# Choice of Law, Forum and Procedure in Conflict of Laws in Transnational and Cross-border Commercial Disputes: Are Kenyan Judicial Decisions Veering Off to the Sidewalk?

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*Abstract*

*This article attempts to unravel the mystery surrounding the interpretation of choice-of-law, choice-of-forum and choice-of-procedure clauses in international trade. Most international contracts contain these clauses. The occurrence of disputes in these contracts is inevitable owing to the exigencies that pervade the environment in which they are performed. It is upon the backdrop of this stark reality that such contracts invariably incorporate dispute resolution mechanisms which take the shape of jurisdiction, choice-of-law and procedural clauses. How courts interpret these clauses determines how parties define their affairs within the text of their contracts. The determination by courts as to which law or procedure is to apply or which country's courts have jurisdiction often makes a significant difference in the determination of the substantive rights and obligations of the parties. The analysis of the approach and rhythm of courts around the world in the rigours of application and interpretation of these clauses is, therefore, the propelling force behind this article. The analysis of Kenya's judicial decisions have, in the hope of bringing to the fore Kenyan courts' approach in the arena of private international contract law, been considered along with judicial decisions from other jurisdictions.*

## I. Introduction

### A. *Definitions*

A choice-of-law clause is a clause in a contract that identifies the applicable law in the event of a dispute arising thereunder. A forum-selection clause is a

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jurisdictional clause that identifies the place or forum where the dispute is to be resolved. Procedural clauses on their part select the mode of dispute resolution that is to say, judicial or arbitral. Choice-of-law, forum-selection and procedural clauses have nothing to do with each other. However, it cannot be denied that they have interlinkages, which come to the fore more often than not, in their operation and effect.

## B. *International Trade and Private International Law*

The determination of which country's laws will govern a transaction in international contracts is critical to the outcome of disputes.[1] Choice of law, forum and procedure clauses are the benchmarks of disposing of these disputes. It is a well established principle of international trade law that if a contract is to be performed out of the state, or if any of the parties is a non-resident, or the contract is signed out of the state, it is good practice to provide for the law that is to govern that contract.[2] It is not uncommon therefore, to find an international trade or commercial agreement stating that it shall be governed by and construed according to the laws of such jurisdiction as may be agreed upon.[3] We can now begin to see the nexus between international trade and commerce, on the one hand, and choice of law, forum-selection and procedure clauses, on the other.

Choice of law, forum and procedure are an integral part of conflict of laws, that is to say, private international law.[4] This body of law from choice-of-law to forum-selection, from arbitral procedure to judicial procedure and from enforcement of foreign judgements to recognition of foreign judgements has aided international trade and commerce in the realm of transnational dispute resolution. Agreeably, when commercial transactions transcend national

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[1] Jacobson, JA, 'Your Place or Mine: The Enforceability of Choice of Law/Forum Clauses in International Securities Contracts' (1998) 8 *Duke Journal of Comp & Int'l Law* 469.

[2] Mandel, Ludwig, *The Preparation of Commercial Agreements (Practising Law Institute*, 1978, at 68.

[3] See generally; Manning, 'Choice of Law for Commercial Contracts' (1961) 2 *BC Industrial & Commercial Law Review* 241; Nordstrom & Ramerman, 'The Uniform Commercial Code and The Choice of Law' (1969) *Duke Law Journal* 623.

[4] Ahmednassir MA, *Burial Disputes in Modern Kenya: African Customary Law in a Judicial Conundrum* (Nairobi: Faculty of Law, University of Nairobi, 1999).

boundaries, they assume a completely new picture.[5] A transnational problem emerges in this scenario, albeit a private one. Rules of conflict of laws necessarily come into play to safeguard contracts of international trade involving enormous sums of money, not because international traders are reckless spendthrifts, but because the smoothness and success of trading activity is dependent on the efficiency and fairness with which the disputes arising therefrom are resolved.

## C. *Uncertainties of International Trade*

Because of the uncertainties that characterise international trade, what is clearly a lucrative business transaction today, may in reality turn out to be a nightmare tomorrow. It may be likened to shadows upon what should have been a wholly bright occasion. Here, the uncertainties in question can take different trends such as a change of regime in a state thus leading to adverse policies, or breakdown in communication between the issuing bank and the corresponding bank,[6] needless to mention perils of the sea.

The uncertainties that wade through contracts of international or cross-border trade give rise to disputes. Another possible uncertainty is which courts have jurisdiction and what law is to be applied. This perhaps accounts for the fact that on each and every day individuals and enterprises throughout the world execute and perform millions of contracts containing choice-of-law and forum-selection or arbitration clauses. Traditionally, therefore, agreements dealing with transactions that cross state and national borders usually designate the law the parties wish to apply in the event of disputes arising thereunder, as well as the forum, or arbitral, or judicial, that is to decide them, by incorporating choice-of-law, forum-selection and procedural clauses in their contract. The choice of a forum is in turn influenced by numerous factors – how the applicable law is

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[5] Zacharias, GO, in 'International Sales and Conflict of Laws' (1966) *Journal of Business Law* 122 states:

> International sales arises as follows; the parties are of different nationalities, resident in different countries, and the goods produced in yet a third country to be processed in a fourth, and payment to be made in a currency chosen independently from any of the foregoing factors. Further, transportation by foreign carriers, the use of foreign sub-agents or contracts, interference by governments in the course of free trade complicate the picture.

[6] There is authority for the proposition that failure by the corresponding bank to pay a letter of credit held by a seller does not absolve the buyer from his responsibility of paying the seller. This was the tenor of the case of *The Maran Road Sawmill v Austin Taylor & Co Ltd* (1975) 1 Lloyd Report 156.

interpreted there, the speed of adjudication, the enforceability of awards, among others. Applicable law is also selected based on nearly similar considerations.

### D. *Merits of Choice of Law, Forum and Procedure Clauses*

The ubiquity of these clauses is therefore the hallmark of dispute resolution in international trade, finance and commerce. The courts usually uphold such clauses lest the inconvenience to international trade and commerce that would follow if party autonomy were not honoured would be enormous and severe indeed. On the whole, the contracting parties would have notice of the law governing their relationship. This obviously reduces the burden of having to enquire into the home state of everyone with whom one trades internationally.

## II. The Place of Choice of Law and Proper Law in International Trade

### A. *Proper Law*

The analysis of choice of law is, strictly speaking, a concerted effort aimed at unveiling the applicable law to a contract bearing transnational features. Choice of law, in its starkest form, revolves around the principle of validation of contracts. Now, choice of law has acquired a new image, which speaks to proper law. The principle of validation is, itself, a negation of freedom of contract or party autonomy in contracts bearing strands of conflict of laws. This principle is meritorious in the sense that it seeks to promote good intentions of the contracting parties.

The operation of this principle is predicated upon a legal system that would validate an offer and acceptance as the foundation of contract formation. If a contract would be valid under the law of one country, but yet invalid under the law of another country, the law of the former would apply since the law of contract tends to honour the principle of validation.[7] Consequently, it would be tenable to concede that here the parties are presumed to have intended the performance of a juridical act. Proceeding from this premise, a party would hardly complain if he is held bound, when he is so bound by the law of his own country, so that the justice which is given to him by that country's court is, as it

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[7] Jaffey, AJE, 'Essential Validity of Contracts in the English Conflict of Laws' (1974) 23 *ICLQ* 1.

were, his own justice.[8] The holding in *Albeko v Kamborian*[9] was informed by this proposition and has come to be known as the authority for the proposition itself. There, the offeree had posted a letter of acceptance and the English offeror contended that he was not bound. Surprisingly, by his own law, English law, he was bound, but not by the offeree's law, Swiss law. It was emphatically held that he was bound.

