made (*lex loci contractus)*;
(b) where the contract is to be performed (*lex loci solutions)***;**.and
(c) where the defendant resides.
In the instant case, the place of performance – particularly the place of delivery – was in Kastina State – so the High Court of Kastina State could assume jurisdiction in this case.

Maska adds to the confusion on the concept of jurisdiction in Nigerian conflict of laws[13]. This is because in the said case, the attention was on what it termed as "territorial jurisdiction for breach of contract" in inter-state matters. In international and inter-state matters, Nigerian judges apply at least four approaches in determining whether or not to assume jurisdiction in cases concerned with conflict of laws[14]. First, some Nigerian judges apply the traditional common law rules on private international law to determine issues of jurisdiction[15] which is based on the residence and/or submission of the defendant to the jurisdiction of the Nigerian court. Where the defendant is resident in a foreign country and does not submit to the jurisdiction of the Nigerian court, then leave of court is required in accordance with the relevant civil procedure rules to bring a foreign defendant before the Nigerian Court. This is all subject to the principle of *forum non conveniens* – the appropriate forum where the action should be brought in the interest of the parties and the ends of justice.

Again, some Nigerian judges apply choice of venue rules to determine conflict of law rules on jurisdiction[16]. Indeed, some Nigerian judges have rightly held that choice of venue rules are not supposed to be used to determine matters of jurisdiction in

[13] Chukwuma Okoli, 'Territorial Jurisdiction for Breach of Contract in Nigeria or Whatever' (May 31 2021) https://conflictoflaws.net/2021/territorial-jurisdiction-for-breach-of-contract-in-nigeria-or-whatever/ accessed 06 October 2021.

[14] Ibid.

[15] See generally *British Bata Shoe Co v Melikan* (1956) SCNLR 321; *Nigerian Ports Authority v Panalpina World Transport (Nig) Ltd* (1973) 1 ALR Comm 146, 172; *Muhammed v Ajingi* (2013) LPELR-20372 (CA); *Barzasi v Visinoni* (1973) NCLR 373.

[16] See generally the Supreme Court cases of; *Dangote General Textiles Products Ltd v Hascon Associates (Nig) Ltd* (2013) 16 NWLR (Pt. 1379) 60; *First Bank of Nigeria Plc v Kayode Abraham* (2008) 18 NWLR (Pt. 1118) 172; *Arjay Ltd v Airline Management Support Ltd* (2003) 7 NWLR (Pt. 820) 57.

Nigerian conflict of laws[17]. Furthermore, some Nigerian judges apply the strict territorial jurisdiction approach[18]. This approach is based on the notion that a Nigerian court cannot assume jurisdiction where the cause of action arose in one State, or another foreign country. I label this approach as "strict" because my understanding of the Nigerian Supreme Court decisions on this point is that based on constitutional law a Nigerian court is confined to matters that arose within its territory, so that one State High Court cannot assume jurisdiction over a matter that occurs within another territory. There is no provision of the Nigerian constitution that states that a court's jurisdiction is limited to matters that occur within its territory. It also leads to injustice and unduly circumscribes the jurisdiction of the Nigerian court, which ultimately makes Nigerian courts inaccessible and unattractive for litigation. Nigerian courts should have jurisdiction as of right once a defendant is resident or submits to the jurisdiction of the Nigerian court.

Lastly, some Nigerian judges apply the mild territorial jurisdiction approach[19]. This approach softens the strict territorial jurisdiction approach. This is an approach that has mainly been applied by the Nigerian Court of Appeal probably as a way of ameliorating the injustice of the strict territorial approach applied in some Nigerian Supreme Court decisions. This approach is that more than one court can have jurisdiction in matters of conflict of laws where the cause of action is connected to such States. With this approach, all the plaintiff needs to do is to tailor its claim to show that the cause of action is also connected to its claim. The danger with this approach is that it can lead to forum shopping and unpredictability – the plaintiff can raise the slightest grounds on why the cause of action is connected with its case to institute the action in any court of the Nigerian federation. The mild territorial jurisdiction approach was applied in *Maska* because the Court of Appeal held either the Kastina State High Court or Yobe State High Court could assume jurisdiction as the cause of action was connected with both states.

