

CHOICE OF LAW AND FORUM AGREEMENT SURVIVES A CONSTITUTIONAL CHALLENGE IN THE KENYA COURT OF APPEAL

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Introduction

The enforcement of choice of law and forum agreements is of paramount importance to any person transacting business across national boundaries, and wishes to be certain about what law will govern the transaction or where related disputes will be settled. The cost of litigation and its potential outcome often turn upon these agreements. Therefore, anything that threatens their enforcement is a concern to business, and possibly affects the investment fortunes of countries. In a recent decision of the Kenya Court of Appeal, an interesting issue of the relationship between existing private international law doctrines on the enforcement of choice of law and forum agreements and constitutional law was decided.¹ Private international law problems bordering on the relationship between private international law and constitutional law are increasingly being articulated in other jurisdictions. The case provides us with a foretaste of what is to come in Africa in this area of law. The court's ruling should also come as a welcomed development to all who seek to enforce choice of law and forum agreements in Kenya and, potentially, all other common law African countries with similar constitutional provisions.

Raytheon Aircraft Credit Corporation v Air Al-Faraj Limited

The first appellant, Raytheon Aircraft Credit Corporation, was a company incorporated under the laws of the State of Kansas, USA. The respondent, Air Al-Faraj Limited, was a company incorporated under the laws of Kenya. The appellant leased to the respondent an aircraft. Clause 15:1 of the Lease Purchase Agreement contained an exclusive State of Kansas choice of law and forum clause. The respondent took possession of the aircraft in January 1998. The respondent alleged that in June 1998, the second appellant, NAC Airways Limited, acting on behalf of the first appellant, and without legal authority, took the aircraft out of Kenya into South Africa. In this action the respondent sought a mandatory injunction to compel the return of the aircraft, a permanent injunction to restrain interference with its subsequent use, and a declaration that the appellants were not entitled in law to re-possess the aircraft.

At trial, the appellant's counsel, relying on Clause 15:1 challenged the jurisdiction of the court to entertain the action. It was argued that the clause was binding between the parties and by bringing the action the respondent had breached the contract and abused the process of the court. In reply, counsel for the respondent argued that the jurisdiction conferred on the superior court by section 60 of the Constitution of Kenya cannot be limited by a contract between two parties, or even by an Act of Parliament.² Section 60(1) of the Kenya

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¹ Raytheon Aircraft Credit Corporation v Air Al-Faraj Limited (Civil Appeal 29 of 1999) Judgment delivered on 8 July 2005.

² Counsel also argued that the contract was one-sided and that the choice of law and forum clause was forced on the respondent.

Constitution provides: “there shall be a High Court ...which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.” Contrary to the argument of counsel that this provision was “peculiar” to Kenya, similar constitutional provisions are found in other African countries. This makes the decision significant to these countries as a persuasive authority.³

The trial court upheld the respondent’s argument and dismissed the preliminary objection to jurisdiction. The court held that taking into consideration the facts of the case, the attendant circumstances, and above all the provisions of section 60(1) of the Kenya Constitution, the court had jurisdiction to hear and determine the suit. Significantly, this reluctance by the trial judge not to have the constitutionally conferred jurisdiction interfered with by private agreements reflects a similar view echoed by Oputa JSC of the Nigeria Supreme Court in 1987. In *Sonnar (Nigeria) Ltd v. Partenreedri M S Nordwind*,⁴ Oputa JSC queried whether “parties by their *private act* [can] remove the jurisdiction vested by our Constitution in our courts.”⁵ He held that “as a matter of public policy our court 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 choose a foreign forum and a foreign law.”⁶

On appeal in the *Raytheon Aircraft* case, the Court of Appeal allowed the appeal. It rejected the trial court ruling on the effect of section 60(1) of the Kenya Constitution, and held that the section does not authorize the High Court to disregard private international law on the status of choice of law and exclusive jurisdiction agreements in international contracts and assume jurisdiction over persons outside Kenya. The court further held that since the appellant was outside the jurisdiction of the court, the high court had wrongly assumed jurisdiction, as leave for service outside the jurisdiction had not been obtained.⁷

Significance of the Decision

The conclusion of the court that choice of law and forum agreements do not infringe the constitutionally conferred jurisdiction of the High Court is correct and welcomed. It follows in the wake of, and is consistent with, other cases in which the Kenya courts⁸ and courts in common law Africa have shown a willingness to uphold party autonomy and enforce choice of law and forum agreements. As far back as 1967, courts in Ghana upheld an Italian choice

3 See e.g. article 140 of the Constitution of the Republic of Ghana (1992) which provides that the High Court shall, subject to the provisions of this Constitution, have jurisdiction in all matters and in particular, in all civil and criminal matters....” Article 80(2) of the Constitution of Namibia (1990) “the High Court shall have original jurisdiction to hear and adjudicate upon all civil disputes and criminal prosecutions....” Article 108 (1) of the Constitution of Malawi (1994) “there shall be a High Court for the Republic which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law.”

