

**MARITIME JURISDICTION IN NIGERIA:
LIGNES AERIENNES CONGOLAISES**

VS.

AIR ATLANTIC NIG LTD (2005) 11 CLRN 55¹

BY

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CHARTERED ARBITRATOR**

1. **INTRODUCTION**

Section 20 of the Admiralty Jurisdiction Act 1991 (AJA) renders null and void any agreement “which seeks to oust the jurisdiction of the Court” in certain specified circumstances. In the recent case of **Lignes Aeriennes Congolese vs. Air Atlantic Nigeria Ltd (2005) 11 CLRN 55** the Court of Appeal of the Federal Republic of Nigeria considered the effects of section 20 of the AJA on the enforceability of arbitration agreements with a foreign forum. Ordinarily, exclusive jurisdiction in admiralty matters is by the Constitution of Nigeria vested in the Federal High Court and the Federal Appellate system.

2. **THE FACTS**

2.1 The appellant, Lignes Aeriennes Congolese (LAC) a commercial airline and national carrier of the Democratic Republic of Congo with its head office in Kinshasa entered into an Aircraft lease agreement with the respondent, Air Atlantic Nigeria Ltd (AAN) a Nigerian company with its head office in Lagos. By virtue of Section 7 of the agreement the parties agreed the procedure for dispute settlement as arbitration and the applicable law Congolese Law. Article 7 of the agreement states: -

“The present agreement shall be governed by Congolese positive law. Any dispute relating to the execution, the interpretation and/or the termination of the present agreement shall be settled in a friendly way between the

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parties. If they fail to do so, the dispute shall be referred to arbitration by both Presidents of Kinshasa and Lagos Bars.”

Article 8 of the agreement provides thus:-

“For any usual notification: the parties have chosen residence at their respective head offices as mentioned in the preamble to the present agreement.”

- 2.2 A dispute arose between the parties. AAN filed an action at the Federal High Court Lagos Nigeria. AAN’s claim before the Federal High Court was for the sum of 169,794 USD (one hundred and sixty-nine thousand, seven hundred and ninety-four United states dollar) being consideration for the lease of Cargo Aircrafts to LAC. AAN filed a motion against LAC’s Boeing 737 with Reg. No. 9Q CNK seeking to prevent it from leaving jurisdiction as security for the sum of 169,794 USD (one hundred and sixty-nine thousand, seven hundred and ninety-four United States Dollar). LAC filed a preliminary objection to the claim by the AAN on the basis that by the lease agreement the party had chosen the Congolese law to apply to their relationship and therefore the lower court lacked jurisdiction to entertain the suit.
- 2.3 The learned trial judge in his judgment delivered on 20th September 1999 in suit No. FHC/L/CS/1155/98 disagreed with the defendant/appellant and held that it had jurisdiction to entertain the suit despite the provisions as to arbitration and governing law contained in the agreement.
- 2.4 LAC appealed the lower court’s decision. LAC contended before the Court of Appeal that the trial court ought to have given effect to the agreement of the parties on arbitration citing the provisions of the Arbitration law of Lagos State, Arbitration Law of the Federation of Nigeria and Chitty on contract Volume 1, 24th Edition. AAN inter-alia relied on the case of **Sonnar vs. Nordwind (1987) 1 A.N.L.R 548** on the principles governing the enforcement of foreign jurisdictional clauses. In the **Nordwind** case the Supreme Court had overturned the Court of Appeal and set aside the order of stay of proceedings made by the court to enable the determination of the dispute by the foreign venue stipulated in the bill of lading. LAC argued that the facts of the present case does not justify the applicability of the relevant principles relied upon by the court in Nordwind case and concluded that the case of **Sonnar Nigeria Ltd. vs. M.S. Norwind** was not applicable. A.A.N on the other hand submitted that section 20 of the Admiralty Jurisdiction Act is clear and unambiguous and that once an agreement involves a person or party who is resident in Nigeria, any clause in such agreement which seeks to oust the jurisdiction of the Federal High Court will be null and void.
- 2.5 The Court of Appeal agreed with the counsel to AAN that the only real and substantial issue for determination in the appeal is whether the lower court had jurisdiction to entertain the claim of the respondent against the appellant arising

out of an agreement governed by the laws of the Democratic Republic of Congo. The Court of Appeal answered the question in the affirmative. The court found that section 20 of the Admiralty Jurisdiction Act was applicable in that the following limbs of section 20 were satisfied;