Jurisdiction agreements in Nigerian courts

What is the attitude of Nigerian courts to jurisdiction agreements? Theoretically, we may say that Nigerian courts enforce jurisdiction agreements. There are numerous precedents extolling party autonomy and the need to enforce contracts freely negotiated by parties. Nevertheless, in practice, Nigerian courts assume jurisdiction, in some cases, in breach of jurisdiction agreements. There is hardly any

[17] *British Bata Shoe Co v Melikian* (1956) SCNLR 321, 325 – 26, 328; *Muhammed v. Ajingi* (2013) LPELR-20372 (CA); *Zabusky v Israeli Aircraft Industries* (2008) 2 NWLR (Pt. 109) 109, 133-6; *Ogunsola v All Nigeria Peoples Party* (2003) 9 NWLR (Pt. 826) 462, 480.

[18] See the Supreme Court cases of *Capital Bancorp Ltd v Shelter Savings and Loans Ltd* (2007) 3 NWLR 148; *Dairo v Union Bank of Nigeria Plc* (2007) 16 NWLR (Pt 1059) 99; *Mailantarki v Tongo & Ors* (2017) LPELR-42467; *Audu v APC & Ors* (2019) LPELR – 48134.

[19] *Sarki v Sarki & Ors* (2021) LPELR – 52659 (CA); *Onyiaorah v Onyiaorah* (2019) LPELR-47092 (CA).

distinction between exclusive and non-exclusive jurisdiction agreements[20]. Jurisdiction agreements have only been upheld in few cases[21]. A study of the reported cases on jurisdiction agreements reveals that jurisdiction agreements are jettisoned on three main grounds as presented below:

The categorization of jurisdiction agreement as an ouster clause

Nigerian jurisdictional law generally lacks any coherent theoretical foundation. Unlike elsewhere where courts consider many factors like reasonableness, party autonomy, due process, proximity, foreseeability when treating adjudicatory jurisdiction, Nigerian courts largely see it from the realm of territorialism and power. It is no surprise that the courts are extremely protective/jealous of their power when a matter is connected to the forum. They generally frown at any attempt to divest the courts of their jurisdiction. Hence, they categorized jurisdiction agreements as ouster clauses.

This misconception can be traced to *Sonnar (Nig.) Ltd. v Nordwind*[22] where the Supreme Court imported this idea relying on *The Fehmarn*[23] *i*n this case, Oputa JSC had this to say on jurisdiction agreements:

"As a matter of public policy our courts should not be too eager to divest themselves of jurisdiction conferred on them by the Constitution and by other laws simply because parties in their private contracts chose a foreign forum and a foreign law. Courts guard rather jealously their jurisdiction and even where there is an ouster of that jurisdiction by Statute it should be by clear and unequivocal words, if that is so, as indeed it is, how much less can parties by their private acts remove the jurisdiction properly and legally vested in our courts? Our courts should be in charge of their own proceedings. When it is said that parties make their own contracts and that the courts will only give effect to their intention as expressed in and by the contract, that should generally be understood to mean and imply as contract which does not rob the court of its jurisdiction in favour of another foreign forum"[24].

While an earlier case of[25] mentioned an ouster clause, most recent cases rely on the above reasoning from *Sonnar*. Oputa's view was recently echoed by Nweze JSC[26]

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[20] Chukwuma Okoli, 'The Practicality of Enforcement of Jurisdiction Agreement' (December 17, 2020) https://conflictoflaws.net/2020/the-practicality-of-the-enforcement-of-jurisdiction-agreements-in-nigeria/ accessed 06 October 2021.

[21] *Nso v Seacor Marine (Bahamas) Inc* (2008) LPELR- 8320 CA*, Beaumont Resources Ltd v DWC Drilling Ltd* (2017) LPELR-42814 (CA)*, Nika Fishing Co Ltd v Lavina Corporation* (2008) 16 NWLR (Pt 1114) 509, *Megatech Engineering Ltd Sky v Vission Global Networks LLC* (2014) LPELR-22539 (CA) and *Damac Star Properties LLC v Profitel Limited* (2020) LPELR-50699 (CA).

