

# JURISDICTION AND THE CONTRACTUAL FREEDOM OF PARTIES – Does Expropriatory Contracts really expropriate? \*

## Introduction

*“It is a fundamental principle of law, which is constantly being proclaimed by international courts, that contractual undertakings must be respected. The rule pacta sunt servanda is the basis of every contractual relationship”<sup>1</sup>.*

As a general principle of law, parties are said to be free to contract as they wish and deem fit.<sup>2</sup> The popular exceptions to this rule are that parties cannot contract to commit a crime or to perpetuate an illegal act, such as fraud, duress and misrepresentation.<sup>3</sup> Apart from the above, the contractual freedom of parties to contract freely is unimpeded. As put by Brian A. Blum<sup>4</sup>,

*“The power to enter contracts and to formulate the terms of the contractual relationship is regarded in our legal system as an exercise of individual autonomy – an integral part of personal liberty.”*

It, therefore, follows that once parties have entered into an agreement, which said agreement has been reduced into writing, the said contract forms a “matrimonial” union between the parties with regard to the terms stated therein. Such contract is regarded as sacrosanct and the only jurisdiction which courts can exercise over same is their interpretative jurisdiction (as courts cannot make contracts for parties)<sup>5</sup>. This seemingly immutable stance have been taken by Nigerian courts in a litany of cases. Our courts have

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<sup>1</sup> Arbitral award in Sapphire vs. National Iranian Oil Company, 1963, I.L.R 1967, 136 at 181 (delivered on March 15, 1967).

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

<sup>3</sup> Chief A.N. Onyuike III vs. G.F. Okeke (Unreported) Supreme Court of Nigeria, Suit No: SC/430/74 delivered on May 5, 1976; A.C.B Ltd vs. Alao (1994) 7 NWLR (Pt. 358) 614; JFS Investment Ltd vs. Brawal Line Ltd & 2 Ors (2010) 12 S.C (Pt. 1) 110.

<sup>4</sup> Brian A. Blum “Contracts: Examples and Explanations” (2007) 4<sup>th</sup> Ed., Aspen Publishers, USA p.8.

<sup>5</sup> Alade vs. ALIC (Nig) Ltd & Anor. (2010) 12 S.C (Pt. II) 59 at 95; Ekiadolor vs Osayande (2010) 6 NWLR (Pt. 1191) 423, CA.

even gone further to hold that, the words employed in such contracts must be given their literal and ordinary meanings.<sup>6</sup> The attendant, and often overlooked, consequence of the position taken by the courts is its expropriatory implications on the jurisdiction of the court.

Taken at face value, the proposition presented by the doctrine of *pacta sunt servanda*<sup>7</sup>, in contractual relations, will apply to donate express terms of contract with the effect of finality. However, the insidious problem presented by the question as to whether parties can, by contract, oust the jurisdiction of the courts exposes the imminent dangers associated with treating contractual terms with majestic immutability. This paper seeks to draw inspiration from the nascent trend observed in the Nigerian commercial circles wherein parties now, by contract, agree between themselves to vest jurisdiction with regard to contractual disputes in foreign courts e.g the High Court of England. The tacit implication of this trend is that parties are now, by their contracts, ousting the jurisdiction of Nigerian courts and unilaterally conferring same on foreign courts.

This paper, in essence, will attempt to examine the extent to which parties can contract to oust the jurisdiction of Nigerian courts and vest same, over disputes arising from contracts entered into or to be performed in Nigeria, on foreign courts. The paper shall, within the context of our jurisprudence, demonstrate that parties lack the legal capacity to deprive Nigerian courts of their constitutional powers in relation to disputes arising between them and captured by our legal process. The author shall also draw attention to the different classes of contracts and the legal regimes governing them *vis-à-vis* the theme of this paper. The paper shall conclude by drawing a distinction between cases wherein such expropriatory clause(s) may be permissible and those where it will not. The author shall

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<sup>6</sup> *Cotecna International Ltd vs. Churchgate (Nig) Ltd & Anor.* (2010) 18 NWLR (Pt. 1225) 346 at 383, SC.

<sup>7</sup> This is a latin maxim which means "parties are bound by their agreements".

also invite courts to 're-think' their attitude towards expropriatory contracts and attempt to propose a more convenient approach to same.

### **Jurisdiction - What does it connote?**

The discussions in this paper must, as of necessity, proceed from a conceptual explanation of the term jurisdiction and its attendant generic ramifications. I shall, in the course of this paper, clear certain misconceptions associated with jurisdiction and related terms, such as competence. I must, however, confess my inability to discuss all the conceivable aspects of the subject due to my limited knowledge of the subject in its amphibious terms.