- (a) the place of performance, execution, delivery, act or default is or takes place in Nigeria; or
- (b) any of the parties resides or has resided in Nigeria

The Court of Appeal dismissed the appeal. The court agreed that the lower court has and possesses the requisite statutory jurisdiction to entertain the respondent's suit. The court found that the real and combined effect of Articles 7 & 8 of the Aircraft Lease Agreement entered into by the parties was and remains to oust the jurisdiction of the lower court in respect of disputes arising from the said agreement. The court found that the agreement of the parties was within the contemplation of the provisions of section 20 of the Admiralty Jurisdiction Decree and was thereby rendered null and void.

3 COMMENTARY

- 3.1 The basis of the decision of the Court of Appeal was the provisions of section 20 of the Admiralty Jurisdiction Act. The Court of Appeal in accepting that the parties agreements fall under the purview of section 20 recognized that the suit relates to an admiralty matter placing reliance on section 1 of the AJA which provides that the admiralty jurisdiction of the court includes jurisdiction to hear and determine any question relating to a proprietary interest in a *ship or aircraft* or any maritime claim as specified in section 2 of the Act. Section 2 categorizes maritime claims into those of a proprietary or general nature.²
- 3.2 It is significant that agreements rendered null and void by the provisions of section 20 are those that oust the court's jurisdiction in the specified circumstances. However the court accepted that arbitration clauses do not oust the court's jurisdiction. On the arbitration clause the Court of Appeal stated thus: -

“Though the appellant had made heavy weather about the Arbitration Clause contained in the lease agreement between the parties in his brief of argument, the lower court did not make any finding or pronouncement on it. In any event the Arbitration Clause did not seek to oust the jurisdiction of the court as all it did was to allow parties avenues and possibilities of settling disputes amicably out of court. The position of the law is that an arbitration clause in agreements generally does not oust the jurisdiction of court or prevent the parties from having recourse to the

² See Louis Nnamdi Mbanefo Nigerian Shipping Practice and Procedure (1994 Lomanc Books) Chapter 4 page 57 See also Mr. Chidi Ilogu “*Legislative restrictions on jurisdiction / arbitration clauses and anti-suit injunctions in Nigeria*” *Maritime and Transport Law Committee Newsletter Vol. 13 No.1 February 2006*.

court in respect of disputes arising there from. A party to an agreement with an arbitration clause has the option to either submit to arbitration or to have the dispute decided by the court. The choice of arbitration does not bar resort to the court to obtain security for any eventual award. See *NV Scheep v. "MV's Araz"* (2001) FWLR (Pt. 34) 543 at 596 – SC, *Obembe v. Wemabod Estates* (1977) 5 SC 115 at 131, *K.S.U.D.B. v. Fanz Ltd.* (1986) 5 NWLR (Pt.39) 74 at 86 - 7. But assuming that the arbitration clause in the agreement between the parties in this appeal seeks to oust the jurisdiction of the court, and then it further supports the ruling of the lower court that the lease agreement comes within the purview of section 20 and therefore null and void.”

The trial court had held thus: -

“...Article 8 of the Aircraft Lease Agreement as well as a few other provisions in the agreement brings the agreement within the contemplation of the provision of section 20 of the A.J.A. 1991 and in as much as they seek to oust the jurisdiction of this court the agreement is to that extent null and void. See the *Norwind* case (*supra*). A court must jealously guide its jurisdiction as conferred on it under section 6(6) (a) of the Constitution as well as under the provisions of the A.J.A. 1991. I therefore hold that this court can entertain this suit in order to determine whether or not it has jurisdiction to deal with the matter – See *Barclays Bank Ltd. v. C.B.N.* (1976) N.S.C.C.29. Accordingly the present application is hereby dismissed.”