### B. *Party Autonomy, Proper Law and Validation of Contract*

More recently though, credence is being given to party autonomy, that is to say, the freedom to choose the law to govern their (parties') contractual relations. Party autonomy is healthy to contractual relations as it is consistent with privity of contract. Nevertheless, it should not be forgotten that not every contracting party would have the same bargaining power to negotiate choice of law clauses on an equal footing.

Anyhow, there is the whole question of construction of these choice law clauses. In order to give these clauses an exhaustive, sensible, useful and an all-round meaning so as to realise the manifestations of the parties proper law is the cardinal guiding principle. Proper law is the law by which the parties have expressly or impliedly chosen as the governing law, or if the choice is not *bona fide* or legal, the law of the country with which the contract is most closely connected.[10] Proper law seems to incorporate the principles of validation which posit that for an international contract to be valid some domestic legal system must be identified as being applicable which contains a rule conferring validity on that contract.[11] Suffice it to say that now the validity of an international contract is governed by its proper law. Besides, proper law may be the domestic legal system with which it is most closely connected, and proximately so. However, it has been established axiomatically that if parties choose a domestic law to govern their contract, which in whole or in part nullifies it, they are presumed not to have intended that invalidating rule to apply. We can therefore begin to see how proper law incorporates the rules of validity of contract.

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[8] Jaffey, AJE, 'Offer and Acceptance and Related questions in the English Conflict of Laws' (1975) 24 *ICLQ* 603 at p 609.

[9] *Albeko v Kamborian* (1961) 111 LJ 519.

[10] Chesire & North, *Private International Law* (London: Butterworths, 11th ed, 1979) at p 213; Dicey & Morris, *Conflict of laws* (London: Stevens, 11th ed, 1987) at p 106; and Lord Atkin's speech in *R v International Trustee* (1937) AC 529.

[11] *Supra*, n 7 at p 2.

## C. *Intention of Parties: Subjective or Objective Test*

In the realm of proper law the express intention of the parties does not present complex difficulties. Implied intention, on the other hand, presents a lot of difficulties as it invites both objective and subjective construction. KN Counter has opined that 'in the circles of approaches to the determination of the proper law, two distinct arcs have allegedly been discerned; one represents the 'objective'; the other, the 'subjective' school'.[12] It is plainly clear from the outset that the subjective approach in the search of proper law is a misnomer, because for one consistency may not be possible in the sense that different people look at things differently. In this manner subjectivity would invent intentions alien to the parties, which are themselves suspect. The objective school sees invocation of the non-existing intention of the parties as unnecessary and as an involuntary concealment of the fact that it is the court that determines the proper law and not the parties.[13] It is to be noted that the objective view finds expression in the phrase 'closest connection' and more often than not it is favoured as against the subjective view. It is therefore safe to aver that the courts may impute to the parties an intention to 'stand by the legal system which, having regard to the incidence of the connecting factors and the circumstances as a whole, belong'.[14] And, this is the system with which the transaction has the closest and most real connection.[15]

## D. *Closest and Real Connection*

The concept of 'closest and most real connection' does not operate in a vacuum. It speaks to the legal system with which a transaction is closely related, that is to say: where the contract is to be performed, where the parties are resident, the currency in which the contract price is to be paid and so on. This is more clearly illustrated by case law. In *Benaim v Debono*[16] the appellants, residents of Gibraltar, sold to the respondents in Malta a quantity of anchovies f.o.b Gibraltar. Gibraltar was the place of payment. The contract was made in Malta. When the goods arrived in Malta the respondents complained about their inferior quality, but did not reject them. Later, when sub-purchasers refused to accept the goods

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[12] Counter KNS, 'The Proper Law of Contract - A Re-examination' (1965) *Journal of Business Law* 326.

[13] Kahn-Freud, 'Contractual Obligation and the Conflict of Laws: Contracts of Insurance' (1959) 22 *Modern Law Review* 195 at p 196.

[14] Chesire, *et al*, *supra*, n 10 at p 202.

[15] *Bonython v Commonwealth of Australia* (1951) AC 201 at p 219.

[16] (1924) AC 514.

on deficiency grounds, the respondents purported to rescind the sale. The dispute was first tried in Malta, where civil law, which allows rescission in such circumstances, applied. It was held that since the contract was to be performed by the delivery of the goods on board a ship at Gibraltar selected by the buyer, the applicable law in Gibraltar, and not that of Malta, was the proper law. Suffice it to say that connecting factors tended to lean more on Gibraltar than on Malta.

In the absence of an express choice of law clause, at common law the proper law of a credit is the law of the country in which payment is to be made because that is the country with which it has the closest connection.[17] In *Power Curber International Ltd v National Bank of Kuwait*[18] a CIF contract was made between sellers in North Carolina and buyers in Kuwait. Payment was to be by irrevocable but unconfirmed credit. The credit was issued by the National Bank of Kuwait, to the advising bank, Bank of America through the North Carolina National Bank. Before 75% of the price could be paid, as a result of a provisional attachment an order was made in the Kuwait courts, the effect of which under Kuwait law was to prevent any further payment under the credit. Action was taken against the National Bank of Kuwait in London courts. Apart from the fact that the National Bank of Kuwait traded in London, the case had no connection with England. Question arose as to whether the order of Kuwait courts had the effect of preventing it from honouring its obligations, which question hinged on the fact whether the credit was governed by Kuwait law. The Court of Appeal held that the proper law of the credit was the law of North Carolina since it was the country with which the credit had the closest connection as that was where the bank was, required, under the terms of credit, to perform its obligation to pay.

## E. *And Kenya?*

The principles of 'closest and most real connection' are the very ones that apply in East Africa and in Kenya in particular[19] and have found judicial recognition in the case of *Karachi Gas Ltd v Issaq*.[20] There, by correspondence written both in Kenya and Pakistan a contract was concluded for the sale of 100,000 feet of pipes, which were then in Mombasa, Kenya on FOB terms. Preliminary

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[17] Todd, Paul, *Bills of Lading and Bankers' Documentary Credits* (London: Lloyd's of London Press Ltd, 2nd ed, 1993) at p 245.

[18] (1981) 1 WLR 1233.

[19] Salim Dhanji, 'Kenya', Campbell, Dennis (ed), *Remedies for International Sellers of Goods* (London: Sweet & Maxwell).

[20] *Karachi Gas Ltd v Issaq* (1965) EA 42.

negotiations for the contract took place in Pakistan between the appellant company registered in Pakistan and a representative of the respondent who was on a visit to Pakistan. The respondent was ordinarily resident in Kenya. The respondent cancelled the order for pipes on the ground that it had failed to obtain the import licence. The respondent then sued the appellant claiming damages for breach of contract. The appellant contended that the proper law of the contract was that of Pakistan and not Kenya. It was held, *inter alia*, that the proper law of the contract was that of Kenya. Duffs JA (as he then was) found that the parties intended that, insofar as the shipment and delivery of the goods were concerned, they were to be carried out in accordance with the law of Kenya, but, insofar as it concerned the importation into Pakistan in accordance with Pakistan law.[21] In justifying the jurisdiction of Kenyan courts and Kenya's system of law Newbold Ag VP (as he then was) said that the transaction was more closely connected with Kenya. The seller was a resident in Kenya. The goods were in Kenya. Delivery was to be made in Kenya. The language of the contract was English. And the terms were familiar terms in English contracts of sales. The proper law of the contract was therefore Kenya. Further, he said that, contrary to FOB terms, the buyer had failed in his duty to take delivery in Mombasa and thus committed breach within the jurisdiction of Kenya courts.[22]

## F. *Bargaining Power and Choice of Law*

The hallmark of choice of law is that party autonomy allows parties freedom to select the proper law to their contract. Concededly, this is understandable because it enables them to ascertain beforehand, with accuracy and certainty, their rights and obligations arising from the contract. The general rule having been stated, one is immediately faced with the reality that paramountcy of party autonomy is not to be without qualifications. These qualifications are, first, that the law selected must not be in conflict with a fundamental policy of a state, which has a greater interest in that its laws would have been applied in the absence of a choice-of-law selection clause; second, that the law selected must have a reasonable relationship with the parties and the transaction.