In general terms, jurisdiction is simply the power of courts to entertain and adjudicate over cases presented to them for determination. It also means " the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision"<sup>8</sup> According to Black's Law Dictionary<sup>9</sup>, jurisdiction is the "court's power to decide a case or issue a decree". The consensus among these definitions is that jurisdiction is the legal power and/or authority which a court has to entertain a case filed before it, adjudicate over same and deliver its judgment thereon. It is this power exercised by the courts that is referred to as jurisdiction.<sup>10</sup> In the case of *State vs. Onagoruwa*<sup>11</sup>, the Supreme Court, per Nna-emeka Agu and Akpata, JJSC, respectively, held as follows:

"Jurisdiction is the determinant of the *vires* of a court to come into a matter before it. Conversely, where a court has no jurisdiction over a matter, it cannot validly exercise any judicial power thereon."

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<sup>8</sup> Halsbury's Laws of England, 4<sup>th</sup> Ed. (Re-issue of 2002) Vol. 10, Simon Hetherington, LLB, London, p. 132 para. 134. See also *Bright vs. Tyndall* (1876) 4 Ch.D 189; *Glasgow Navigation Co. vs. Iron Ore Co.* (1910) AC 293.

<sup>9</sup> 8<sup>th</sup> Ed. (2004) Thomson West, USA, p. 867.

<sup>10</sup> See the decisions of the Supreme Court in *Mobil Producing Nig. Unltd vs. LASEPA & 3 Ors.* (2002) 18 NWLR (Pt. 798) 1 at 32.

<sup>11</sup> (1992) 2 NWLR (Pt. 221) 33 at 57 – 59.

“It is now common-place, indeed a well beaten legal track, that jurisdiction is the legal right by which courts exercise their authority. It is the power and authority to hear and determine judicial proceedings. A court with jurisdiction builds on a solid foundation because jurisdiction is the bedrock on which court proceedings are based.”

Jurisdiction may be used in negative or positive senses or terms. In its negative connotation, jurisdiction is the limits to the powers of a court, imposed by law, regulating the extent of the exercise of the powers vested in it.<sup>12</sup> It is in this restrictive sense that jurisdiction of courts are classified along the definitive lines of party, subject matter, territorial, original and appellate jurisdictions. These qualifications restrict the powers of the courts to certain specific and identifiable heads of claims. The point being made here was beautifully captured by the court in the case of Attorney General, Ogun State & Anor. vs. Coker<sup>13</sup>, where the court, in explaining the term ‘jurisdiction’, held that “it exists when court has cognisance of class of cases involved, proper parties are present and point to be decided is within powers of court...Areas of authority, the geographic area in which a court has power or types of case it has power to hear.”

In its positive sense, jurisdiction represents and embodies the exercise of power by the court to achieve the ends of justice. As put by Ukeje<sup>14</sup>, jurisdiction in this sense “embraces the settled practice of the court as to the way in which it will exercise its power to hear and determine issues which fall within its jurisdiction (in the strict sense) to grant, including its settled practice to refuse to exercise such powers or to grant such reliefs in particular circumstances.”

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<sup>12</sup> Hon. Justice .R. Ukeje “Nigerian Judicial Lexicon” (2006) Ecowatch Publications (Nig.) Ltd, Lagos p. 249.

<sup>13</sup> (2002) 17 NWLR (Pt. 796) 304. See also the judgment of Niki Tobi, JSC in N.E.P.A vs. Edegbenro (2002) 18 NWLR (Pt. 798) 79.

<sup>14</sup> Ibid p. 250.

The bifurcation of jurisdiction into negative and positive spectres, is, in the opinion of the author, academic especially as same does not add to or remove from the powers vested in the courts. It only serves the purpose of shedding light on the different perspectives from which jurisdiction can be appreciated or viewed. In all, the bottom line is that, jurisdiction is the legal impetus bequeathed, by law, upon courts to inquire into, adjudicate and decide cases placed before them. It is, perhaps, apt to end this exposition on the meaning of jurisdiction by setting out the implications of jurisdiction as held in *Ekekeugbo vs. Fiberesima*<sup>15</sup>:

“It is the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties. Jurisdiction defies powers of courts to inquire into facts, apply the law, make decisions and declare judgment. The legal right by which judges exercise their cognizance of class of cases which involve proper parties are present and point to be decided is within power of court. Power and authority of a court to hear and determine a judicial proceedings and power to render particular judgment in question. The right and power of a court to adjudicate concerning the subject matter in a given case. The term may have different meanings in different contexts. Area of authority, the geographic area in which a court has power or types of cases it has power to hear.”

