"SECTION 20 ADMIRALTY JURISDICTION ACT 1991 & ARBITRATION CLAUSES IN MARITIME AGREEMENTS"

By

Oritsematosan EDODO – EMORE LLM, [Lond] BL

Maritime contracts,such as bills of lading , charter parties , and memorandum of agreement for sale of ships, usually have clauses empowering parties to settle their disputes by arbitration in different jurisdictions around the world.

The question has arisen in our courts whether such arbitration clauses oust the jurisdiction of the Federal High Court which has exclusive original jurisdiction over maritime matters in Nigeria and whether they are null and void ,having regard to Section 20 of the Admiralty Jurisdiction Act[AJA] 1991.

The See-Saw

Some courts have held that arbitration clauses such as those in maritime agreements, oust the jurisdiction of the Nigerian courts and so are null and void by virtue of S.20 AJA 1991. Other decisions have held the contrary view.

Oritsematosan Edodo, Thorpe & Associates,3Olushesin Olugborogun Street,Lekki 2nd Tollgate at Chevron,Lekki Peninsula – Lagos State, NIGERIA,Tel: +234.808.278.9913, +234.803.305.2747, +234.816.611.8313 email:edodo-emore.o@oetalaw.com,oritsematosan2011@yahoo.com www.oetalaw.com

The Locus Classicus

The locus classicus on the issue is found in the dictum of Uwaifo JCA as he then was in **MV LUPEX V NIGERIAN OVERSEAS CHARTERING & SHIPPING LTD[NOCS LTD]** , where the Learned Justice declared unequivocally,

> "**Arbitration agreements as they often do, which merely make a resort to arbitration as a first choice to settle differences arising from an agreement, do not seek to oust the jurisdiction of the court**.....
> .**It is clear that section 20 is walking on its head. In my view, it was wrongly thought out and badly drafted .."**"

The Détour.

In 2003, the Court of Appeal ,had an opportunity to deal with the interpretation of section 20 AJA 1991 and its effect on arbitration clauses in maritime agreements in **MV Panormos Bay v Olam Nigeria Plc**.

Clause 7 in the relevant bill of lading stated that "Any dispute arising under this bill of lading shall be referred to Arbitration in London. The unamended centrecon arbitration clause will apply"

Issues for determination

The question was whether this clause came within section 20 AJA 1991 and whether section 20 AJA 1991 , had impliedly modified sections 2 and 4 of the Arbitration and Conciliation Act[ACA] 1988 as regards agreements which contain foreign jurisdiction clauses in admiralty matters .

Oritsematosan Edodo, Thorpe & Associates,3Olushesin Olugborogun Street,Lekki 2nd Tollgate at Chevron,Lekki Peninsula – Lagos State, NIGERIA,Tel: +234.808.278.9913, +234.803.305.2747, +234.816.611.8313 email:edodo-emore.o@oetalaw.com,oritsematosan2011@yahoo.com www.oetalaw.com

The decision of the Court of Appeal

The Court of Appeal made a détour from its line of thought in **MV Lupex vs NOIC** above and declared that the arbitration agreement in the bill of lading was null and void .It held that section 20 AJA 1991 is a statutory limitation on the enforcement of arbitration agreements in the bills of lading and that it modified sections 2 and 4 of the ACA 1988 thus restricting enforceable arbitration agreements in admiralty matters to those having Nigeria as the forum.

In 2005,the Court of Appeal also had another opportunity, to consider the effect of section 20 AJA 1991 on foreign arbitration clauses and the maritime jurisdiction of the Federal High Court in the case of Lignes Aeriennes Congolaises[LAC] vs Air Atlantic Nig. Ltd .

The terms of the aircraft lease

The aircraft lease in Article 7 provided that the agreement shall be governed by Congolese positive law and that disputes should be settled by arbitration by both Presidents of Kinshasa and Lagos Bars. Articles 8 provided that parties should be served notices at their respective head offices in Lagos and Kinshasa.

The bone of Contention

When the Plaintiff filed its action at the Federal High Court ,Lagos, it served the processes on the Defendant at its operational office at the Murtala Mohammed International Airport, Ikeja ,Lagos Nigeria rather than in Kinshasa.Thereafter the Defendant filed a notice of preliminary objection challenging the jurisdiction of the court ,on the ground that the aircraft lease agreement provided that the transaction should be governed by the Congolese positive law .

Oritsematosan Edodo, Thorpe & Associates,3Olushesin Olugborogun Street,Lekki 2nd Tollgate at Chevron,Lekki Peninsula – Lagos State, NIGERIA,Tel: +234.808.278.9913, +234.803.305.2747, +234.816.611.8313 email:edodo-emore.o@oetalaw.com,oritsematosan2011@yahoo.com www.oetalaw.com

The court dismissed the objection on the ground that Article 8 and other terms of the aircraft lease sought to oust the jurisdiction of the Federal High Court within the meaning of section 20 AJA 1991 and so the agreement was to that extent null and void. The Defendant appealed to the Court of Appeal on the grounds that the trial court ought to have respected the arbitration clause . The Plaintiff/Respondent contended that so long as any of the parties resided in Nigeria, section 20 AJA 1991 was applicable and the court could disregard the jurisdiction clause in the agreement.

The Court of Appeal agreed with the decision of the lower court that the agreement comes within the contemplation of section 20 of the AJA 1991 which renders it null and void.

The Supreme Court to the rescue in a roundabout way

It transpired that at this time the case of **MV Lupex vs NOC&S Ltd** had reached the Supreme Court, the Respondent as Plaintiff had filed an action against the Appellants as Defendants at the Federal High Court Lagos. Clause 7 of their charter party agreement stated that:

> "The parties agreed interalia on arbitration in London under English law, in the event of any dispute."