The first of these qualifications has been seen to be acquiring a dimension of some degree of interest by states. It is from this realisation that the interest analysis and its debate originate in a discourse on choice of law. From a pragmatic

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[21] *Id* at pp 49-50.
[22] *Id* at p 54.

standpoint, choice of law lends itself to policy considerations of a state when it is perceived to put the interests of that state at stake. It must be borne in mind that a state always has some interest in whatever policies it may espouse.[23] It should therefore come as no surprise that interest analysis is not a unitary methodology but rather an agglomeration of 'stagnant pools of doctrine, each jealously guarded by its adherents'.[24] This is particularly so in federal inter-state relationships and legislative differences. It should also come as no surprise when a state promulgates policies geared towards the application of the law of the place of contracting so as to afford the contracting parties an opportunity to exit from laws that unduly burden particular transactions or attempt to transfer wealth from weaker to stronger interest groups. In this context stronger interest groups represent investment entities such as transnational multinational corporations, which, as it were, are informed by capitalistic considerations and which have overreaching bargaining power. On the other hand, weaker interest groups represent simple corporations from developing countries with little influence over the world economy. It may also be a case of a stronger and wealthier federal state against a weaker and poorer one.

However, those opposed to interest analysis argue that the issue as to whether one state is more interested than another is irrelevant. They argue that states should not meddle in transnational contracts but should promote interstate customary principles. It has been opined that it is the duty of any state seized of an international fact pattern to transcend its parochial mindset and proclaim from the mountaintop what is the appropriate international law to govern an international trade dispute.[25] Indeed, the introduction of policy considerations in this area will lead to intellectual laxity, whereas their exclusion is dictated by the need for precision and accuracy in legal affairs.[26]

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[23] Juenger, Friedrich K, 'Choice of Law: How it Ought Not to Be' (1997) 48 *Mercer Law Review* 757, 759.

[24] Herma Hill Kay, 'The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience' (1980) 68 *Carlifornia Law Review* 577, 615.

[25] Cox, Stanley E, 'The Interested Forum' (1997) 48 *Mercer Law Review* 727 at p 748.

[26] Higgins, Rosalyn, 'Policy Considerations and the International Judicial Process' (1968) 17 *ICLQ* 58.

## III. Litigating in Choice-of-Law, Forum and Procedural Clauses

### A. *Certainty and Efficiency of Legal Rules*

This section of the article shall examine the interpretation of choice of law, choice of forum and procedural clauses by the courts. It is most fundamental that courts enhance parties' choice of clauses 'rather than forcing parties to reside or contract in another state in order to avoid themselves of its rules'.[27] This would increase the efficiency of legal rules. It is therefore vitally important that the courts should give effect to parties' desire to choose the applicable law. This way they will promote and bolster parties' ability to determine the laws governing their behaviour prior to the conduct that gives rise to litigation.[28] But yet again these fundamental principles are exposed to a litmus test in courts of law.

### B. *The Litmus Test*

It is not uncommon to find a party bringing a question before the court with a view to contesting a forum because the contract incorporates a choice of forum clause turning on the applicable law. In such cases the party opposing the forum-selection clause may claim that if the selected courts resolve the dispute the law that would be applied by those courts would produce an injustice to him. It must also be appreciated that contracting parties could be put into undue injustice if the law of the country selected subsequently changes with the result that if that country's laws are applied they would result in an effect, which the parties neither intended nor contemplated. One can then begin to appreciate the difficulty of enforcing choice-of-law, forum-selection and procedural clauses. This emerges from the fact that the operation of choice-of-law, forum-selection and procedural clauses is undoubtedly complex. The complexities of this issue has been aptly illustrated by Ronald Graveson thus:

> The principles of private international law are construed on the application of space and time to particular problems. These factors apply whether the question is on the applicable law or the appropriate jurisdiction. Thus in respect of the principles of space, one considers whether the law of this country or that country should govern the issue or whether the courts of

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[27] Ribstein, Larry E, 'Choosing Law by Contracts' (1993)18 *Journal of Corporate Law* 245.
[28] Erin O & Larry ER, 'Interest Groups, Contracts and Interest Analysis' (1997) 48 *Mercer Law Review* 765.

> this country and that country should have jurisdiction. The question of time is relevant in deciding whether the law of the chosen country should be applied as it stands now or as it stood at some time in the past.[29]

From the foregoing one can safely concede that whereas the determination of which country's laws should govern international transactions is critical to the outcome of disputes, that of which courts should decide those disputes is much more critical. Historically, courts have been lethargic in enforcing forum-selection clauses. For instance, it is not until the twilight of the 1970's American courts, which were hitherto very reluctant in enforcing jurisdictional clauses, begun to adopt a hospitable attitude towards such clauses. This change in attitude was experienced in the case of *Bremen v Zapata Off-Shore Co*[30] where the Supreme Court made the following pronouncement:

> For at least two decades we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States. The barrier of distance that once tended to confine a business concern to a modest territory no longer does so. The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.[31]

### C. *Twin Forum-Selection and Choice-of-Law Clause Vitiated by Improper Law Diminishing Liability*

It is not uncommon to find a forum-selection clause stipulating that the law of the selected forum shall be applicable. This practice is so predominant that it has blurred the borderline between jurisdictional clauses and choice-of-law clauses. Inevitably, therefore, the linkage between these twin clauses is more pronounced than can be imagined. More often than not, an issue basically revolving around the applicability of a choice-of-law clause turns onto one also concerning the choice of forum. Similarly, it so happens that a selected forum is contested from the standpoint of proper law. It is upon this premise that one sees the inter-linkage and inter-relationship that attends the operation of a twin

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[29] Graveson, Ronald, 'The Inequality of the Applicable Law' (1980) 51 *British YBIL* 231 at p 240.
[30] (1972) 407 US 1.
[31] *Id* at pp 13-14.

clause. There is a long line of cases whereby a party institutes a suit in a country in contravention of the twin clause alleging that the law of the selected forum is improper law in the sense that it diminishes liability of a defendant. International contracts regulated by the Hague Rules are a classic illustration of this phenomenon. It has been established that where a bill of lading incorporates Hague Rules, then any clause in that bill of lading which is inconsistent or mutually irreconcilable with any provision of the Rules is null and void and of no effect. As, for instance, a bill of lading which has the effect of relieving the shipowner of his liability or lessening it other than as provided in the Hague Rules would offend the provisions of Article III, Clause 8 of those Rules. In effect the Rules have made the responsibilities and liabilities of the carrier absolute, irreducible and more stringent.

## D. *The Cases*

In *The Morviken*[32] an asphalt road-finishing machine was shipped from Scotland to Bonaire in the Dutch Antilles then transhipped to Holland on to the defendants' vessel Morviken. When the machine was being discharged at Bonaire it dropped and was severely damaged. The plaintiffs sued the defendants in the United Kingdom for damages. The defendants applied for a stay of all further proceedings in the action on the ground that all actions arising under the bill of lading should be brought before the Court of Amsterdam. The bill of lading here incorporated a jurisdiction clause, which stipulated that all disputes arising thereunder should be determined by the Court of Amsterdam. The plaintiffs opposed the stay principally on the ground that the jurisdiction clause chose the law of Netherlands, which law fixed the maximum liability per package to a sum less than that to which the plaintiffs would be entitled in the United Kingdom under the Hague Visby Rules of 1971. The law of Netherlands incorporated the Hague Visby Rules of 1924. Article III, rule 8 of Hague Rules of 1971 provided that any clause lessening liability shall be null and void and as such of no effect. The Court of Appeal allowed the appeal and ordered all the actions to proceed in England. Lord Diplock held that if it is established that the foreign court chosen as the exclusive forum would apply a domestic substantive law, which has the result of limiting the carrier's liability to a sum lower than that to which he is entitled if Visby Rules applied.