⁴ *Sonnar (Nigeria) Ltd v Partenreedri M S Nordwind* [1988] LRC (Comm) 191.

⁵ *Ibid* at 210. He described this as a “vital and radical question.”

⁶ *Ibid* at 210.

⁷ See Order V of the Civil Procedure Rules Chapter 21.

⁸ See e.g. *Friendship Container Manufacturers Ltd v Mitchell Cotts (K) Ltd* [2001] 2 EA 338 where the court enforced a South Africa choice of law and forum clause.

of forum agreement.⁹ Subsequent case law, however, suggests that they will not accord such respect slavishly.¹⁰ In Nigeria, it has also been held, following the English case of *the Eleftheria*,¹¹ that where parties have agreed to submit their disputes under a contract to the exclusive jurisdiction of a foreign court, strong reasons would be required for the Nigerian court to allow a party to go back on its word.¹²

Although the *Raytheon Aircraft* decision is welcomed, it is unfortunate the court did not attempt to provide reasons for the conclusion it reached. The persuasive authority of the decision in other common law jurisdictions in Africa, and potentially beyond, would have been enhanced by the provision of rational grounds for the conclusion. The casual approach of the court to such a novel issue of fundamental importance leaves much to be desired.

Choice of law and forum agreements do not purport to oust the jurisdiction conferred on the court by statute. Indeed, such jurisdiction can only be ousted by statute and not private agreements. What choice of law and forum agreements seek to do is to influence the *exercise* of the court's jurisdiction by inviting the court to enforce, as it routinely does with other contractual agreements, the intention of the parties. The court must have jurisdiction over the parties at common law through service of process on the defendants or the defendant's submission to the jurisdiction of the court before the question of enforcing a choice of law or forum agreement arises. It is only when jurisdiction *exists* that the issue of *its exercise* arises, in which case the presence of a foreign choice of law and forum agreement becomes relevant.¹³ Thus, as the court rightly concluded in the *Raytheon Aircraft case*, these agreements do not challenge the jurisdiction conferred on the High court by the Constitution; the existence of that jurisdiction is never in issue. The position as correctly stated by Cheshire and North is that:

9 C.I.L.E.V. v Chiavelli [1967] GLR 651 affirmed in [1968] GLR 160. The court held that just as parties to contracts regularly and freely opted to submit their disputes to arbitration and effect was given to their options, so should effect be given to such an expressed intention of the parties if they opted that their disputes should be submitted only to the judicial authority of a particular place and the case for this was even stronger if, as in the present case, the judicial authority in question was one so closely connected with the place and the language in which the contract was made.

¹⁰ See e.g. Fan Milk Ltd v State Shipping Corporation [1971] 1 GLR 238 the court declined to stay and action between the two Ghanaian parties on a contract, which had an English choice of law and forum clause. The court reasoned that since the parties were both Ghanaian, the goods were delivered in Ghana, and Ghanaian and English law on the matter did not differ in any material particular, it was not a proper case to stay proceedings. *Edusei v Diners Club Suisse S.A.* [1982-83] GLR 809 where the court found nothing on the record to show that the parties intended Zurich as the exclusive forum for the settlement of disputes between the parties and accordingly exercised jurisdiction.

¹¹ [1969] All ER 641.

¹² *Commet Shipping Agencies (Nigeria) Ltd v Panalpina World Transport (Nigeria) Ltd* [1990] LRC (Comm) 206 where the Court of Appeal (Lagos) upheld a Brazil choice of forum clause. For a potential statutory restriction on the choice of law clauses in intellectual property agreements in Nigeria see generally Nnona, G, 'Choice of Law in International Contracts for the Transfer of Technology: A Critique of the Nigerian Approach' (2000) 44 JAL 78.

¹³ In instances where the defendant is outside the territorial jurisdiction of the court, the existence of a foreign choice of law or forum clause may be a relevant consideration in deciding whether to allow leave for service out of the jurisdiction.

“In accordance with the principle that contractual undertaking should be honoured, there is a prima facie rule that an action brought in England in defiance of an agreement to submit to a foreign jurisdiction will be stayed. However, the court does have a discretion in the matter, and where the parties are amenable to the jurisdiction... it will allow the English action to continue if it considers that the ends of justice will be better served by a trial in this country.”¹⁴

The above clarification of the proper characterisation of the effect of choice of law and forum clauses is important for subsequent development of the case law in this area. In an earlier case the High Court had taken the position that choice of law and forum agreements “oust” the jurisdiction of the court. In *Fonville v. Kelly III*¹⁵ it was held that a Stock Purchase Agreement, which had a State of Florida, USA choice of law and forum clause “ousts that jurisdiction of the Kenya court regarding any dispute arising from the Agreement.”¹⁶ This is a wrong characterisation of the effect of enforcing a foreign choice of law and forum agreement. Indeed, that this is a mischaracterisation is reflected in the remedy granted after a successful invocation of these agreements. The court merely stays its proceedings and does not strike out the action. The exercise of jurisdiction is suspended but its existence, and the possibility of its subsequent exercise, is never avoided.