The Defendant brought an application at the Federal High Court for a stay of proceedings to enable parties pursue arbitration in London. The court refused the application .The Defendant appealed to the Court of Appeal. The appeal was dismissed. The matter then came to the Supreme Court where the appeal was allowed and a stay of proceedings was granted.

Oritsematosan Edodo, Thorpe & Associates,3Olushesin Olugborogun Street,Lekki 2nd Tollgate at Chevron,Lekki Peninsula – Lagos State, NIGERIA,Tel: +234.808.278.9913, +234.803.305.2747, +234.816.611.8313 email:edodo-emore.o@oetalaw.com,oritsematosan2011@yahoo.com www.oetalaw.com

Although, section 20 AJA 1991 did not come up for interpretation, the Supreme Court did pronounce on foreign arbitration and choice of law clauses, holding parties up to the agreements they have entered into, such that if parties have agreed to settle their disputes by arbitration under a foreign law, the court is bound to give effect to the parties desires.

This decision has been followed by the Court of Appeal in case of **Onward Enterprises Ltd v MV "Matrix"& 2 Ors** where the court upheld a foreign arbitration clause in an admiralty matter. In this case the Court of Appeal expressly departed from its decision in **MV Panormos Bay v Olam Nigeria Plc**.

The Court of Appeal takes an opportunity to reverse itself

In **Onward Enterprises v MV "Matrix"& 2 Ors**, although section 20 AJA was also not central to the dispute, the case provided an opportunity for the Court of Appeal to reverse itself or to choose between its conflicting decisions.

While tracing the détour from its decision in **MV Panormos Bay v Olam Nigeria Plc** Mshelia JCA observed that having regard to the facts and circumstances of the case, the court was inclined to follow the decision of the Supreme Court in **MV LUPEX V NIGERIAN OVERSEAS CHARTERING & SHIPPING LTD** because by implication, the decision of the Court of Appeal in Olam's case could not stand as regards the notion that section 20 AJA 1991 limited enforceable agreements to those having Nigeria as its forum.----------

Oritsematosan Edodo, Thorpe & Associates,3Olushesin Olugborogun Street,Lekki 2nd Tollgate at Chevron,Lekki Peninsula – Lagos State, NIGERIA,Tel: +234.808.278.9913, +234.803.305.2747, +234.816.611.8313 email:edodo-emore.o@oetalaw.com,oritsematosan2011@yahoo.com www.oetalaw.com

Oops! Where are we?

In 2010 ,the Supreme Court had another occasion to consider **S.20 AJA 1991** in **JFS Investment Ltd vs Brawal Line Ltd** .Although its pronouncement was made per incuriam , ,it appears to contradict its findings in the **MV Lupex case** and sides with the thinking of the Court of Appeal in the **MV Panormos Bay vs Olam .**

In JFS Investment Ltd vs Brawal Line Ltd one of the issues for determination was the understanding of a foreign jurisdiction clause regarding what law was applicable to determine time bar in clause 2 of the relevant bill of lading.

The Plaintiff loaded Cargo of sodium chloride on the Defendant's vessel in Hamburg Germany, for delivery in Lagos, Nigeria.The Plaintiff brought an action at the Federal High Court Lagos,two years after the goods were delivered incomplete and badly damaged.The Defendants filed applications for dismissal of the suit on the ground that same was time barred. The Federal High Court held that the action was indeed statute barred as same should have been brought within one year of the damage in accordance with the Hagues Rules 1924.The Plaintiff appealled to the Court of Appeal and the appeal was dismissed .

At the Supreme Court, after affirming the right of parties to choose the law which should govern their contracts, and the duty of the court to uphold that right,Adekeye JSC observed that " S.20 AJA 1991 has

Oritsematosan Edodo, Thorpe & Associates,3Olushesin Olugborogun Street,Lekki 2nd Tollgate at Chevron,Lekki Peninsula – Lagos State, NIGERIA,Tel: +234.808.278.9913, +234.803.305.2747, +234.816.611.8313 email:edodo-emore.o@oetalaw.com,oritsematosan2011@yahoo.com www.oetalaw.com

virtually removed the element of courts discretion in deciding whether or not to uphold a foreign jurisdictional clause.

Consequently, S.20 AJA 1991, enabled the court to deviate from the terms of the foreign jurisdiction clause in the bills of lading reminiscent of the thinking of the Court of Appeal in the **MV Parnomous Bay vs Olam** and contrary to the Supreme Courts decision in the **MV Lupex vs NOIC.**

Where do we go from here?

From the cases reviewed it is clear that we need some consistency as regards the the effect of **S.20 AJA 1991** on foreign arbitration clauses and foreign jurisdiction clauses. Both at the Court of Appeal and at the Supreme Court levels there has been conflicting thoughts.As it stands today, every case will be treated on its on facts.But what is certain is that the dictum of Uwaifo JCA as he then was when he stated in 1994 that **S.20 AJA 1991 was badly drafted and walking on its head, is still apt in 2014 !**

THIS IS AN ABRIDGED VERSION OF THE PAPER DELIVERED AT THE 13TH MARITIME SEMINAR FOR JUDGES IN ABUJA -10-12TH JUNE 2014

Oritsematosan Edodo, Thorpe & Associates,3Olushesin Olugborogun Street,Lekki 2nd Tollgate at Chevron,Lekki Peninsula – Lagos State, NIGERIA,Tel: +234.808.278.9913, +234.803.305.2747, +234.816.611.8313 email:edodo-emore.o@oetalaw.com,oritsematosan2011@yahoo.com www.oetalaw.com