The consequence of this is that an English court or, and as submitted here, any other court shall be commanded by the 1971 Act to treat the choice of

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[32] (1982) 1 Lloyd's Rep 325.

forum clause as of no effect in a clear case whereby the liability of a defendant is diminished, or even worse, obliterated. The foregoing proposition is a well established principle, which has also been given judicial credence by courts in Canada.

The decision in the case of *The Regal Scout (No 2)*[33] is instructive. There, the plaintiff shipped cargo of feed barley on board the ship Regal Scout owned by the defendant from Vancouver to Otaru and Shiogoma in Japan. On arrival it was discovered that the barley was contaminated by salt water apparently blamed on negligence on the part of the defendant, its servants and employees in failing to make and keep the defendant ship seaworthy and fit for the voyage. The bill of lading issued by the agent of the carrier to the shipper incorporated a jurisdiction clause, which stated that any dispute arising thereunder should be decided in the Tokyo District Court in Japan according to Japanese law. Concededly, if the matter was tried in Tokyo Japanese law would apply, under which law the ship owner would not be construed to be a party to the contract of carriage thereby rendering it impossible for the cargo owners to recover any damages. Conversely, Canadian law would construe the ship owner as being a party to the contract. In the Canadian Federal Court, Cattanach J said that under Japanese law the jurisdiction clause would not only have the effect of lessening liability, but of totally obliterating it and held that a Canadian court was obliged to apply the Canadian Carriage of Goods by Water Act and treat the choice of forum clause as being of no effect.

The upshot of the foregoing case law is that a forum-selection clause may be overlooked by a court seized of the issue of compliance with a jurisdiction clause on the footing that the enforcement thereof has the effect of obliterating the liability of a party thereof. Indeed, the tune is an uninterrupted series of authorities to this effect.

## E. *The Francois Vieljeux Capsizes*

However, it should not come as a surprise that that tune has been cut off in Kenya. *The Francois Veiljeux*[34] is a classic illustration. There, cargo had been stowed badly at Mombasa before embarkation. This caused list as a result of which sliding of the cargo occurred thus smashing of the watertight stern starboard. Eventually, the ship capsized. The ship and the cargo were a total

[33] *Federal Court of Canada* (Unreported).
[34] (1982-88) 1 KAR 396.

loss. Twenty-three lives were a casualty. The plaintiff, as endorsee of a bill of lading in respect of a coffee cargo carried on the ship, sued the defendants as joint owners for failure to deliver the coffee. There were several actions pending in Kenya and in France concerning other undelivered cargo. The defendants sought and obtained stay of the proceedings in Kenya relying on a twin choice-of-law and jurisdiction clause, which selected the courts and the law of the country where the carrier had his principal place of business which was France, Paris. If Kenya law applied the casualty would be blamed on unseaworthiness subjecting ship-owners to liability under the Hague Rules. On the other hand, under French law the casualty would be considered merely as a *faute de nautique,* that is to say, an error in the navigation or management of the ship which, by the interpretation of the French court, does not amount to unseaworthiness. This interpretation leads to diminution of the ship-owner's liability.

The stay was contested at the Court of Appeal. Hancox JA (as he then was) said that 'unlike the American legislation which has an overriding effect over a bill of lading the 1926 Kenya Statute did not have such an effect to the extent of striking down a jurisdiction clause'.[35] It is then surprising that the learned judge came to the finding that even if the twin forum and foreign law clause reduced liability on the part of the carrier, nevertheless it represented what the parties agreed at the time of issuing the bill of lading. Nyarangi JA (as he then was) also expressed the same views by stating that the clause was willingly accepted by the parties who were fully aware that the French legal system might be less advantageous than that of Kenya.[36] In my view, the learned judges failed to appreciate that the diminution of liability resulting from the application of the jurisdiction clause is good reason to strike it down.

It is the dissenting judgement of Chesoni JA (as he then was) that seems to uphold the proposition that a jurisdiction clause may justifiably be so overlooked. He said that the spirit underlying the Hague Rules is that in the interests of international trade, all contracts of carriage of goods by sea should be subject to uniform rules which should not differ from country to country.[37] In effect, he underscored the fact that certainty in contracts of international trade is vital and it is conveniently promoted by denying parties the liberty, by any device, directly or indirectly to contract out of the Rules,[38] particularly if

[35] *Id* at p 401.
[36] *Id* at p 420.
[37] *Id* at p 415.
[38] *Id* at p 416.

the result would be to cause an injustice to one of the parties. It is hoped that an opportunity will arise for the Court of Appeal to review the decision in this case, or at any rate, overturn it.

### F. *Choice-of-Law, Choice-of-Forum and Choice-of-Procedure Clauses must be Obeyed*

The general rule is that forum-selection and choice-of-law clauses must be obeyed, unless there are exceptional circumstances, which would justify departure from this rule. The rationale for this proposition is that party autonomy entitles parties under a contract to insert terms thereto for their own convenience and that freedom should not be interfered with. The High Court has paid homage to this jurisprudence in the case of *Friendship Container Manufacturers Ltd v Mitchell Cotts (K) Ltd*.[39] There, the plaintiff contracted with a carrier whose local agent was the defendant, to ship some machinery to the Port of Mombasa. The plaintiff sued the defendant in the High Court of Kenya alleging that, in breach of the agreement, the defendant failed to properly handle and release the machinery leading to its subsequent damage and consequent loss of profits. The defendant contended that the suit was barred under the Hague-Visby Rules which applied as per the bill of lading. The bill of lading in this case incorporated an exclusive jurisdiction clause vesting jurisdiction in the courts of the Republic of South Africa. On account of the choice-of-forum clause Mbaluto J held that parties should be held to their agreement as regards a jurisdiction clause and the party wishing to depart from this clause must discharge a heavy burden of showing strong cause.

### G. *The Heavy Burden*

Parties to contracts incorporating jurisdictional clauses do sue in a forum different from the selected forum according to the forum selection clause. Normally, the party who is sued in contravention of the clause objects to the jurisdiction of the court by way of an application to stay the proceedings. In regard to this the principles governing the question whether or not to enforce the clause are: first, the court is not bound to grant a stay but has a discretion whether to do so or not; second, the discretion should be exercised by granting a stay unless strong cause for not doing so is demonstrated; third, the burden of proving such strong cause lies on the plaintiffs; and fourth, in exercising its discretion the court should take into account all the circumstances of the particular case. More

[39] [2001] 2 EA 338.

specifically, the court considers some guiding factors that will be dealt with in this section. The principles and the factors that guide the court were much the subject in the celebrated case of *The Eleftheria*.[40] These factors were established there by Brandon J. These factors will be considered in this section with some illustrations. The illustrations are mainly from Kenya judicial decisions, but also anchored on the general principles as enunciated by courts in other jurisdictions.

