THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION No. 1177 OF 2021

(Arising from Civil Suit No. 0528 of 2021)

MAERSK AGENCY UGANDA LIMITED …… APPLICANT

VERSUS

1. DERRICK MUNYWEVU }
2. LUTON ELECTRICAL DEALERS LIMITED } …… RESPONDENTS

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

The applicant is a transport and logistics company incorporated and carrying on business in Uganda. It is the subsidiary of A.P. Moller-Maersk, an international shipping and logistics company. Sometime during the month of November, 2020 the 1st respondent contracted the applicant to transport the 2nd respondent's cargo from Liverpool, England to Uganda. The 1st plaintiff provided the respondent with all the required shipping documents and paid the requisite clearance and transport charges upfront. Due to alleged lapses on the part of the respondent, goods that were supposed to have been cleared at the port of Mombasa during the month of January, 2021were not cleared until sometime during the month of May, 2021 resulting in over four months' delay. Thereafter the applicant company retained the goods it its custody claiming shs. 4,219,798 as storage charges and US $ 9,599.95 as additional costs incurred for port storage. The respondents sued the applicant for breach of contract and wrongful detainer of the goods seeking recovery of general and special damages, the costs of the suit and an order for the release of the goods. The applicant then filed this application disputing the jurisdiction of this court.

b. The application.

The application is made under the provisions of section 98 of *The Civil Procedure Act* and Order 9 rules 3 (1) (a), (g), 2, 3, 4, 5, and 6 of *The Civil Procedure Rules*. The applicant seeks a

declaration that this Court is not vested with jurisdiction over the dispute. The applicant contends that the terms and conditions of the contract of carriage, as contained in the bill of lading, provided that it was to be "governed by and construed in accordance with English Law and all disputes arising hereunder shall be determined by the English High Court of Justice to the exclusion of the jurisdiction of the courts of another country." The parties having bound themselves to the exclusive jurisdiction of the English High Court of Justice, this court was divested of jurisdiction.

c. Affidavit in reply

By the 1st respondent's affidavit in reply, it is averred that the contract of carriage was between the applicant and the 2nd respondent. The 1st applicant is not a party thereto. Furthermore, the consignment contains a vehicle belonging to a one Denise Kavuma, who is not a party to the contract of carriage and has cleared all taxes due in respect of that vehicle. The applicant filed the application out of time and without having filed a notice of intention to defend the suit. An interlocutory judgment was entered and the suit had been fixed for formal proof on 2nd October, 2021 before another Judge, when the applicant brought to the attention of court the existence of this application. The application is only meant to delay trial of the case and should be dismissed.

d. Submissions of counsel for the applicant.

M/s ENSAfrica Advocates on behalf of the applicants submitted that the court cannot disregard exclusive jurisdiction clauses in international commercial contracts. Parties to international commercial contracts have contractual freedom to choose the applicable law and jurisdiction for the resolution of their disputes. Parties should be held to their contracts and the court cannot re-write terms in the contract on their behalf. In clause 26 of the bill of lading, the parties not only chose the law applicable to their contract but they also unequivocally submitted to the exclusive jurisdiction of the English High Court of Justice. The applicant has a genuine intention to proceed before the English High Court of Justice. The respondents have not advanced any reason justifying a departure from the exclusive jurisdiction clause. The application was timeously filed within the period allowed by the rules for filing a defence. Computation of time excludes the day of service

of summons and the plaint upon the applicant. The summons should be set aside and the suit demised with costs to the applicant.

e. Submissions of counsel for the respondents.

M/s Kampala Tax Advisory Centre-Legal Department on behalf of the respondents submitted that this court retains the discretion, despite the exclusive jurisdiction clause, to exercise jurisdiction over the dispute. The clause is contained in a standard from contract the terms of which were pre-determined by the applicant. The parties to the contract are all domiciled in Uganda. The goods are in the custody of the applicant in Uganda. It would be inconvenient for both parties to seek a remedy in a foreign jurisdiction. The Courts in Uganda apply principles of English common law. The cargo in question is a groupage consignment that comprises goods of third parties not party to the shipping contract. The applicant having been served with summons on 1st September, 2021 the application filed on 15th September, 2021 was out of time. The applicant not having filed a notice of intention to defend the suit, an interlocutory judgment was entered against it on 1st October, 2021 which has never been set aside. The application should be dismissed with costs and the suit be fixed for formal proof.

f. The decision.