After a trajectory analysis of the meaning and scope of jurisdiction undertaken above, the stage is now set for an archaeological enquiry into the origins of jurisdictions of court. If the enquiry undertaken herein proceeds from an enquiry into the origins of courts, then the conclusion to be reached is settled. Applying the syllogistic methodology of deductive reasoning, the argument on the source or origin of the jurisdiction exercised by the courts will progress thus: courts are creations of statute; by their mode of creation, courts exercise

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<sup>15</sup> (1994) 3 NWLR (Pt. 335) 707 at 733.

statutory powers; therefore, the extent of the powers of courts are as set out in the statutes creating them. The above reasoning is supported by the maxim "*nemo dat quod non habet*"<sup>16</sup>. The first port of call, in this regard, is the Constitution<sup>17</sup>. Section 6(1)(2)(3)(4)(a) and (6)(b) of the Constitution provides as follows<sup>18</sup>:

- "6(1) The judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation.
- (2) The judicial powers of a State shall be vested in the courts to which this section relates, being courts established, subject as provided by this Constitution, for a State.
- (3) The courts to which this section relates, established by this Constitution for the Federation and for the States, specified in subsection (5)(a) to (i) of this section shall be the only superior courts of record in Nigeria; and save as otherwise presented by the National Assembly or by the House of Assembly of a State, each shall have all the powers of a superior court of record.
- (4) Nothing in the foregoing provisions of this section shall be construed as precluding-
  - "(a) the National Assembly or any House of Assembly from establishing courts, other than those to which this section relates, with subordinate jurisdiction to that of the High Court.
- (6) The judicial powers vested in accordance with the foregoing provisions of this section-

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<sup>16</sup> Meaning "you cannot give what you do not have".

<sup>17</sup> Constitution of the Federal Republic of Nigeria, 1999 (as altered).

<sup>18</sup> See also the case of *Ugwa & Anor vs. Lekwauwa & Anor* (2010) 12 SC (Pt. IV) 23 at 50, where the Supreme Court held that: "By the provisions of Section 6(1) of the constitution, Courts in Nigeria derive their jurisdiction from the constitution."

- (b) shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.”

It can be deduced from the above that, existing courts in Nigeria owe their existence to either the Constitution, Acts of the National Assembly or State Houses of Assembly. These laws provide for the extent, scope and items over which the courts are to exercise their jurisdiction.<sup>19</sup> As put by Ukeje<sup>20</sup>, “the limits of jurisdiction of a court are only imposed by the statute, charter or commission under which the court is constituted and may be extended or restricted by similar means.” In the case of *Shelim & Anor. vs. Gobang*<sup>21</sup>, the Supreme Court, per Fabiyi, JSC, held that:

“I wish to make a point here. It is that Jurisdiction of court is derived from its Enabling Statute. It is the statute which creates the court that defines its Jurisdiction.”

It remains to be contended that the categories of instances where the Courts may derive their jurisdiction from statutes are not closed. The enveloping point here is that jurisdiction is basically a substantive subject and hardly procedural in context.

### **Jurisdiction and Competence**

These terms are coterminous but, by no means, synonymous. They aim at achieving the same end but by different means. Jurisdiction is wider in scope than competence. In fact, competence is an aspect of jurisdiction and can comfortably be enveloped under it. The distinguishing factor between these two terms is that, whilst lack of jurisdiction challenges

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<sup>19</sup> See also section 251 of the constitution amongst others, the Federal High Court Act, Cap F. 12 LFN, 2004, etc.

<sup>20</sup> Ibid p. 250

<sup>21</sup> (2009) 5 – 6 SC (Pt. II) 174 at 187.

the substantive power of the court to entertain an action, competence, on the other hand, engages the procedural capacity in which the court proceeds to exercise its powers. For instance, a frontal challenge on the jurisdiction of a court may complain that an enabling statute does not confer jurisdiction on a court to entertain the subject matter of a suit, but a challenge on the competence of a court may concede that the court has jurisdiction over the subject matter of the suit but complain that such jurisdiction is not being properly exercised on the grounds of composition of the court, non-fulfilment of conditions precedent, etc.<sup>22</sup>

It is worthy of note that, the consequence of lack of jurisdiction and lack of competence may, at times, vary. Whilst in all cases, lack of jurisdiction determines a suit *in limine*, this is not always true with lack of competence. The principle of waiver steps in to mitigate against any harsh consequence of lack of competence. Ogwuche<sup>23</sup> properly puts it thus:

“A distinction must be drawn between two types of jurisdiction namely: jurisdiction as a matter of procedural law and jurisdiction as a matter of substantive law. Whilst a litigant can waive the former, no litigant can confer jurisdiction on the court where the constitution or statute or any provision of the common law says that a court does not have jurisdiction.”

In the case of *Feed & Food Farms (Nig) Ltd. vs. Nigerian National Petroleum Corporation*<sup>24</sup>, the respondent, on appeal, raised the issue of competence of the suit instituted by the appellant against it on the ground that the pre-action notice required under Section 11(2) of the Nigerian National Petroleum Corporation Act, 1977 was not served on it. This point was not raised at the trial court but was raised for the first time at

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<sup>22</sup> See *Madukolu & Ors. vs. Nkemdilim* (1962) 2 ANLR 581 and a host of other related decisions.

<sup>23</sup> Abubakar Sadiq Ogwuche (ed) “Compendium of Laws under the Nigerian Legal System” 2<sup>nd</sup> Ed (2008) Maiyati Chambers, Abuja, pp. 60 – 61.