1. *Where evidence is*

Firstly, the court considers the country where the evidence on the issues is situated, or more readily available and the effect of that on the relative convenience and expense of trial as between the present forum and foreign courts. In *The Eleftheria* it was held that a substantial number of witnesses would have to be called and taken to Greece, which would cause substantial inconvenience and expense.[41] It was clearly appreciated that further difficulties and expense would be involved in the process. However, on a balance of convenience Brandon J found that on the point of evidence, it was not one way or the other. In *The Francois Vieljeux*[42] it was held by Chesoni JA (as he then was) that the evidence on improper stowage was mostly situated in Kenya where the off-loading of the cargo took place.[43]

This factor was also considered in favour of the Kenyan forum as the natural forum in the case of *United India Insurance & Kenindia v EA Underwriters*[44] whereby a contract incorporated a twin forum-selection and choice-of-law clause, respectively in favour of Indian courts and laws. Here, Madan JA (as he then was) expressed his mind to the effect that Kenya was the natural forum for the dispute since it is the jurisdiction where all breaches were alleged to have occurred and as such the evidence of the issues of fact and all the essential witnesses were both wholly situated and more readily available in Kenya. The learned judge went further and said that there ought not to be witnesses directly connected with the dispute in Bombay and that

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[40] (1970) AC 94.
[41] *Id* at p 104.
[42] (1982-88) 1 KAR 398.
[43] *Id* at p 419.
[44] (1982-88) 1KAR 639, 652.

the relative convenience centred in Kenya. He expressed himself in the following picturesque terms:

> If the stay is not refused numerous witnesses, some big, some small, may have to travel form Kenya to Bombay at enormous expense. Some may even refuse to travel. They will not be compellable. The expense of the trial in Bombay would be staggering.[45]

## 2. *Differing legal systems*

Secondly, the court considers whether the law of the foreign court applies and, if so, whether it differs in material respects from the law of the country whose courts are seized of the dispute. In *The Eleftheria* counsel for the defendants submitted that the dispute, because of its dependence on Greek law, which was different in material respects from English law, was essentially one for the Greek courts to decide.[46] He submitted that in construing the clauses in question, by Greek law, the court would have to investigate the aspect of contractual good faith and morality, concepts with which a Greek court was familiar. In the *United India*'s case the question of differing legal systems was equally considered and Madan JA (as he then was) observed that the law of Kenya and the law of Bombay were the same on the subject in question. In *The Francois Vieljeux* Chesoni JA (as he then was) found that there was a major difference between the Kenyan law and the French law, in the sense that a French court would not consider improper stowage affecting the stability of the ship as unseaworthiness but rather '*faute nautique*'[47] whereas, on the contrary, under Kenya law a Kenyan court would construe improper stowage which affects the stability or safety of the ship as unseaworthiness.[48]

## 3. *Closest connection*

Thirdly, the concept of close and real connection of the dispute to a particular jurisdiction plays a crucial role in determining whether or not a stay can be granted. A dispute may be connected to a jurisdiction in a variety of ways as earlier demonstrated in Section D of Part II of this article. This factor is vital as has been seen in the criteria for establishing the proper law to govern a certain

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[45] *Ibid.*
[46] *Supra*, n 40.
[47] '*faute nautique*' is a French terminology meaning error in the navigation and management of the ship. The English translation is 'nautical fault'.
[48] *Supra*, n 42 at p 418.

dispute. It reinforces the prima facie case for granting a stay and actually weighs heavily on the scales since the real connection of the defendant to the country chosen bears a lot on their willingness to protect the plaintiff in relation to security for his claim. In the *United India*'s case it was accepted that the issue of close and real connection is instrumental in considering whether a stay is imperative or not. Madan JA (as he then was) said that all the alleged breaches were alleged to have occurred in Kenya.[49] To this writer's mind, the learned judge was saying in effect that this being the case the dispute was more closely connected with Kenya and remotely connected with Bombay. This point has been repeatedly laid down and the opportunity was not missed by the American court in the case of *Bremen v Zapata* where it was stated that if the forum were so remote that the complaining party would for all practical purposes be deprived of his day in court. Hancox JA (as he then was) considered this factor in the *United India's* case in which he guided himself on the authority in the case of *Evans Marshall v Bertola*[50] as articulated by Kerr J. The learned judge explained himself in a manner that clearly showed that the dispute was more closely connected with the United Kingdom as the substance of the case was exclusively concerned with the United Kingdom. This is the manner in which he rendered this exposition:

> It is a battle about the proper marketing of sherry in the United Kingdom. Bertola have claimed to be entitled to terminate this agreement because they contend that Evans Marshall have failed in their obligations in this country.[51]

### 4. *Genuine desire or mere procedural advantage*

Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages is a factor to be considered. It may very well be the case that a defendant merely wants the jurisdiction clause to be enforced so that the plaintiff's case could be prejudiced because of procedural technicalities or advantages. In the *United India's* case it was contended that the limitation period for suing in India on the subject was three years. Madan JA (as he then was) observed that the defendants did not genuinely desire trial in Bombay and that they were merely seeking a procedural advantage of time bar with which the plaintiff would be faced there, which was not applicable in Kenya.[52] In *The Francois Vieljeux* it was contended by Mr Inamdar, counsel

[49] *Supra*, n 44 at p 643.
[50] (1973) 1 WLR 349.
[51] *Id* at p 363.
[52] *Supra*, n 44 at p 644.

for the plaintiffs that the French system of trying commercial cases was unfavourable as compared to that obtaining in Kenya, oral testimony being rare and the court's decision frequently being based on the result of discussions between experts.[53] Hancox JA recognised that these matters could be disadvantageous to the plaintiffs, but surprisingly found that these procedural differences are inevitable if any foreign law were to govern the case.[54] It was found as a fact that French law was different from Kenyan law in the sense that whereas Kenyan law would consider improper stowage affecting the stability of the ship as unseaworthiness French law would consider this as '*faute nautique*' by which unseaworthiness cannot be caused. Here again it could be said that the defendants did not have genuine desire to have the case tried by French courts but were merely seeking procedural advantage offered by the French legal system's procedure of trial of actions namely, that of courts relying on the discussions of experts.

This factor was also a subject of discussion in *Kisumuwalla Oil Industries Limited v Pan Asiatic Commodities (2)*.[55] There, the point in issue was an arbitrtion clause in a contract in which the arbitral procedure for dispute resolution as opposed to a judicial procedure was selected in a forum-procedure clause. Pall JA (as he then was) observed that in order to take advantage of an arbitration clause, the party desiring to do so must satisfy the court that at the time when the proceedings sought to be stayed were commenced he was ready and willing to do all things necessary for the proper conduct of the arbitration. This is an important aspect as it goes to show that he actually has genuine desire in seeking compliance with the arbitration clause. In *Niazsons (K) Limited v China Road and Bridge Corporation (K)*[56] where the defendant objected to the court's jurisdiction on the basis of a jurisdiction clause that required resolution of disputes by arbitration, Tunoi JA came to the finding that since the respondent had not appointed an arbitrator as provided for in the arbitration clause, so the respondent had not unequivocally elected to have the dispute decided by arbitration. There was no genuine desire in relying on the arbitration clause. The learned Judge expressed himself thus:

> There was, therefore, no valid appointment of any arbitrator under the clause when the application for stay was made. I think that willingness to arbitrate manifests itself, if the Respondent does what it is obliged to do in the

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[53] *Supra*, n 42 at p 404
[54] *Ibid.*
[55] *Kisumuwalla Oil Industries Limited v Pan Asiatic Commodities (2)* [1995-1998] 1 EA 153.
[56] *Niazsons (K) Limited v China Road and Bridge Corporation (K)* (2001) 2 EA 502

> arbitration, for example, make valid appointments of arbitrators in terms of the arbitration clause. When it does not do so at all, as here, can it then be said that the Respondent was ready and willing for such arbitration? With respect, the answer to this would, in my view, be in the negative.