According to Order 9 rule 3 (1) (g) of *The Civil Procedure Rules*, a defendant who wishes to dispute the jurisdiction of the court, may apply to the court for a declaration that in the circumstances of the case, the court has no jurisdiction over the defendant in respect of the subject matter of the claim or relief or remedy sought in the action. The ground raised is that exclusive jurisdiction over the subject matter of this suit is vested with the English High Court of Justice.

a. Whether the application was filed out of time.

According to Order 9 rule 3 (1) (a) and (g) of *The Civil Procedure Rules* a defendant who wishes to dispute the jurisdiction of the court in the proceedings on any ground has, within the time limited for service of a defence, apply to the court for an order setting aside the summons or service of the

summons on him or her and for a declaration that in the circumstances of the case the court has no jurisdiction over the defendant in respect of the subject matter of the claim or the relief or remedy sought in the action. Order 8 rule 1 (2) of *The Civil Procedure Rules* provides that where a defendant has been served with a summons, he or she shall, unless some other or further order is made by the court, file his or her defence within fifteen (15) days after service of the summons.

Section 34 (1) (a) of *The Interpretation Act* states that in computing time, a period of days from the happening of an event or the doing of any act of thing shall be deemed to be exclusive of the day in which the event happens or the act or thing is done. The applicant having been served with summons on 1st September, 2021 the time allowed to filing the application elapsed on 16th September, 2021. That happens to be the day the application was filed. I therefore find that the application was filed within the time allowed by the rules.

b. Whether by failure to give notice of intention to defend the proceedings the applicant submitted to the jurisdiction of this court.

In the first place, a defendant who seeks relief from the court pending an application to challenge jurisdiction submits to the jurisdiction of the court (see A*elf MSN 242, LLC (a Puerto Rico limited liability company) v. De Surinaamse Luchtvaart Maatschappij N.V. D.B.A. Surinam Airways [2021] EWHC 3482 (Comm); [2021] WLR(D) 643]*). A useful test is whether a disinterested bystander with knowledge of the case, would regard the acts of the defendant (or his advocate) as inconsistent with the making and maintaining of a challenge to the validity of the writ or to the jurisdiction (see *Sage v. Double A Hydraulics Limited [1992] TLR 165*). The *Sage case* was a case of what one might call common law waiver, the doing of an act inconsistent with maintaining a challenge to the jurisdiction. Such a waiver must clearly convey to the claimant and the court that the defendant is unequivocally renouncing his right to challenge the jurisdiction, and the application of a bystander test is plainly apt. For example in *Deutsche Bank AG London Branch v. Petromena ASA [2015] 1 WLR 4225*), applying the disinterested bystander test, the court regarded the issue of a summons seeking an extension of time, in the period when there was no extant challenge to the jurisdiction, as an act inconsistent with the maintenance of such a challenge. The challenge to the validity of the writ therefore failed.

The timing of the conduct alleged to constitute a submission to the Court's jurisdiction is important. If the conduct took place before an application contesting the Court's jurisdiction was intimated or issued, then it is more likely to be an unequivocal submission to the jurisdiction; if the relevant conduct occurred whilst there was a pending application to contest the Court's jurisdiction or a reservation of the right to do so, then it is unlikely, perhaps very unlikely, to constitute a submission to the jurisdiction (see *Zumax Nigeria Ltd v. First City Monument plc [2016] EWCA Civ 567; [2016] 1 CLC 953, para. 44-51*). Conduct motivated to forestall the entry of or the setting aside of a default judgment is not inconsistent with an intention to contest jurisdiction (see *Winkler and another v. Shamoon [2016] EWHC 217 (Ch), para. 48; [2016] WLR (D) 101*).