[22] Sonnar (Nig.) Ltd. v Nordwind (1987) 4 NWLR (Pt.66) 520.

[23] The Fehmarn [1957] 1 WLR 815.

[24] Ibid p. 544 paras B-E.

[25] *Ventujol v Compagnie Francaise DeL'Afrrique Occidentale* (1949) 19 NLR 32.

where his Lordship noted that: "our courts will only interrogate contracts which are designed to rob Nigerian courts of their jurisdiction in favour of foreign fora or where, by their acts, they are minded to remove the jurisdiction, properly and legally, vested in Nigerian courts."

Furthermore, many Nigerian lawyers have equally misunderstood the nature of jurisdiction agreements. In those cases, where the courts have shown this combative attitude, some counsel have asked courts for dismissal on the ground that the courts lacked jurisdiction based on jurisdiction agreements. A wrong labelling leads to unfavorable treatment. While ouster clauses are special statutory clauses which are meant to prevent courts from entertaining specific cases that engage state interest, jurisdiction agreements only appeal to the courts to decline jurisdiction in accordance with parties' choice based on *pacta sun servenda*. It is interesting to also note that an arbitration agreement is never treated as such and there are plethora of authorities on this point[27]. One wonders whether there is any rational or legal basis to treat a jurisdiction agreement differently from an arbitration agreement.

Mandatory statutes

Some Nigerian statutes confer mandatory jurisdiction over some subject matters on Nigerian courts[28]. The reasonability or otherwise of such sweeping and exclusive jurisdiction over matters that are purely civil is outside the scope of this paper. One can understand the predicament of Nigerian courts when they are approached to enforce jurisdictional agreements which fall within the scope of these mandatory statutes. No amount of judicial ingenuity would override mandatory national statutes vesting exclusive jurisdiction in Nigerian courts. It was on this basis that the courts refused to enforce jurisdictional agreements in *Swiss Air Transport Coy Ltd v African Continental Bank*[29]

Forum non conveniens

Forum non conveniens (FNC) is a practical procedural apparatus developed by common law judges even though it has a Scottish origin[30] to advance efficiency and justice in civil litigation. Many transactions have connections with more than one jurisdiction and parties would want to institute action in any of those fora that can deliver maximally. Thus, where a court has jurisdiction over a matter under its

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[26] *Conoil v Vitol S.A.* (2018) 9 NWLR (Pt. 1625) 463 at 502, para A-B.

[27] *Felak Concept Ltd. v A.-G., Akwa Ibom State* (2019) 8 NWLR (Pt. 1675) 433; *Mainstreet Bank Capital Ltd. v Nig. RE* (2018) 14 NWLR (Pt. 1640) 423.

[28] Admiralty Jurisdiction Act 2017 and Civil Aviation Act 2016.

[29] Swiss Air Transport Coy Ltd v African Continental Bank (1971) 1 NCLR 213.

[30] Ardavan Arzandeh, 'The Origins of the Scottish *forum non Conveniens* doctrine' , Journal of Private International Law(2017), Vol. 13 https://www.tandfonline.com/doi/abs/10.1080/17441048.2017.1303044#:~:text=Scotland%20is%20widely%20regarded%20as,across%20the%20common%20law%20world accessed 06 October 2021.

national laws, it can decline jurisdiction (by staying an action) to allow parties to litigate in a more convenient forum.
FNC test as stipulated by Brandon J in *The Eleftheria*[31] has been adopted and applied by the Nigerian Supreme Court in *Sonnar (Nig.) Ltd. v Nordwind*[32] Brandon J was merely laying down general factors that the court should consider when asked to decline jurisdiction. Brandon test supports the enforcement of jurisdiction agreement. The underlying principles are largely based on convenience and justice. The case emphasized "a strong"' cause for assuming jurisdiction in breach of a jurisdiction agreement. The strong cause has further been qualified in subsequent cases such as *Donohue v Armco Inc &Ors*[33]. Where many FNC grounds were discountenanced[34].