<sup>24</sup> (2009) 12 NWLR (Pt. 1155) 387. See also the case of *Ariori vs. Elemo* (1983) 1 SC 13.



the Court of Appeal. The Court of Appeal allowed the appeal on this ground. However, upon further appeal to the Supreme Court, the decision of the Court of Appeal was reversed. The Supreme Court held as follows:

“I agree with the decision of the court in *Mobil Producing Nigeria Unlimited vs. Lagos State Environmental Protection Agency* that the right to be served with a pre-action notice does not fall within the category of rights which cannot be waived. I do not think it is correct to say that a party cannot waive his right in all matters affecting jurisdiction of the court...In my view, for purposes of waiver, matters affecting the jurisdiction of the court should be categorised into two areas or compartments. These are jurisdictional matters affecting the public in the litigation process and those affecting the personal, private or domestic right of the party. While the former cannot in law be waived, the latter can be waived in law.”

Having shown the nuances between substantive and procedural colourations of jurisdiction, the next hurdle to be scaled is to answer the question whether, contractual clauses with expropriatory consequences on the jurisdiction of courts are void *ab initio* or merely voidable. The answer to the above query shall climax to the resolution of the issue of whether, Nigerian courts can assume jurisdiction, both substantive and procedural, over such expropriatory contracts or whether such clauses render the contracts illegal and unenforceable. A re-think of the present position of the law in this regard will be undertaken and an alternative route to dealing with expropriatory contracts will be suggested.

## Effect of Expropriatory Contracts on the Jurisdiction of Courts

*"It is agreed that, in the event of any dispute with regard to the rights, liabilities and obligations of the parties herein, in relation to the performance of this contract, same shall be submitted to the High Court of England for adjudication."*<sup>25</sup>

*"In this agreement 'Court' means the High Court of England"*<sup>26</sup>

The above examples of expropriatory clauses inserted into commercial contracts may appear inconsequential but the insidious implications they have on the jurisdiction of courts are far-reaching. These clauses are inserted by parties in their contracts on the understanding that parties are free to contract as they wish. However, on the other side of the divide, it may be argued that, if parties are curtailed in their ability to contract freely, then, the aim and understanding of contracts, as it is today, will ultimately be altered. It may as well be canvassed that the right to choose an arbiter over a contract enures intrinsically in the parties creating it.<sup>27</sup> This position stands to reason when the right to contract is conceived from the perspective of it being an extension of the natural right to personal liberty. In this wise, it can also be argued that, since the right to contract is not a creation of law, the law should not be allowed to limit it in any way whatsoever. The resolution of this conflict will be traced to the evolution of 'law' itself.

Law as it is known today evolved out of the realisation of men that "man, by nature, is brutish".<sup>28</sup> The formation of civilised society led to the resort to codified standards of

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<sup>25</sup> This is an example of a standard expropriatory clause by which the jurisdiction of courts are excluded from applying to contracts.

<sup>26</sup> This is an example of a standard interpretation clause in contracts which, in essence, divests jurisdiction from courts.

<sup>27</sup> See footnote 4 above. If this is not the case, then all agreements by which parties agree to refer disputes to arbitration will be void.

<sup>28</sup> This formed the basis of Hobbesian "state of nature" and establishment of civilised states.

behaviour which have been agreed to by citizens for the regulation of their behaviour. This is how 'law', as we know it, came about.<sup>29</sup>

"Law grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its nationality."<sup>30</sup>

This is how law and, indeed, the Constitution of the Federal Republic of Nigeria, 1999 evolved – by the agreement of the citizens to be bound by it.<sup>31</sup> The preamble and Sections 1(1)(2) of the Constitution reads thus:

"We the people of the Federal Republic of Nigeria: having firmly and solemnly resolved: To live in unity and harmony.....

And to provide for a constitution for the purpose of promoting the good government and welfare of all persons in our country...do hereby make, enact and give to ourselves the following constitution:

1(1) This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.

(2) The Federal Republic of Nigeria shall not be governed...except in accordance with the provisions of this Constitution."

The implication of the above provisions of the Constitution is that, Nigerian citizens enacted the Constitution and are bound by its provisions. The provisions of Section 1(2)

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<sup>29</sup> This is the basis of the sociological and anthropological schools of thought on law.

<sup>30</sup> Volkgeist as quoted by W.M Dias "Jurisprudence" 3<sup>rd</sup> Ed (1970) Butterworths, London p. 428. See also the reasoning of the Privy Council in Lewis vs. Bankole (1908) 1 NLR 81 at 100 – 101.