In the instant case, the applicant company on 10th December, 2021 filed an application seeking to set aside the default judgment entered against it on 1st October, 2021 for failure to file a defence within the time specified by the rules. This was three months after it had filed the current application on 16th September, 2021. Since Misc. Application No. 1700 of 2021 was filed while there was a pending application to contest the Court's jurisdiction, albeit without a reservation of the right to do so by filing a notice of intention to defend the proceedings, that of itself cannot be said to be an unequivocal act of submission to the jurisdiction of this court.

However, Order 9 rule 3 (1) of *The Civil Procedure Rules* requires a defendant who wishes to dispute the jurisdiction of the court in the proceedings on any ground to "give notice of intention to defend the proceedings" and within the time limited for service of a defence, apply to the court for an order setting aside the summons or service of the summons on him or her and for a declaration that in the circumstances of the case the court has no jurisdiction over the defendant in respect of the subject matter of the claim or the relief or remedy sought in the action, or such other order. Filing and service (on the plaintiff) of a notice of intention to defend the proceedings will not be construed as a submission to jurisdiction since the defendant is clearly reserving its right to challenge jurisdiction. In the instant case, whereas the application challenging jurisdiction was filed timeously, the applicant did not give notice of intention to defend the proceedings. The question then is whether that omission should be construed as a submission to the jurisdiction of this court.

Whether a defendant's conduct amounts to a submission to jurisdiction is a question of fact in each case. The question is whether the defendant's conduct demonstrates an unequivocal, clear and consistent intention to submit to the jurisdiction of the court. If a party's conduct clearly and unequivocally signifies a submission to jurisdiction, it is doubtful whether it can necessarily be salvaged by a mere reservation. Even the filing of a jurisdictional challenge may not suffice if the challenge is fundamentally inconsistent with the nature of the defendant's acts. The test to be applied in determining whether any particular conduct amounts to a submission to the jurisdiction was considered in *SMAY Investments Ltd. v. Sachdev [2003] 1WLR 1973* at p.1976, thus;

> A person voluntarily submits to the jurisdiction of the Court if he voluntarily recognises, or has voluntarily recognised, that the Court has jurisdiction to hear and determine the claim which is the subject matter of the relevant proceedings. In particular, he makes a voluntary submission to the jurisdiction if he takes a step in the proceedings which in all the circumstances amounts to a recognition of the Court's jurisdiction in respect of the claim which is the subject matter of those proceedings. The effect of a party's submission to the jurisdiction is that he is precluded thereafter from objecting to the Court exercising its jurisdiction in respect of such claim. Whether any particular matter, for example an application to the Court, amounts to a voluntary submission to the jurisdiction must depend upon the circumstances of the particular case.

There will be an effective waiver, or a submission to the jurisdiction, only where the step relied upon as a submission to the jurisdiction, cannot be explained, except on the assumption that the party in question accepts that the court should be given jurisdiction. If the step relied upon, although consistent with the acceptance of jurisdiction, is a step which can be explained also because it was necessary or useful for some purpose other than acceptance of the jurisdiction, there will be no submission. The representation derived from the conduct of the party said to have submitted must be capable of only one meaning.

A party's submission to jurisdiction is evinced by its unconditional filing of a defence (see *Rashida Abdul Karim Hanali and another v. Suleimani Adrisi, H. C. Misc. Civil Application No. 9 of 2017* and *Miruvor Ltd v. Panama-Globe Steamer Lines SA [2007] 1 HKLRD 804*), a failure to file a prompt jurisdictional challenge, lack of protest against the court assuming jurisdiction over the parties, or if an unequivocal step has been taken which cannot be interpreted as consistent with a

challenge to the jurisdiction, particularly where there has been no reservation of rights such as filing or contesting applications in the suit, e.g. contesting a summary judgment application and filing a striking out application. Submission is established where a party has taken a clear and unequivocal step that is incompatible with the position that the High Court of Uganda does not have jurisdiction.