## 5. *Prejudice*

The Court considers whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:

(i) be deprived of security of their claim;
(ii) be unable to enforce any judgment obtained;
(iii) be faced with a time bar not applicable in the forum court; or
(iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

## 6. *Overreaching, unreasonableness and public policy*

The factors considered above are not exhaustive. In *Bremen v Zapata Offshore*[57] the court identified new ones. First, it considered that if the contract was obtained through fraud or overreaching that might invalidate a choice of forum clause. It is axiomatic that parties may not necessarily have an equal footing or bargaining power in any given transaction since conditions of economic duress[58] constantly come into play. In Kenya, this point was raised in *Air Al-Faray Limited v Raytheon Aircraft Credit Corporation & Another*[59] at the High Court whereby an aircraft lease agreement contained a choice-of-law and forum selection clause that chose the law of the State of Kansas and the United District Court for the District of Kansas located in Wichita, Kansas, or the Eighteenth Judicial District Court of Sedgwick County, Kansas, respectively. The plaintiff lessee of the aircraft defaulted in making rental lease payments for the lease of the aircraft. The defendants, lessor and financier of the aircraft repossessed the aircraft. The plaintiff brought an action in the High Court of Kenya. The defendant raised a preliminary objection on the ground that the Kenya High Court did not have jurisdiction. Seeing that this clause was excessively overreaching and enjoyed over-inclusion in respect of one party and suffered from under-inclusion as against the other party, the plaintiff argued that the clause was invalid and fraudulent. The plaintiff's counsel argued that the clause presupposes the denial

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[57] *Supra*, n 30.
[58] Wooldridge, F, 'Inequality of Bargaining Power in Contract' (1977) *Journal of Business Law* 312, 313.
[59] High Court of Kenya at Nairobi, Civil Case No 1611 of 1998 (Unreported).

of one party's right to go to court and confers the whole of that right on the other. Indeed, Mbogholi Msagha J (as he then was) held that the clause imposed a total waiver of all rights on the part of the plaintiff as to choice of law and forum, the defendants conferred itself a right to dictate unlimited jurisdiction and that the terms of the clause were apparently tinctured with oppression. This decision was contested at the Court of Appeal which overturned it.[60] Second, if enforcement of the clause would be unreasonable and unjust then it may be ignored. Third, a clause may be struck down if enforcement would contravene a strong public policy of the forum in which the suit is brought, whether declared by Statute, or by judicial decision.

### 7. *Liberal and protective jurisdictions: can party autonomy oust the court's jurisdiction?*

It is an established principle that the concept of party autonomy permits parties to select a forum for the adjudication of their dispute. This freedom is so much cherished that parties are by it allowed to choose the law that is to govern their contract. It is also by it that parties select the procedure that would be applied in resolving disputes between them. Courts have responded in two ways when construing forum-selection clauses. In the scales on the one hand, some courts have taken the view that party autonomy is paramount and therefore a choice of forum clause should be given effect since it is a product of the parties themselves. In the scales on the other hand, it is thought that forum-selection clauses cannot oust the court's jurisdiction. The latter view is informed by the fact that if jurisdiction clauses are given the meaning and effect of ousting the court's jurisdiction that would be tantamount to opening floodgates to forum shopping. Some parties will seek the enforcement of the clause when it is in their interests or convenient for them. At other times they will seek to depart from it when it disadvantageous to them.

One question that remains moot is whether choice-of-law, forum selection and procedure clauses oust the jurisdiction of non-selected countries' fora. If the answer to this question is in the affirmative, then one can safely concede to the paramountcy of these clauses. However, if the answer is in the negative, another question that arises is that regarding the instances when the jurisdiction

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[60] Court of Appeal, Civil Appeal No 29 of 1999. There, the Court of Appeal of Kenya held that where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation unless the party suing in the non contractual forum discharges the burden cast on him of showing strong reasons for suing in that forum.

is preserved. Kenyan courts have tended to favour the latter view as can be illustrated by a long line of decided cases. An illustration of this is the decision in the case of *Tononoka Steels Limited v EA Trade and Development Bank (PTA Bank).*[61] There, the appellant desirous of setting up in Kenya a plant for manufacturing steel products, entered into a loan agreement with the PTA Bank, the respondent. For settlement of disputes, the parties agreed that their agreement should be governed by and construed, not in accordance with the laws of any Member State but with the laws of England. A Legal Notice[62] issued in Kenya supported this. A dispute arose and the appellant sued in the High Court of Kenya, seeking an injunction against the PTA Bank restraining it from recalling for the repayment of the facility or taking possession of the project. Special damages and general damages were also claimed by the appellant. The PTA Bank entered appearance and filed defence under protest. A question arose as to whether the jurisdiction of the Kenyan High Court of Kenya was ousted. The arbitration clause and the Legal Notice were heavily relied on. Lakha JA (as he then was) citing the authority in *Davies v Mistry*[63] as pronounced by Spry VP (as he then was) said that the right of access to the Courts of the Republic of Kenya may only be taken away by clear and unambiguous words of the legislature and that subsidiary legislation cannot suffice.[64] Kwach JA (as he then was), in justifying jurisdiction, said that while the jurisdiction to deal with substantive disputes and differences was given to the International Chamber of Commerce in London, the Kenyan Courts retained residual jurisdiction to deal with peripheral matters.[65] This decision mirrors a protective attitude regarding the jurisdiction of the Kenyan Courts. This decision took a restrictive approach towards jurisdiction clauses. In this case, the Court seamlessly elided the discussion of the jurisdiction clause and delved into a discussion of immunity of international organisations.

A similarly restrictive approach was adopted by the High Court of Kenya in the case of *Air Al-Faray Ltd v Raytheon Aircraft Credit Corporation.*[66] There, there was a contract between the plaintiff and the defendants for the lease of an aircraft Model Beechcraft 1900c. The plaintiff took possession of the aircraft in January 1998. Without the authority of the plaintiff, the defendants flew the aircraft to South Africa. The plaintiff claimed against the defendants

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[61] (2000) 2 EA 536.
[62] Republic of Kenya, Legal Notice Number 265 of 26th May 1991.
[63] (1973) EA 463.
[64] *Supra*, n 61 at p 541
[65] *Id* at p 549.
[66] *Supra*, n 59.

its rights to operate and have possession of the aircraft. Clause 15.1 of the Lease Purchase Agreement on Law and Jurisdiction stated as follows:

> This Agreement shall be governed by and construed in accordance with the law of the State of Kansas. In relation to any dispute arising out of or in connection with this agreement, the Lessee hereby irrevocably and unconditionally agrees that all legal proceedings in connection with this agreement shall be brought in the United States District Court for the district of Kansas located in Wichita, Kansas or in the eighteenth Judicial District Court of Sedgwick County Kansas and the Lessee waives all right to a trial by jury.

Counsel for the defendants argued that the Lease Purchase Agreement was binding on the parties and that the plaintiff having waived all rights to bring action in any other jurisdiction rendered the suit incompetent. A question arose as to whether the court could decline to enforce a choice of law or forum clause in a contract, which is otherwise binding between the parties. Counsel for the plaintiff submitted that the jurisdiction of the High Court as conferred by s 60 of the Constitution of Kenya could not be limited by a contract between two parties even by an Act of Parliament. The case of *Kamlesh Mansukhlal Damji Pattni v Nassir Ibrahim Ali & 2 Others*[67] was relied upon heavily where Kuloba J (as he then was) had expressed himself thus:

> ... there is no room for the derogation from the unlimited original jurisdiction of this court and any practice, rule, or proposition which has the result of a derogation from the unlimited original jurisdiction of this court, constitutionally conferred, and not given by statute but by the constitution, must be rejected as being inconsiderate with the letter and spirit of the constitution of the Republic of Kenya.

## 8. *Scott v Avery clauses: special choice of procedure*

It is not uncommon to find parties entering into a contract containing an arbitration clause stipulating that the award of an arbitrator is to be a condition precedent to the enforcement of any rights under the contract.[68] This does not necessarily mean that the obligations under the contract cannot be enforced by an action in court, since the arbitration clause is an independent covenant. Consequently,

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[67] High Court of Kenya at Nairobi, Civil Case No 418 of 1998.