International Transactions in US

In the United States, commercial transactions and contracts are governed by state law[35]: with rare exceptions of certain contracts to which the Federal Government is a party, there is no such thing as U.S. contract law. However, the laws of the 50 U.S. states — as well as those of the handful of U.S. territories — are generally consistent in applying a "freedom of contract" approach to commercial agreements between sophisticated (or presumed to be sophisticated) parties. Accordingly, choice of law and choice of forum provisions in commercial agreements are generally enforced in accordance with the contract language.[36]

This is contrary to the Nigerian courts' approach where any FNC test no matter how weak may displace foreign jurisdiction clause. The Supreme Court re-emphasized the approval of any of the FNCs grounds in a decided case however, an application for stay was granted in that case because the party in breach did not file any counter affidavit[37].

International Transactions in Canada

Under the Canadian Law, when two companies based in different provinces enter into a commercial contract and a dispute occurs, the question often arises as to which province's laws will govern[38]. This can be a significant issue since laws vary

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[31] Supra.
[32] Supra.
[33] Donohue v Armco Inc &Ors. [2001] UKHL 64
[34] Ibid para 24-39.
[35] Charles Weiss, Holland & Knight, 'Drafting Choice of Law and Choice of forum Provisions for US Agreements' (August 16, 2021) https://www.hklaw.com/en/insights/publications/2021/08/drafting-choice-of-law-for-us-agreements accessed 06 October 2021.
[36] *Bremen v Zapata Offshore* Co.92 S. Ct. 1907 (1972)
[37] Nika Fishing Company Ltd v Lavina Corporation (2008) 16 NWLR 509, 535
[38] Larrisa Roche: Mosdaq, 'Governing Law and Choice of Forum Clauses' (February 15, 2016) https://store.thomsonreuters.ca/en-ca/products/behind-and-beyond-boilerplate-drafting-commercial-agreements-fourth-edition-30835437 accessed 06 October 2021.

from jurisdiction to jurisdiction and such variations can have significant impacts on how disputes are resolved. A "governing law" clause allows the parties to a commercial contract to choose the "proper law of the contract" i.e. the system of law by which the parties intend the contract to be governed[39]. An instance of provincial law differences exists in differentiation in limitation periods across the provinces. These differences could mean that a claim could be statute barred under Alberta law[40] if it is not commenced within 10 years while still valid in Ontario[41] for an additional 5 years. In light of such differences, there are serious implications of one jurisdiction's laws being chosen over another as the governing law of a commercial contract.

A governing law clause may or may not include a "choice of forum" component. A choice of forum clause allows the parties to choose the court or jurisdiction that will hear an action relating to the contract. Where the governing law and choice of forum are not expressly specified in the contract, courts will look to other terms of the agreement and relevant surrounding circumstances to determine the appropriate law and forum. If the parties to an agreement wish to have certainty as to the governing law and choice of forum, they must clearly and precisely indicate this in the agreement.

The Absence of a Governing Law Clause

The proper law of the contract is the law that the parties intended to apply at the time the contract was created. As a rule, if the choice of governing law in a contract is *bona fide* and legal, and if there is no reason for avoiding the choice on public policy grounds, the choice of law specified by the parties in a governing law clause will be upheld by the courts as the proper law of the contract[42]

Where the parties have not expressly chosen a governing law in the agreement, the proper law of the contract will be established by the courts by determining the system of law with which the transaction has the "closest and most substantial connection.[43]" Courts will evaluate the following factors to determine the "closest

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[39] Cynthia L. Elderkin & Julia S. Shin Doi, *Behind and Beyond Boilerplate: Drafting Commercial Agreements*, 3d edn. (Toronto: Carswell, 2011) at 81 https://store.thomsonreuters.ca/en-ca/products/behind-and-beyond-boilerplate-drafting-commercial-agreements-fourth-edition-30835437 accessed 06 October 2021.

[40] Alberta Limitation Law 2016 file:///C:/Users/USER/Downloads/Bennett%20Jones%20%20Alberta%20Limitation%20Law%202016%2020Page.pdf accessed 06 October 2021.

[41] Limitation Act 2002 limitation-periods-in-ontario.html#:~:text=The%20Basic%20Limitation%20Period&text=The%20Limitations%20Act%20sets%20out accessed 06 October 2021.