The decision of the Court of Appeal may be compared with the earlier decision of the Court in the case of ***M.V Parnomous Bay & Ors vs. Olam Nigeria Plc*** (2004) 5 NWLR 1. In the ***M.V Parnomous Bay*** case the effect of section 20 on an arbitration clause in a bill of lading came under consideration. The court upheld the decision of the lower court not to stay court proceedings pending reference to arbitration in London. The Hon. Justice Galadima delivering the lead judgment stated that the object of section 20 was to limit enforceable arbitration agreements to those having Nigeria as its forum. The court reasoned that since the object of the arbitration clause in the bill of lading is to oust the jurisdiction of Nigerian courts to exercise its admiralty jurisdiction over the case, the said clause is null and void.

3.3 In the case under review despite moving away from the argument that arbitration agreements oust the court’s jurisdiction, the court failed to refer the parties to arbitration in accordance with the agreement entered into. The basis of the court’s decision was that the real and combined effect of Articles 7 & 8 of the Aircraft Lease Agreement entered into by the parties was and remains to oust the

jurisdiction of the lower court in respect of disputes arising from the said agreement. The court found that the agreement of the parties was therefore within the contemplation of the provisions of section 20 of the Admiralty Jurisdiction Decree and was thereby rendered null and void. Section 20 relied upon had been criticized in the earlier case of the **Owners of M.V Lupex vs. Nigerian Overseas Chartering and Shipping Ltd** [(1993 – 1995) NSC 182] by Uwaifo JCA (as he then was) as “walking on its head, a section that was wrongly thought out and badly drafted, an inappropriate provision of the law whose meaning cannot be comprehended”. The Court of Appeal in that case pronounced that if an arbitration agreement seeks to oust the court’s jurisdiction it would be unenforceable as contrary to public policy but found that the arbitration agreement of the parties did not purport to oust the court’s jurisdiction. The court however refused to grant a stay of court proceedings in deference to the arbitration agreement not on the basis of section 20 but inter alia on the application of the Brandon Tests as set out in **The Eleftheria** (1969) 1 Lloyd’s L.R 237 at 242 and approved in the **Nordwind** by the Supreme Court. The Court of Appeal found that Nigeria was the place with the closest connection. On appeal the Supreme Court of Nigeria disagreed with the decision of the lower court. It reversed the Court of Appeal decision and stayed the court proceedings *sine die* to enable the arbitration proceedings already commenced in London. Though the court was however not called upon to consider the effects of section 20 it arrived at its decision on the basis inter alia of the facts of the case which it considered had explained clearly that the respondent had compromised its right to resort to litigation in Court by submitting to arbitration. The Supreme Court distinguished the case of **Sonnar vs. Nordwind** where a stay had been refused to enable foreign arbitration on the grounds that the proceedings in the foreign venue were time barred in that case but held that in the present case the foreign arbitral proceedings had already commenced and parties had even begun to present their respective cases.

4 **CONCLUDING REMARKS**

This case illustrates the dichotomy between the application of the principle of *pacta sunt servanda* and the application by state courts of legislation and principles pertaining to the enforcement of foreign arbitration clauses.

In the **Lignes** case the appellant contended that the case of **Sonnar vs. Nordwind** was not applicable but the court failed to make any finding on this contention. The court despite accepting that an arbitration clause does not oust the court’s jurisdiction failed to decline jurisdiction and refer the parties to arbitration. The court preferred to resolve the issue in the context of the stipulated Congolese positive law notwithstanding that the choice of law was contained in an arbitration clause. The court found that the real intention and combined effect of sections 7 & 8 of the parties’ agreement was to oust the court’s jurisdiction. In other words the court accepted that arbitration agreements do not generally oust the courts jurisdiction but found the arbitration clause to be unenforceable on the basis inter alia of section 8 which included a foreign law stipulation. Was this then

not an application of the court's pronouncement in the **M.V Parnomous Bay** case against arbitration agreements with foreign forums?