In the instant application, the question is whether failure to give notice of intention to defend the proceedings constitutes a failure to file a prompt jurisdictional challenge and therefore a submission to the jurisdiction of the court. A reading of Order 9 rule 3 (1) of *The Civil Procedure Rules* shows that a proper jurisdictional challenge requires the filing of both a "notice of intention to defend the proceedings" and "an application for a declaration of lack of jurisdiction," all within the time allowed to serve a defence. The conjunction "and" is used as a function word to indicate connection or addition especially of items within the same class or type. If the legal consequences or conditions specified by a statute are to occur simultaneously, the coordinating conjunction "and" is placed between the last two enumerated options. In contrast, if the legal consequences or conditions may or may not occur simultaneously, the exclusionary conjunction "or" is placed between the last two alternatives. If the alternatives are mutually exclusive, the word "either" is placed before the first alternative and the exclusionary conjunction "or" between the last two alternatives.

Since the ordinary rules of interpretation construe the word "and" when used in statutes, rules, laws or bye-laws conjunctively rather than disjunctively, the implication is that the requirement of both aspects of the provision has to be satisfied to avail the benefit. Giving notice of intention to defend the proceedings should be undertaken before, together with or simultaneously with filing an application for a declaration of lack of jurisdiction. In order to challenge the court's jurisdiction, a defendant must have filed a notice of intention to defend the proceedings within the time permitted under the rules. Failure by the defendant to file a notice of intention to defend the proceedings before or simultaneously with filing the challenge the court's jurisdiction, will be deemed a submission to the jurisdiction of the court. By that omission, the applicant submitted to the jurisdiction of this court.

c. Whether the exclusive jurisdiction clause should be enforced.

An "exclusive choice of court agreement" means an agreement concluded by two or more parties that designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of a specified country or one or more specific courts of the specified country to the exclusion of the jurisdiction of any other courts. In the instant case, clause 26 of the bill of lading states as follows;

> For shipments to or from the U.S. any dispute relating to this bill of lading shall be governed by U.S. law and the United States Federal Court of the Southern District of New York is to have exclusive jurisdiction to hear all disputes in respect thereof. In all other cases, this bill of lading shall be governed by and construed in accordance with English law and all disputes arising hereunder shall be determined by the English High Court of Justice in London to the exclusion of the jurisdiction of the courts of another country. Alternatively and at the Carrier's sole option, the Carrier may commence proceedings against the Merchant at a competent court of a place of business of the Merchant.

An exclusive choice of court agreement that forms part of a contract is treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid. The choice of forum clause fixes in advance where a case will be heard, thus reducing the forum shopping. The court or courts so designated in an exclusive choice of court agreement has jurisdiction to decide a dispute to which the agreement applies.

When faced with a suit brought in breach of an exclusive jurisdiction clause in favour of another forum, the starting position is that the court will stay its proceedings unless the plaintiff is able to show "strong cause" or "strong reasons" (such as bias or countervailing circumstances) why he should be allowed to breach his promise to sue exclusively in another forum (see *Global Partners Fund Limited v. Babcock & Brown Limited (in liq.) and others [2010] NSWCA 196*). There is therefore a presumption in favour of a stay of local proceedings where the parties have entered into a foreign exclusive jurisdiction clause with the presumption only rebutted where exceptional

circumstances are shown by the plaintiff. Another means by which the courts strive to uphold exclusive jurisdiction clauses is by taking a liberal construction of them.

The task of the court in deciding jurisdiction is usually to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice (see *Spiliada Maritime Corporation v. Cansulex Ltd, The Spiliada [1987] 1 AC 460; [1986] 3 All ER 843; [1986] 3 WLR 972*). Consideration should be given as to which court is most cost effective, practical and convenient for the potential dispute. The court has to determine whether, *prima facie*, there is some other available forum in which it is more appropriate for the case to be tried. In this regard, the burden is on the defendant to show that there is such a more appropriate forum. Upon this burden being discharged, the court will ordinarily grant a stay unless in the circumstances of the case justice demands that a stay should nevertheless not be granted. However, an exclusive jurisdiction clause imposes a contractual obligation to sue in the nominated court and should not be easily evaded by mere appeals to post-dispute convenience. Matters of convenience or connection are generally of little relevance in an application to enforce a foreign exclusive jurisdiction clause.