A mischaracterisation of the effect of these clauses may also unwittingly lead some courts to apply the restrictive jurisprudence on statutory ouster clauses in their determination of whether to enforce choice of law and forum agreements. It may lead to unnecessary judicial hostility towards choice of law and forum agreements. The respect the common law accords party autonomy will be adversely affected by such a move.

Another effect of characterising choice of law and forum agreements as ousting the jurisdiction of courts is that it may lead courts to dismiss suits seeking provisional and protective reliefs in support of any suit pending or that may be instituted in the foreign forum as a result of the choice of forum agreement. Once a court assumes its jurisdiction has been “ousted,” it may resolve not to have anything more to do with the dispute or act in aid of the foreign proceedings. The provisional and protective reliefs include interim injunctions, Mareva injunctions,¹⁷ Anton Piller orders,¹⁸ the Anti-suit injunctions,¹⁹ and negative declarations. These reliefs preserve the status quo, ensure that a party does not dissipate his

¹⁴ North, PM, & Fawcett, JJ, *Cheshire and North’s Private International Law*, 1999, London: Butterworths at 350.

¹⁵ [2002] 1 EA 71.

¹⁶ *Ibid* at 80. See also *Sonnar (Nigeria) Ltd v Partenreedri M S Nordwind* [1988] LRC (Comm) 191 at 211 where Oputa JSC characterises these clause as attempts to “remove” the jurisdiction properly and legally vested in our courts or “rob” the courts of its jurisdiction.

¹⁷ *Mareva Compania Naviera v International Bulkcarriers* [1975] 2 Lloyd’s Rep. 509. A Mareva injunction freezes the assets of the defendant or prevents him from dealing with them in such a manner as will defeat the plaintiff’s claim. It may be granted over assets both in and out of the jurisdiction of the court.

¹⁸ *Anton Piller v Manufacturing Processes Ltd* [1976] 1 All ER 779. An Anton Piller order allows the plaintiff to enter the defendant’s premises to search and take documents or other evidence relevant to the plaintiff’s claim against the defendant.

¹⁹ *Turner v Grovit* [2001] UKHL 65; *Donohue v Armco Inc* [2002] 1 All ER 749. An anti-suit injunction restrains the defendant from litigating in a foreign court.

assets to defeat a prospective judgment, and generally prevents a party from taking actions to obstruct the course of justice. They may also be tactically deployed to achieve an out-of court settlement. The interest of justice to foreign and local litigants will not be served if this judicial understanding of the effect of choice of law and forum clauses prevents the grant, in appropriate cases, of these reliefs.

The *Raytheon Aircraft* case does not settle the wider question of the relationships between private international law and existing constitutional norms, especially in the area of human rights law. It however opens the door to what will be a potentially fascinating area of study and litigation as constitutional and human rights norms gain a foothold in Africa. Other jurisdictions are having their fair share of arguments invoking human rights norms and the structure of constitutional arrangements in adjudicating private international law issues. In the United Kingdom, parties have challenged the enforcement of choice of forum agreements²⁰ and the upholding of sovereign immunity²¹ as infringing statutory guarantees of rights of access to justice. Some have invited the court to make human rights considerations such as the right to legal aid an essential component in the decision to decline jurisdiction under the doctrine of *forum non-conveniens*.²² In yet another case, an unsuccessful challenge was made, all the way to the House of Lords, against the enforcement of a USA judgment for failing to meet the standards of procedural fairness guaranteed by article 6 of the European Convention on Human Rights to which the UK is party.²³

In Canada, the Supreme Court has relied on the intention of the framers of the Constitution to create “a single country,” and the need to facilitate economic activities within Canada as a “common market” to work fundamental changes in various aspects of Canadian private international law.²⁴ One Canadian writer has also admonished, “... when applying a given jurisdictional test, courts need to take seriously the question of ‘what justice requires’ in the modern context of commercial globalization. This notion of ‘justice’ must be viewed expansively to include ... international human rights considerations...”²⁵ The jurisprudence of the Supreme Court of Canada, especially those founded on the need to facilitate economic activity within a common market will become relevant in Africa as the continent edges closer towards economic integration under the African Economic Community.²⁶ In Australia, the High Court relied on constitutional factors in holding that the *lex loci delicti* (the law of the

²⁰ O.T. Africa v Hijazy [2001] 1 Lloyds Rep 76.