[42] Vita Food Products Inc v Unus Shipping Co. Ltd., *[1939] 1 All ER 513 (PC)*

[43] Imperial Life Assurance Co. of Canada v Colmenares *[1967] SCR 443 at 448.*

and most substantial connection"; domicile and residence of the parties; national character of a corporation and the place where its principal place of business is situated; place where the contract is made and the place where it is to be performed; style in which the contract is drafted, as, for instance, whether the language is appropriate to one system of law, but inappropriate to another; fact that a certain stipulation is valid under one law but void under another; economic connection of the contract with some other transaction; nature and subject matter of the contract; location of the head office of a corporation; and any other fact which serves to localize the contract[44].

Where the contract agreement did not specify any chosen governing law, it gives room for the Court to consider that the proper law of the contract is a law that the parties never intended to apply, exposing the parties to the risk that the court's determination may have negative or unforeseen consequences should a dispute arise[45].

Including the Federal Jurisdiction

In Canada, parties often draft governing law clauses by citing the laws of one specific province, followed by the phrase "and the laws of Canada applicable therein." There is some debate whether this phrase is necessary. The phrase implies the possibility that certain federal laws of Canada may not be applicable in a province. Elderkin and Doi[46] suggest the door is open for federal laws of Canada that do not apply in each province and, therefore, recommend the phrase should be used to provide certainty when drafting governing law clauses.

Conclusion

Legal certainty and predictability of jurisdiction is a catalyst to international business transaction enforcement and development especially in the area of cross border commercial transactions. A country with public international framework that is driven by these values will promote and enhance commercial activities because it is a risk management mechanism in itself. Businesspersons are interested to do business in jurisdictions where contracts are enforced. They want to make informed decisions about the governing law of the contracts, the jurisdiction

[44] *Lilydale Cooperative Limited v Meyn Canada Inc.*, (2015) 0NCA 281 at para 10.
[45] United Nations Publications, (2015) Principles for Responsible Contracts Integrating the Management of Human Rights Risks into State-Investor Contract Negotiation Guidance for Negotiation:
https://www.ohchr.org/Documents/Publications/Principles_ResponsibleContracts_HR_PUB_15_1_EN.pdf accessed 06 October 2021.
[46] Elderkin (*supra)* note 35 p. 81

in which contractual disputes are resolved, jurisdictions whose judgments can be respected and enforced abroad.

Courts ought to help parties to achieve their contractual goals. They should neither frustrate negotiated terms nor rewrite them for the parties provided it is a contract that is negotiated at arm's length. Nigerian courts should promote party autonomy as much as practicable. With this approach, foreign businesses would take the Nigerian justice system seriously and would be confident to do business with Nigeria. It can potentially attract more Foreign Direct Investment to Nigeria if we earn the trust of foreign investors. Non-enforcement of jurisdiction agreements disincentives commercial transactions because of litigation and enforcement risks. Assuming that foreign companies must do business with Nigerians nevertheless, these risks ultimately be factored into contractual negotiations as businessmen would not want to spend their profits on litigation in unfamiliar/non-chosen fora. Cost of doing business with Nigeria will invariably be higher and this will further lead to an increase in the cost of goods and services in Nigeria. In view of the forgoing, it is only sensible that Nigerian courts should give maximum effect to jurisdiction agreements.

Recommendations

The first task is to get the legislators to review some of the extant legislation such as the Admiralty Jurisdiction Act and Civil Aviation Act which vest exclusive jurisdiction in Nigerian courts over a wide range of purely private commercial transactions.

Also, the courts can learn from the developments in other jurisdictions, particularly, how "strong cause" has been redefined in the light of modern developments to admit of only genuine cases where it is either practically or reasonable impossible to litigate in the chosen forum or where non-parties are genuinely involved in the suit.

Lastly, Nigeria needs to join the Hague Conference and the 2005 Choice of Court Convention of 30 June 2005[47]. It will benefit from the rich jurisprudence and expertise available at the Hague Conference and foreign investors will be assured of the commitment of Nigeria to the enforcement of jurisdiction agreements which will further aid socio-economic development of the country.

[47] https://www.hcch.net/en/instruments/conventions/full-text/?cid=98 accessed 06 October 2021.