<sup>31</sup> In the case of Buhari & ors. vs. Obasanjo 7 ors (2003) 11 SC 74 at 84, the Supreme Court held that: "The Constitution, I must point out, is a general statement of how Nigerians wish to be governed and the real way of governing will be found in all the laws, body of laws, that comply with the Constitution."

clearly stipulate that the Federal Republic of Nigeria is to be governed, solely, as provided under the Constitution. The question that necessarily arises is, whether, citizens, who are bound by the Constitution can, by contract, exclude the applicability of the Constitution to their contractual relations entered into in Nigeria and/or to be performed in Nigeria? Perhaps, it is beneficial to point out that, since Nigerian citizens are bound by all the provisions of the Constitution, they cannot pick and choose which of its sections are to apply to their contracts thereby excluding other sections or *vice-versa*. The Constitution provides under Section 6(1)(2) and (6)(b), as follows:

- “6(1) The judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation.
- (2) The judicial powers of a state shall be vested in the courts to which this section relates, being courts established, subject as provided by this constitution, for a state.
- (6) The judicial powers vested in accordance with the foregoing provisions of this section-
- (b) shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.”

The provisions of the Constitution reproduced above are mandatory and permits of no exceptions.<sup>32</sup> In this regard, it has been held that courts, in interpreting constitutional provisions, should refrain from giving its provisions such interpretations that would

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<sup>32</sup> This is particularly so by the use of the word “shall” in the section. See *PDP vs Taiwo & Ors.* (2004) 8 NWLR (Pt. 876) 656 at 676; *Unegbu vs Unegbu* (2004) 11 NWLR (Pt. 884) 332 at 356.

defeat the ends sought to be achieved by the constitution.<sup>33</sup> A convergence of the above statutory, judicial and jurisprudential authorities will reveal a legal conspiracy to ensure that the powers of courts are not ousted with levity. The weight of the Nigerian state as a whole leans in support of guarding and protecting the majestic powers of the courts. It will, therefore, conflict with public policy to permit parties, with the appendage of their signatures to contracts, to wrest jurisdiction from the courts. The point being made here is that: "An agreement purporting to oust the jurisdiction of the courts entirely is illegal and void on grounds of public policy".<sup>34</sup> Ogwuche<sup>35</sup> makes the same point this way:

"As a general rule the courts will neither enforce a contract which is illegal or which is otherwise contrary to public policy, nor permit the recovery of benefits conferred under such a contract."

It is worthy to tarry for a while to consider what is meant by "public policy". Public policy are "principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society."<sup>36</sup> In a nutshell, public policy are prevalent and underlying perceptions in society that dictate how laws are formulated and form the conscience of society. Admittedly, the scope of what qualifies as public policy, as can be seen above, is wide and open ended. The manifestations and heads of public policy have been identified and classified as follows:

"Objects which on grounds of public policy invalidate contracts may, for convenience, be generally classified into five groups: firstly, objects which are illegal by common law or by legislation; secondly, objects injurious to good government either in the field of domestic or foreign affairs; thirdly, objects which interfere with the proper working of the machinery of justice fourthly, objects injurious to

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<sup>33</sup> See Braithwaite vs. G.D.M (1998) 7 NWLR (Pt. 557) 307 at 333.

<sup>34</sup> Halsbury's Laws of England, Ibid p. 136 para. 318; Baker vs Jones (1954) 2 All ER 553 at 559; Macaulay vs. RZB of Austria (1999) 4 NWLR (Pt. 600) 599.

<sup>35</sup> Ibid p. 341.

<sup>36</sup> Black's Law Dictionary, Ibid p. 1267.

family life; and, fifthly, objects economically against the public interest."<sup>37</sup>

Having attempted to identify the possible heads of public policy, I shall now return to my discussion of its legal effect on expropriatory contracts with regard to the jurisdiction of Nigerian courts. The Nigerian Courts seem to have provided a sign post of its disposition and resentment to parties or contracts seeking to oust its jurisdiction. That was the decision of the court in the case *Lignes Aeriennes Congolaises (L.A.C) vs. Air Atlantic Nigeria Limited (A.A.N)*<sup>38</sup>. In that case, the appellant, a Congolese company with an operational office in Lagos, Nigeria, and the respondent, a Nigerian company, entered into an aircraft leasing contract, in Nigeria, for the respondent to lease aircrafts to the appellant. The parties agreed in the contract that their relationship would be governed by Congolese laws. Upon the breach of the appellant to pay the leasing charges it owed the respondent, the respondent commenced legal proceedings against the appellant to recover same. The appellant filed a Notice of Preliminary Objection against the proceedings contending that since the parties had agreed that their relationship should be governed by Congolese laws, the trial court had no jurisdiction over the matter. The trial court dismissed the objection. The appellant, being aggrieved, appealed to the Court of Appeal. The question as to whether parties could contract, in Nigeria, to oust the jurisdiction of Nigerian courts arose for determination. In a unanimous decision, the Court of Appeal dismissed the appeal. The Court<sup>39</sup> held, relying on judicial authorities, held as follows:

"The court's jurisdiction is well spelt out by the provision of section 6(6)(a) of the constitution....The case of *Sonnar (Nig.) Ltd & Anor v. Partenreedri M.S Nordwind & Anor. (1987) 4 NWLR (Pt. 66) 520, (1987) All NLR 548*, is of significant relevance for guidance...With due regard, Oputa JSC in adopting the pronouncement by Lord Denning

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<sup>37</sup> Chitty on Contracts, 24<sup>th</sup> Ed (1977) Vol. 1, Sweet & Maxwell, London, p. 905, para. 904.