[68] Mustill & Boyd, *Commercial Arbitration* (London & Edinburgh: Butterworths, 1989) at p 161.

the court has jurisdiction to entertain the action albeit in a majority of cases the court will enforce the separate covenant to arbitrate by granting a stay of proceedings and as such declining to exercise its jurisdiction. It is clauses of this nature that have come to be known as *Scott v Avery* clauses.[69] Practically, this effectively forces the parties to refer their dispute to arbitration, unless of course they mutually consent to have the dispute resolved by a court of law. It has been said that the enforcement of *Scott v Avery* clauses is tantamount to the ouster of the jurisdiction of the court. Indeed, an attempt to bring action in court in defiance or contravention of the clause is consigned to fail.[70] However, the position in law is that a *Scott v Avery* clause does not deprive a party of his right to bring an action in court, but merely postpones it. Such clauses do not annihilate the right of access to the court since parties cannot by their own act, lock out one another's right to seek redress from the courts.

The approved procedure in the application of the *Scott v Avery* clauses is to apply for stay of proceedings. In *Corporate Insurance Co v Loise Wanjiru Wachira*,[71] the plaintiff submitted a claim to the appellant insurance company to be indemnified for the loss and damage arising out of damage of his vehicle but the defendant disclaimed liability. The defendant filed a suit in contravention of a clause in the insurance policy that required all disputes arising thereunder to be referred to arbitration. The defendant entered appearance and filed a defence denying liability on the ground, *inter alia*, that the suit was premature and incompetent because of a clause in the Policy referring all disputes to arbitration before going to court. At the commencement of the trial, counsel for the defendant raised a preliminary objection, but the trial judge overruled it as he found as a fact that the defendant had not complied with the mandatory provisions of s 6 of the Arbitration Act, which requires an application for stay of proceedings to be made. However, counsel for the defendant submitted that the nature of *Scott v Avery* clauses is that they can provide a defence to a claim. It was held that whereas that may be so, a party could not circumvent the statutory requirement to apply for a stay of proceedings. In the writer's view, the court

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[69] 25 LJ Ex 308.These clauses were named after this House of Lords famous case in which a mutual assurance company inserted in all its policies a condition that when a loss occurred the suffering member should give in its claim and prove his loss before a committee of members appointed to settle the amount; that if a difference arose between the committee and the suffering member the matter should be referred to arbitration and that no action should be brought except on the award of the arbitration. The House of Lords held that this condition was not illegal as ousting the jurisdiction of the courts.

[70] *Supra*, n 68.

[71] No 270 of 1991.

was right as it sought to address itself to the economy of legal rules. Mustill and Boyd state:

> A *Scott v Avery* clause performs two different functions. First, it creates an obligation to arbitrate and as such, it gives the defendant ... the right to apply for a stay of proceedings. Second, it creates a condition precedent to the plaintiff's right of action and as such, it gives the defendant a substantive defence to the claim.... A defendant sued in breach of a *Scott v Avery* provision thus has a choice of remedies. In law, he is entitled to bide his time and rely on the *Scott v Avery* point at the trial. But the court does not approve of this procedure because it wastes the costs of the action. The right course is for him to apply for a stay. Upon the hearing of the application, all questions of the applicability of the arbitration provisions can be dealt with along with any issue whether the clause ought in the circumstances to be declared of no effect. If it is held that the clause does apply, then the action will be stayed and the matter can proceed to arbitration no further costs being incurred in the action.[72]

It is imperative to note that there are instances when a party's conduct could disentitle it from relying on the *Scott v Avery* clause. Firstly, where the defendant has waived reliance on the clause by defending the action without relying on the clause or by himself instructing proceedings in breach of it. In *Corporate Insurance Co v Loise Wanjiru Wachira*, the defendant's defence exhibited this conduct as it raised the defence that the vehicle in question was being driven by an unauthorised driver, which was a breach of the policy and that the appellant had repudiated liability. It may safely be contended that once the parties have submitted to the jurisdiction of the court, they cannot blow hot and cold. It has been said:

> If the court has refused to stay an action or if the defendant has abstained from asking it to do so, the court has seisin of the dispute and it is by its decision and by its decision alone that the rights of the parties are settled.[73]

If the defendant takes a step in the proceedings that in itself may disentitle it from the advantage of the *Scott v Avery* clauses. Indeed, in *Eagle Star v Yuval*[74] Lord Denning MR defined a step in the proceedings as a step by which the defendant evinces an election to abide by the court proceedings and waives his right to ask for arbitration. In the same case, Geoff LR remarked that a step

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[72] *Supra*, n 68 at pp 165-166.
[73] Russell, *The Law of Arbitration* (London: Stevens & Sons, 18th ed, 1970) at p 137.
[74] (1978) 1 Lloyds Report 357, 361.

in the proceedings is something in the nature of an application to the court such as taking out summons or something of that kind which is in technical sense a step in the proceedings.[75] In the case of *TM AM Construction Group v AG*,[76] the plaintiff instituted action against the Attorney General for money due to it under a construction contract for work done. The Attorney General entered appearance and later applied for stay of proceedings under section 6 of the Arbitration Act of 1995. It was held that an application for stay of proceedings must be made not later than the time when appearance is entered. It was further held that as the Attorney General had waited 41 days before making the application, he had lost the right to rely on the arbitration clause.

In *Kisumuwalla Oil Industries v Pan Asiatic Commodities (2)*[77] the contract between the parties had an arbitral clause referring all disputes arising out of the contract to arbitration in London. The clause stated that neither party shall bring any action or other legal proceeding until such disputes shall first have been heard and determined by the Arbitration and Appeal of the Federation and that the obtaining of an award from the arbitration was a condition precedent to the right of either party bringing any action or other legal proceedings. The plaintiff brought action in the High Court of Kenya for breach of contract and the plaintiff's counsel raised a preliminary objection that was overruled. The defendant's counsel argued before the Court of Appeal that the *Scott v Avery* clause in the contract made the obtaining of an award a condition precedent to the plaintiff's right of action and further submitted that the Court of Appeal's decision in *Corporate Insurance v Loise Wanjiru Wachira* was erroneous. Pall JA (as he then was) observed that the appellant was obliged to apply for stay of proceedings after entering appearance, which it never did. The learned judge also remarked that the appellant's conduct, that is to say, an application to strike out the defence, was a step in the proceedings. The defendant's failure to apply for stay of proceedings disentitled it from relying on the *Scott v Avery* clause.

From the recent cases of *Kisumuwalla* and *Naizsons* it would appear that less and less weight is being attached to *Scott v Avery* clauses in Kenya. It would appear that nowadays, in Kenya, it is not a condition precedent that one must obtain an arbitral award before taking a dispute to court even where a contract incorporates a jurisdiction clause in the nature of *Scott v Avery* clauses.

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[75] *Id* at p 363.
[76] (2001) EA 291.
[77] *Supra*, n 55.

It should therefore be understood that *Scott v Avery* clauses no longer have application in Kenya.

## IV. International Authority and Comparative Analysis

An analysis of conflict of laws in the realm of disputes arising from transnational and international contracts cannot, as it were, avoid the analysis of the attaching international authority. It is upon this premise that I find it imperative to discuss this perspective of the subject, albeit obliquely in a significant way. Undeniably, the contracts with a foreign seller raise legal problems that are unlikely to be raised when dealing with domestic party contracts.[78] Perhaps this explains the adoption of The Restatement of Conflict of Law in 1943 by the American Law Institute to bring order, uniformity and predictability in the realm of conflict of laws through the use of relatively few broad rules.[79] However, in the Restatement special narrow choice of law rules have been created for several transactions and other matters where they seem desirable. In the same strain, the Brussels convention, that is to say, the European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters[80] was concluded at Brussels on 27 September 1968.