Case law with respect to exclusive jurisdiction clauses reflects important policy considerations, relevantly, that parties should be held to their contractual bargains and the resolution of disputes arising from contractual arrangements should occur in a coherent and consistent manner and as expeditiously and efficaciously as possible. This suggests that the fewest different jurisdictions should be involved in resolving the fewest number of separate proceedings. This spirit is reflected in Article 6 of the Hague *Convention on Choice of Court Agreements, June 2005* (to which Uganda is not a party and whose scope specifically excludes purely domestic cases as well as disputes involving consumers or employees, family matters, personal injury, and real rights, among others) which provides that a court in a Contracting State to the Convention must decline jurisdiction when confronted by an exclusive choice of court agreement designating the courts of another member state to the Convention. On its face this provision would seem to preclude arguments for avoiding enforcement of a foreign exclusive jurisdiction clause based on convenience such as the residence of the parties and the location of evidence.

Consequently the proper approach to the construction of clauses agreeing jurisdiction is to construe them widely and generously (see *Donohue v. Armco Inc [2002] 1 Lloyd's Rep 425 at [14]; [2001] UKHL 64*). Whether a dispute falls within one or more related agreements depends on the intention of the parties as revealed by the agreements (see *Satyam Computer Services Ltd v. Upaid Systems Ltd [2008] 2 All ER (Comm) 465, at [93]; [2008] EWCA Civ 487*). The clause should be understood in a transitive sense, that is, that each party promises to submit claims within the clause to the specified forum (see *Austrian Lloyd Steamship Company v. Gresham Life Assurance Society Limited [1903] 1 KB 249* and *Continental Bank v. Aeakos SA [1998] 1 WLR 588 at p.592*). A stipulation that the parties agree to be bound in all things by the jurisdiction and decision of the courts of a particular country has been held decisive (see *Royal Exchange Assurance Corporation-v. Sjotorsakrings Aktiebolaget Vega [1902] 2 KB 384 394; Euromark Ltd v. Smash Enterprises Pty Ltd [2013] EWHC 1627 (QB); Bremen v. Zapata Off-Shore Co. 407 U.S. (1972)* and *Kirchener & Co. v. Gruban [1909], Ch.413*). The effect of an agreement prorogating a foreign jurisdiction is to confer on the domestic court a discretion to stay the domestic proceedings (see *The Fehmarn [1958] 1 WLR 159*).

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 by showing strong reasons for suing in that forum (see *Raytheon Aircraft Credit Corporation and another v. Air Al- Faraj Limited [2005] 2 EA 259; The Fehmarn (1957) 1 Ll.L.R. 511 and, on appeal, (1957) 2 Ll.L.R. 551; The Eleftheria (1970) p.94; The Makjefell (1975) 1 Ll.L.R. 528 and, on appeal (1976) 2 Ll.L.R.29; and The Adolf Warski (1976) 1 Ll.L.R. 107 and, on appeal, (1976) 2 Ll.L.R. 241* and *Aratra Potato Co. Ltd. and another v. Egyptian Navigation Co. (the "El Amria"), [1981] 2 Lloyd's Rep. 119*). There must be a good reason why the parties should not be held to the bargain that they freely made.