<sup>38</sup> (2006) 2 NWLR (Pt. 963) 49.

<sup>39</sup> Per Ogunbiyi, JCA (in his concurring judgment)

(*supra*) had the following to say in contributing to their decision in the *Sonnar (Nig.) Ltd & Anor. v. Patenveedri M.S. Norwind & Anor* (*supra*) at page 576.

“Our courts should not be too eager to divest themselves of jurisdiction conferred on them by the constitution and by other laws simply because parties in their private contracts chose a foreign forum and a foreign law. Courts guard rather jealously their jurisdiction and even where there is an ouster of that jurisdiction by statute it should be by clear and unequivocal words. If that is so, as indeed it is, how much less can parties by their private acts remove the jurisdiction properly and legally vested in our courts? Our courts should be in charge of their own proceedings. When it is said that parties make their own contracts and that the court will only give effect to their intentions as expressed in and by their contracts, that should generally be understood to mean and imply a contract which does not rob the courts of its jurisdiction in favour of another foreign forum.”<sup>40</sup>

In the earlier case of *Sonnar (Nig.) Ltd & Anor. v. Partenreedri M.S Nordwind & Anor*<sup>41</sup>, the parties entered into an admiralty contract, evidenced by a Bill of Lading, for the importation of rice from Germany to Nigeria. Clause 3 of the Bill reads thus: “*Any dispute arising under this Bill of Laden shall be decided in the country where the carrier has his principal place of business and the law of such country shall apply except as provided elsewhere herein.*” The appellant (a Nigerian company) sued the respondent (a German company having its office

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<sup>40</sup> In coming to this conclusion, the Supreme Court relied on the decision of Lord Denning, M.R in the case of *The Fehmarn* (1958) 1 All E.R 333 at 335, while resolving the question “can parties by their private act remove the jurisdiction vested by our constitution in our court?”. The eminent jurist held thus: “...English courts are in charge of their own proceedings and one of the rules which they apply is that a stipulation that all disputes should be judged by the tribunals of a particular country is not absolutely binding. Such a stipulation is a matter to which the courts of this country will pay much regard and to which they will normally give effect *but it is subject to the overriding principle that no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them. I would ask myself therefore: is this dispute a matter which properly belongs to the courts of this country.*”

<sup>41</sup> (1987) 4 NWLR (Pt. 66) 520, (1987) All NLR 548

in Germany) in Nigeria for breach of the contract as contained in the Bill of Lading. The respondent raised Clause 3 quoted above and urged the court to stay its proceedings. The Federal High Court and the Court of Appeal granted the stay of proceedings sought pending the resolution of the dispute in Germany. The appellant, being aggrieved, appealed to the Supreme Court. In resolving the issue as to whether the parties can validly contract to oust the jurisdiction of court, the Supreme Court first of all admitted that parties have the right to contract as they wish as embodied in the maxim "*pact suntan servoanda*". The Court also took judicial notice of the contract in question was a Bill of Lading and held that it was a "contract on international standard". The Court went on to hold that "when a clause of this kind is introduced into a contract it must be supposed that the parties consider that, in general, trial in the places mentioned in the clause is more convenient than trial elsewhere".<sup>42</sup> However, the twist introduced by the Court is that, the law is not absolute that parties cannot contract to oust the jurisdiction of Nigerian courts and vest same in a foreign court. The court held that, the agreement of the parties, in this regard, will be subject to the "discretion" of the court whether or not to accede to the expropriatory clause or not taking into account the surrounding circumstances of the case. The Supreme Court, thereafter, adopted the yardstick laid down by Brandon. J in the English case of *The Eleftheria*<sup>43</sup> as the principles to guide courts in exercising their discretion in similar cases. The Court held as follows:

"The tests set out by Brandon J, in "*The Eleftheria*" are as follows:

- (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.

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<sup>42</sup> See the lead judgment of Eso, JSC.

<sup>43</sup> (1969) 1 Lloyd's LR 237 at p. 242 (also known as "the Brandon Tests")



- (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.
- (3) The burden of proving such strong cause is on the plaintiffs.
- (4) In exercising its discretion, the Court should take into account all the circumstances of the particular case.
- (5) In particular, but without prejudice to (4), the following matters, where they arise, may be properly regarded:
  - (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts.
  - (b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects.
  - (c) With that country either party is connected, and how closely.
  - (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.
  - (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would
    - (i) be deprived of security for that claim;
    - (ii) be unable to enforce any judgment obtained;
    - (iii) be faced with a time-bar not applicable in England;or
    - (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."

To these I would add, with all respect-

"Where the granting of a stay would spell injustice to the plaintiff as

- Where the action is already time-barred in the foreign court and

the grant of stay would amount to permanently denying the plaintiffs any redress.”