The Brussels Convention applies whenever the defendant is domiciled in a Contracting State, regardless of his nationality. However, the Convention may apply regardless of the domicile of the defendants.[81] The general rule is that persons domiciled in a contracting state must be sued in the courts of that state.[82] They may only be sued in the courts of another state by virtue of the provisions set out in the Brussels convention. As for instance, a person domiciled in a contracting state may be sued in the courts of the place of performance of the obligation in question, provided this is also in a contracting state.[83] In sales contracts, the courts that have jurisdiction are those of the place where delivery should take place, if the claim concerns the delivery of sold goods or to the courts of the place where the buyer has to pay if the claim concerns the payment

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[78] Wouter Den Haerynck, 'Belgium', Campbell, Dennis (ed), *Remedies for International Sellers of Goods* (London: Sweet & Maxwell, 1997).

[79] Herzog P, 'Recent Developments in Choice of Law in the United States' (1964) *Journal of Business Law* 273.

[80] European Convention on Jurisdiction and Enforcement and Judgments in Civil and Commercial Matters done at Brussels on 27 September 1968.

[81] Articles 16, 17 and 18.

[82] See *The Deichland* (1989) 3 WLR 478.

[83] Article 5(1). Also see *Effer v Kanther* (1982) ECR 825.

of the goods. The place where the contractual obligation concerned must be performed is determined according to the proper law of the contract. Invariably therefore, the court must first grapple with the problem of conflict of laws so as to determine the proper law of the contract before it can decide whether it has jurisdiction.

The other international agreement on conflict of laws is the Vienna Convention, that is to say, The United Nations Convention on Contracts for the International Sale of Goods. It governs only the formation of the contract of sale. It also governs the rights and obligations of the seller and the buyer arising from such a contract. It is not concerned with the validity of the contract or any of its provisions or of any usage or the effect, which the contract may have on the property of the goods sold.[84] The Vienna Convention will apply to contracts between parties whose places of business are in different states when; first, both parties have ratified and are parties to the Convention; or second, the rules of private international law lead to the application of the law of a contracting state. However, Kenya has not ratified this Convention though it may apply in certain circumstances.[85] In Belgium, whether Belgian courts have jurisdiction with respect to international sales contracts is mainly determined by the Convention. In order to determine the proper law of an international trade contract, that is to say, the *lex contractus*, the Belgian courts take into account two international Conventions, namely; first, the Convention on the Law Applicable to International Sale of Goods.[86] These two Conventions reflect an objective criterion in the sense that the law of the state determined to be the *lex contractus* by the Conventions will apply, even if this law belongs to a non-member state. These Conventions have captured and codified some strands of the concept of close and real connection. They have also codified the tenets of proper law in contracts.

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[84] Article 4.
[85] *Supra*, n 19.
[86] Negotiated at the Hague on 15 June 1955, but came into force for Belgium in September 1964.

## V. The Way Forward

### A. *Harmonisation and Consistency of Inter-State and International Rules and Policies*

The tenor of this article is that the smoothness and success of trading activities across national frontiers can only be informed by the efficiency and fairness with which the disputes arising therefrom are resolved. It is not an easy task, but the need for this is clearly evident. An established system that deals with the problem should be informed by a sound fundamental object. First, that system should meet and satisfy the justified expectations of the parties since each person who enters into a commercial transaction with another expects that the other party will perform his part of the bargain. Second, attaining certainty and uniformity in judicial approaches to choice of law in conflict of law cases are pertinent considerations in commercial transactions. Third, there is the need to enhance harmonisation of policies by the various states. Fourth, it is necessary to ensure flexibility and avoid rigidity. For a lawyer who would like to provide good representation in the realm of transnational disputes and international trade, the attainment of the above objects is a tenable venture.

States should endeavour to move toward a policy of unification. When one says that a unified system of resolving conflict of laws disputes is imperative, it should not be interpreted to mean that party autonomy is being looked down upon. What one is saying is that a predictable system is a much-needed tenet in this realm. Consistency may definitely not be possible, but subjectivity invents intentions on the part of the parties, which is normally frowned upon. To the writer's mind, different legal systems should not have divergent judicial policies as regards the resolution of disputes bearing the character of private international law. Never before have goods, services and humans moved across national frontiers massively. Therefore, as traders engage in this process they need assurance that certainty of legal rules is the hallmark of that process. In fact, even at the regional level one would expect that there would emerge an ascertainable body of private international law sufficient enough to handle transnational trade disputes.[87] There is the whole question of enforcement of foreign judgements which is obviously hinged on the policy of a certain

[87] Smokin Wanjala, 'The Untrodden Path: Regional Trade and Conflict of Laws in Eastern Africa: An Analysis of Choice of Law Problems' in Vyas, Kibwana *et al*, *Law and Development in the Third World* (Nairobi: University of Nairobi, Faculty of Law, 1st ed, 1994) at p 526.

jurisdiction. It is of utmost importance that there are rules of jurisdiction to avoid the harshness and illogicality of the widely accepted conflict of laws principle, which requires for the recognition and enforcement of a foreign judgment the compliance by the foreign court with the conflict of laws rules on jurisdiction of the country in which recognition or enforcement is sought.[88]

## B. *Arbitration and Other Alternative Dispute Resolution Tools*

There is clearly ample scope for the exercise of the lawyer's fundamental task of cutting through inessentials to arrive, if he may, at essentials.That process needs to go on, even if it is difficult to see where to begin, and in fact the growth of international trade will not wait for us to locate the best starting point. Whereas the choice of a forum is an issue one has to contend with, one is always able to point to the less contentious fora and procedures as tools of transnational dispute resolution such as arbitration, mediation and other forms of alternative dispute resolution. Arbitration should be encouraged. It is time saving. It may be costly however. More importantly though, on the whole, it is cheaper in the long-run. Despite its obscurities, the way ahead through wider acceptance of arbitration as a means of settling disputes may yet prove a firm and worthwhile path to follow. Unlike litigation, arbitration is not engulfed in an adversarial environment. The other forms of alternative dispute resolution bear these advantages and conveniences. This recommendation to embrace arbitration flows from the fact that cases bearing strands of conflict of laws are, in a litigation, likely to be approached with a vigour that normally prejudices one party.

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[88] Zaphiriou, GA, 'The EEC Convention on Jurisdiction and Enforcement of Judgements' (1969). *Journal of Business Law* 74.

# Harmonisation of *Shari'ah*, Common Law and Customary Law in Nigeria: Problems and Prospects

**Abdulmumini A Oba***

*Abstract*

*Law in Nigeria is traceable to three distinct legal traditions namely customary law, Islamic law and the English common law. These laws often differ irreconcilably in substantive law, procedural law, concepts of justice, and worldviews. The colonial administration ensured the ascendancy of the common law in the country but the movement in support of Islamic law has remained very strong. Thus, there exist a lot of tensions within the Nigerian legal system. Various approaches have been suggested to resolve these conflicts. Some have suggested a unification of the three systems of law. Others, towing the colonial policy want the specialist courts administering Islamic and customary laws abolished. The biggest obstacle to unification of laws in Nigeria is that Islam does not permit for Muslims a hybrid law out of Islamic law and any other law. Muslims have argued in favour of a clear separation of Islamic law from common law and for the establishment of a parallel system of courts from the lowest to the highest court to deal with each of the three laws in the country. This parallel system of courts has many challenges and there may still be a case for administering Islamic law by specialists within a unified courts system. Law in Nigeria took a new turn in 1999 with the adoption of Islamic law as the basic law in many States in northern Nigeria. The changes introduced Sharia Penal Codes and Sharia Courts. Non-Muslims are not subject to Islamic law. The major obstacles to these reforms include constitutional limits, Muslims themselves, and non-Muslims both on the national and international fronts. Muslims must therefore show more commitment and dedication to the cause of Islamic law if they want to see full-fledged Islamic law entrenched firmly in the country.*

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