A slightly different approach has been taken in Uganda. Any instrument purporting to oust its jurisdiction must do so in clear and uncertain terms. Where the parties have not only chosen foreign law to govern their agreement, but have unequivocally submitted to the exclusive jurisdiction of the foreign Courts, the jurisdiction of the High Court is ousted (see *Uganda Telecom Ltd v. Rodrigo Chacon t/a Andes Alpes Trading, H. C. Misc. Application No. 37 of 2008*). The fact that the

agreement was negotiated, performed and possibly breached in Uganda is immaterial (see *Sebagala Electronic Centre v. Kenya National shipping Lines (1997-01) UCLR 389; Wissam v. Bharti Airtel Limited, H.C. Civil Suit No. 1028 of 2017*). The High Court though jealously guards its jurisdiction such that even where exclusive jurisdiction conferred to a foreign court, the High Court has discretion whether or not to order stay of action (see *Larco Concrete Products Ltd v. Transair Ltd [1987] HCB 40; [1988-90] HCB 80*). The court will not only consider whether or not the parties have unequivocally submitted to the jurisdiction of a foreign court, but also whether it is proper and just for the court where the proceedings are brought to entertain the suit.

The High Court will suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless;- (a) the agreement is null and void under the law of the chosen court; (b) a party lacked the capacity to conclude the agreement under the laws of Uganda; (c) giving effect to the agreement would lead to a manifest injustice (for example where the plaintiff can show that it would "lose" substantive or procedural rights under the laws of Uganda, where there is no equivalent under the law of the country of the designated court) or would be manifestly contrary to the public policy of the courts in Uganda; (d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or (e) the chosen court has decided not to hear the case.

The distinction between "manifest injustice" and "public policy" is that the concept of manifest injustice is concerned with the interests of a particular individual, while the concept of public policy deals with the interests of the public at large. With regard to the public policy exception, it is critical for the party seeking to invoke the exception to: (i) articulate a clear public policy that will be contravened, (ii) demonstrate how it is "highly probable" that such policy would be contravened, and (iii) show how the contravention would be "manifest," i.e. clear or extremely serious. This Court may proceed with the case under these exceptions only in unusual circumstances, and with the greatest circumspection. These exceptions should not be invoked on the speculative possibility that something undesirable might happen if the choice of court agreement is honoured. A threshold level of reasonable certainty that an unacceptable result will result is required.

That the injustice must be manifest is intended to underscore the caution with which these exceptions should be invoked. The result must be incontrovertibly unjust from the perspective of the law and policy of Uganda. The result of failure to exercise jurisdiction also must be a serious injustice as well. Mere inconvenience is not a ground for refusal to suspend or dismiss the suit. In other words, the issue is not whether giving effect to a choice of court agreement leads to injustice as a matter of law; whether the injustice is "manifest" is a matter to be interpreted in light of the traditional force given to the term by the Courts in Uganda. It means that the injustice or violation of public policy which would result from the decision in the particular case to give effect to the choice of court agreement is not an arguable violation, but must be one which is definitely recognisable as such (see *Dicey, Morris & Collins on the Conflict of Laws*, 15th Ed at [41] - that the public policy exception "is to operate only in exceptional circumstances").

It is not in doubt that in the instant case that the parties not only chose foreign law to govern their agreement, but also unequivocally submitted to the exclusive jurisdiction of the foreign Court. The key question in this application therefore is whether there is a "strong cause," or there are "strong reasons" or countervailing circumstances why the respondents should be allowed to breach their promise to sue exclusively in that forum. This Court is obliged to make a double check. First, the court must ascertain that giving effect to the agreement in this specific case would lead to the mentioned consequence, i.e., it would lead to manifest injustice or would be manifestly contrary to the public policy. Second, the threat of violation of these two legal institutions is not only hypothetical but is highly probable.

Avoiding a foreign choice of court agreement may be premised on the fact that the plaintiff would suffer a disadvantage or injustice through application of a different choice of law by the foreign designated court. Manifest injustice would cover the exceptional case where one of the parties would not receive a fair trial in the foreign state's court, perhaps became of bias or corruption or where there are reasons specific to that party that would preclude the plaintiff from bringing or defending proceedings in the chosen court. Part of the respondents' argument in essence is that giving effect to the agreement would lead to a manifest injustice since all the parties to the contract are all domiciled in Uganda, and the goods are in the custody of the applicant in Uganda. It would

therefore be inconvenient for both parties to seek a remedy in a foreign jurisdiction yet the Courts in Uganda apply principles of English common law.