This is the case here. And I think justice is better served by refusing a stay than by granting one!”

From the above, the considerations upon which Nigerian courts would exercise their discretion have been established. However, it is my humble view that these conditions are not of universal application. The courts must reach each decision on its own peculiar facts and circumstances. The reason for taking this stand is that, the conditions laid down above were arrived at in cases where one party is a foreigner and the other party, a Nigerian. Again, the case discussed above is one dealing with a “contract on international standard” – bill of lading. Putting these reasons together, it is believed that the conditions should not be applied generally to all cases where parties have contracted to oust the jurisdiction of Nigerian courts. In this wise, it is submitted, with respect, that, in cases between two Nigerian citizens and which contract is entered into and is to be performed in Nigeria, the parties cannot contract to oust the jurisdiction of Nigerian courts over same. The Court would appear not to have any difficulty or discretion in reaching the conclusion that such contract or clause is offensive of both the Constitution and public policy. To apply the principles set out in *The Eleftheria* (*supra*) and followed in *Sonnar (Nig.) Ltd & Anor. v. Partenreedri M.S Nordwind & Anor* (*supra*) will be unnecessary in that regard.

With respect to contracts entered into or to be performed in Nigeria, it is submitted that parties do not possess the right to oust the jurisdiction of the Nigerian court. This contention must be understood outside the scope permitted under the Arbitration and Conciliation Act <sup>44</sup> which empowers parties to appoint arbitrators or tribunals to hear and determine their disputes notwithstanding that such tribunal or arbitrator is foreign or local.

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<sup>44</sup> Cap. A. 18, LFN 2004, Sections 1, 2, 4 and 5.

The paramount consideration is that parties to the contract must bear in mind that the purpose and performance of the contract are the critical factors that gauge their legality or otherwise. In the case of *W.C.C Ltd vs. Batalha*<sup>45</sup>, the Supreme Court held thus:

“Let me consider various situations that could make some contracts incapable of enforcement;

- (a) Both knew that the **performance** of the contract necessarily involves the commission of an act which was to their knowledge criminal *see Apthrop v. Neville (1907) 23 T.L.R. 575; Stoneleigh Finance Ltd. v. Phillips (1965) 2 Q.B. 537, 572, 580*. It does not apply here.
- (b) Both parties knew that the contract is intended to be **performed** in a manner which, to their knowledge is legally objectionable in that sense. This is certainly not the case here.
- (c) The **purpose**” of the contract entered by the parties should be seen to be legally objectionable and that notwithstanding such knowledge of that they still went with the contract. Once again this postulation does not apply in this case. *See Alexander v. Rayson (1936) 1 K.B. 169, 182; Elder v. Auerbach (1950) 1 K.B 359*.
- (d) Both parties participate in **performing** the contract in a manner which they know to be legally unacceptable. *See Ashmore, Benson, Pease & Co. Ltd v. A.V.Dawson Ltd (1973) 1 WLR 828*. This situation does not equally apply here.

After carefully evaluating and systematically appraising and synthesizing the above conditions it is difficult for me to pigeonhole any of the above to apply even inferentially to this contract.”

(Emphasis mine)

From the above, effective words are “**performance**” and “**purpose**”. The implication of the above is that, Nigerian courts can exercise both substantive and procedural

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<sup>45</sup> (2006) 9 NWLR (Pt. 986) 595 at 621 – 622.

jurisdictions over expropriatory contracts. This is made possible by the application of the blue pencil rule<sup>46</sup> to the contract. In this wise, the expropriatory clause is excised from the contract. However, if it would be impossible to sever such offensive clause from the contract without causing damage to the contract, then the whole contract becomes illegal and unenforceable. In the case of *Adesanya vs. Otuewu*<sup>47</sup>, the Supreme Court, per Nnaemeka-Agu, JSC, made this fine point thus:

“Be that as it may, I wish to express my opinion on the point, albeit briefly...This is because it is a recognised principle of law that a contract will rarely be totally illegal or void: certain parts may be entirely lawful in themselves, while others are (*sic*) valid. Where the illegal or void parts can be “severed” from the rest of the contract on the well-known principles of severance such will be done and the rest of the contract enforced without the void part. It is permissible for courts to adopt this course where the objectionable part of the contract involves merely a void step or promise and is not fundamental, and it is possible to simply strike down the offending part without re-writing or remaking the contract for the parties and without altering the scope and intention of the agreement; and lastly, the contract, shorn of the offending parts, retains the characteristics of a valid contract.”

The proposition put forward above contrasts with the general understanding that contracts against public policy are unenforceable. However, reading the decisions of courts, as shall be set out hereunder, will reveal that this generalisation is untrue. The point being made will be better appreciated if it is understood that there is a difference between illegal contracts, void contracts and voidable contracts. The distinctions between these contracts are slim. A contract is illegal if the performance or purpose of same has

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<sup>46</sup> Also known as the “severance principle”.