²¹ AIC Capital Partners Inc v The Republic of Kazakhstan [2005] EWCH 2239, [2006] 1 All ER 284.

²² Lubbe v Cape Industry [2000] WLR 1545.

²³ Government of the United States of America v Montgomery (No.2) [2004] 1 WLR 2241 See generally Briggs, A, ‘Foreign Judgments and Human Rights’ (2005) 121 LQR 185.

²⁴ Morgaurd Investments Ltd v De Savoye [1990] 3 SCR 1077, 76 DLR (4th) 256; Hunt v T & N plc [1993] 4 SCR 289, 109 DLR (4th) 16; Tolofson v Jensen [1994] 3 SCR 1022, 120 DLR (4th) 289. See generally Blom, J, ‘Private International Law in a Globalizing Age: The Quiet Canadian Revolution’ (2002) 4 Yearbook of Private Int’l L 83; Edinger, E, ‘The Constitutionalization of the Conflict of Laws’ (1995) 25 Can Bus LJ 38.

²⁵ Farrow, TCW, ‘Globalization, International Human Rights, and Civil Procedure’ (2003) 41 Alberta L Rev 671 at 702.

²⁶ Treaty Establishing the African Economic Community: reprinted in (1991) 3 Afr J Int’l Comp L 792. Another potential jurisprudential source will be the European Courts of Justice whose judgments in the area of private international law also facilitate the operation of the European common market.

place of tort) should be the choice of law rule for intra-national torts.²⁷ It is worth noting that often the new intra-national private international law jurisprudence resulting from domestic constitutional exigencies is applied or extended to international issues.²⁸

It remains to be seen how judges, scholars, lawyers, and litigating parties in Africa will make use of existing human rights and constitutional norms in seeking remedy for their private international law problems. In *Tononoka Steels Ltd v. The Eastern and Southern Africa Trade and Development Bank*²⁹ in which the Kenya Court of Appeal adopted the restrictive doctrine of sovereign immunity, the court was influenced in its decision by the right of individual access to court for the vindication of rights. Areas where the transformative impact of human rights and constitutional law is likely to be felt in the future include the law on domicile, jurisdictions (especially as regard the exercise of the courts power to decline jurisdiction) and the enforcement of foreign judgments. For example, as regards the enforcement of judgments, there are statutory provisions that allow the Executive to determine which judgments from specified countries may be enforced, and restrict individual judgment creditors from specified countries to only a single means of enforcing those judgments. I have argued elsewhere that these provisions may be challenged as unconstitutional executive incursions on judicial powers and an infringement of individual property rights.³⁰

The *Raytheon Aircraft* decision also leaves open the issue of whether a similar conclusion would have been reached had all the parties to a contract with a foreign choice of law and forum clause been nationals of Kenya. It cannot be doubted that, even in such an instance, the constitutional provision conferring jurisdiction on the High Court in all civil matters will not in any way have been challenged by the foreign choice of law and forum agreement. However, it is likely that a court in such an instance will exercise its discretion to allow the action to continue in the domestic forum while applying the foreign law chosen by the parties unless there is strong public policy consideration against the application of the foreign law. In exercising this discretion, courts should consider the parties' rationale for choosing the foreign forum, the association of the contract with that forum, and the difficulties associated with ascertaining and applying a foreign law in the domestic forum.

Conclusion

Choice of law and forum agreements are a fundamental feature of international commercial transaction. The *Raytheon Aircraft* decision will come as relief to all who advocate respect for party autonomy and the enforcement of these agreements. The decision, however, raises and

²⁷ *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503. See generally Stellios, J, 'Choice of Law and the Australian Constitution: Locating the Debate' (2005) 33 Federal L Rev 8.

²⁸ Thus, the principles of real and substantial connection developed by the Supreme Court of Canada in *Morguard v De Savoye* fn 24 for intra-national enforcement of judgments was subsequently applied to international judgments in *Beals v Saldanha* [2003] 3 SCR 416, 234 DLR (4th) 1. Similarly, the adoption by the Australia High Court of the principle of *lex loci delicti* as the choice of law rule for intra-national torts in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 was subsequently extended to international torts in *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491.

²⁹ [2000] EA 536.

³⁰ See Oppong, RF, 'The Recognition and Enforcement of Foreign Judgments in Ghana: A Second Look at a Colonial Inheritance' (2005) 31 CLB 19 at 31.

opens up the broader issue of the relationship between constitutional law and private international law. Some jurisdictions outside Africa have begun exploring these issues. It remains to be seen how judges, scholars, lawyers, litigants, and all interested in private international law in Africa will address this evolving area of learning.