<sup>47</sup> (1993) 1 NWLR (Pt. 270) 414 at 456 – 457.

been outlawed by statutory provisions which also provide a sanction for its contravention.<sup>48</sup> A void contract is one which its performance or purpose contravenes a statutory provision but for which no sanction for such contravention is provided for by statute.<sup>49</sup> Voidable contracts, on the other hand, are those contracts with lawful purpose and their performance will not occasion illegality but contain certain defects which, if they are not severable from the whole contract, may render it unenforceable.<sup>50</sup> In the case of *PanBisbilder (Nig). Ltd vs. FBN Ltd (2000) (supra)*, the Supreme Court, per Achike, JSC, held as follows:

“Without getting unduly enmeshed in the controversy regarding the definition or classification of that term, it will be enough to say that contracts which are prohibited by statute or at common law, coupled with provisions of sanctions (such as fine or imprisonment) in the event of its contravention are said to be illegal. There is however the need to make a distinction between contracts that are merely declared void and those declared illegal. For instance, if the provisions of the law require certain formalities to be performed as conditions precedent for the validity of the transaction, without however imposing any penalty for non-compliance, the result of failure to comply with the formalities merely renders the transaction void, but if penalty is imposed, the transaction is not only void but illegal, unless the circumstances are such that the provisions of the statute stipulate otherwise...Generally, the consequence of illegality in relation to the parties contract is that the court will not come to the assistance of any party to an illegal contract who wishes to enforce it. This position of the law is founded on the principle of

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<sup>48</sup> *PanBisbilder (Nig). Ltd vs. FBN Ltd (2000) 1 NWLR (Pt. 642) 684 at 693 - 695; Alao vs. A.C.B Ltd (1998) 1 – 2 SC 177 at 190 – 191.*

<sup>49</sup> *Op cit.*

<sup>50</sup> *Illegal and Void contracts have been classified as that contracts which are “ex facie” illegal, See Fasel Services Ltd & anor. vs. N.P.A & anor (2009) 4 – 5 SC (Pt. II) 101.*

public policy and is expressed in the maxim *ex turpi causa non oritur action*, meaning that an action does not arise from a base cause.”

The above, therefore, make the unenforceability rule applicable to only illegal and void contracts and exculpates voidable contracts – under which expropriatory contracts fall – from such legal consequence.

It remains to be submitted that, even if expropriatory contracts are viewed from the angle of their contravention of Section 6(6)(b) of the Constitution, the Constitution does not provide a sanction for such breach. Again, even if it can be said that the Constitution provides a sanction<sup>51</sup>, by the application of Section 1(3) of the said Constitution, the contract will be declared void only to the extent of its inconsistency with the Constitution.<sup>52</sup> This implies that the offending clause(s) will be expunged from the contract for being inconsistent with the provisions of Sections 1(1)(2) and 6(6)(b) of the Constitution. Ultimately, the crux of my argument above is that, the remedy made possible by the principle of severance applies in every case where the contract is not *ex facie* illegal or void.

It is, therefore, within the judicial powers of the courts to, when confronted by expropriatory contracts between parties bound by Nigerian law, assume jurisdiction over same, expunge the offending clause(s) and determine the rights of the parties in relation to the valid part of the contract. The consensus of parties to contract to oust the jurisdiction of Nigerian courts and vest same in foreign courts will prevent Nigerian courts from exercising their constitutional power of adjudication over the dispute. This position will remain unchanged even if the foreign court has assumed jurisdiction over the contract and have far reaching made pronouncements or orders against the parties.

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<sup>51</sup> Under Section 1(1)(2) of the Constitution (as altered).

<sup>52</sup> See the application of the inconsistency rule in the cases of *A.G Ondo State vs. A.G Federation & Ors.* (2002) 6 SC (Pt. I) 1 and *A.G Lagos State vs. A.G Federation & Ors.* (2003) 6 SC (Pt. I) 24.

## Conclusion

From the above discussion, it is, therefore, clear that courts, in appropriate cases, are empowered to decline jurisdiction and stay proceedings in the face of expropriatory clauses in contracts. However, caution should be taken to ensure that the discretion allowed the courts, as stated in *The Eleftheria (supra)* and followed by the Supreme Court in *Sonnar (Nig.) Ltd & Anor. v. Partenreedri M.S Nordwind & Anor (supra)*, is only exercised in appropriate case and correctly.

Again, it is my sincere belief that this paper has laid to rest all lingering doubts as to whether indigenous parties can contract to oust the jurisdiction of Nigerian courts in respect of disputes arising from their commercial transactions. In this wise, it is my considered view that reasons such as the uncertain nature of the Nigerian legal process, alleged high level of irregularities inherent in the Nigerian judiciary and the snail pace at which matters are dispensed with in Nigerian courts, cannot stand as plausible justifications for contracting to oust the jurisdiction of Nigerian courts and vest jurisdiction in foreign courts.