The court is more inclined to hold the parties to their agreement where it is evident the clause is contained in a fully negotiated business to business agreement, than when the dispute involves a non-negotiated standard contract in which one of the parties was potentially disadvantaged. The courts will frown upon standard inclusion of a forum selection clause in a contract when it is highly foreseeable that the other party will face considerable obstacles in bringing a suit.

For example in *Petersen v. Boeing Co., 715 F.3d 276*, prior to departing for Saudi Arabia, Petersen was required to sign a preliminary employment agreement. That agreement did not contain a forum selection clause. On arrival in Saudi Arabia, however, he was forced to sign a second employment agreement, which he was not given time to read and which he was told he must sign or else return immediately to the United States at his own expense. This agreement contained a forum selection clause requiring any contractual disputes to be resolved in the Labour Courts of Saudi Arabia. Petersen signed the second agreement without reading it, as he was instructed to do by his employer.

Petersen's passport was then confiscated; he was effectively imprisoned in his housing compound under miserable living conditions; and his work environment was marked by rampant safety and ethics violations. When he attempted to resign and return to the United States, his employer refused to return his passport for a period of nearly three months. During his time in Saudi Arabia, Petersen contracted an upper respiratory infection as a result of his living conditions and was permanently maimed as a result of receiving inadequate surgical treatment for an Achilles tendon tear, which he would have had treated in the United States had he been permitted to leave Saudi Arabia.

When he finally returned to the United States (after the intervention of the United States Consulate in Jeddah), Petersen brought suit against Boeing and BISS alleging breach of contract as well as several statutory and common law claims. In addition to his Complaint, his submissions to the district court included a sworn affidavit claiming that (1) he was not financially capable of traveling to Saudi Arabia in order to institute proceedings against his employer; (2) he would be

subjected to harsh conditions and internal travel restrictions if he were somehow able to return to Saudi Arabia; and (3) the forum selection clause was foisted on him through fraud and undue pressure. He also submitted a report from the United States Department of State tending to demonstrate that (1) he would not be legally permitted to travel to Saudi Arabia; (2) he would not in any event be able to obtain a fair trial in Saudi Arabia; and (3) his employer could detain him in Saudi Arabia for the entire duration of any legal proceedings. The district court nonetheless dismissed the entire lawsuit without a hearing under Federal Rule of Civil Procedure 12 (b) (3) for improper venue, holding that the forum selection clause was enforceable.

On appeal the Court observed that under the applicable federal law, there were three reasons a forum selection clause may be unenforceable: (1) if the inclusion of the clause in the agreement was the product of fraud or overreaching; (2) if the party wishing to repudiate the clause would effectively be deprived of his day in court were the clause enforced; and (3) if enforcement would contravene a strong public policy of the forum in which suit is brought. The court found in that case that Petersen had provided specific evidence sufficient to demonstrate that he lacked the resources to litigate in Saudi Arabia and thus court found he would be wholly foreclosed from litigating his claims against Boeing and BISS in a Saudi forum. Petersen plausibly alleged that the majority of his witnesses would be American. He named at least 16 such witnesses, including other Boeing/BISS employees who experienced similar conditions during their time in Saudi Arabia and United States-based recruiters working for Boeing/BISS. The court finally found that the forum selection clause's inclusion in the employment agreement was obtained via fraud or overreaching by taking undue advantage of Petersen's vulnerable position as a newly-arrived employee in Saudi Arabia and was therefore unenforceable. Therefore, the district court abused its discretion by dismissing on the basis of the forum selection clause.

In the instant application, clause 26 of the bill of lading is a “hybrid” or “asymmetric” clause. The consignee and consignor are restricted to suing in a particular jurisdiction while the carrier retains the right to commence proceedings in any court of competent jurisdiction i.e. at a court of the place of business of the consignee or consignor. Such clauses are normally negotiated where there is an imbalance of negotiating power between the parties as it clearly leaves one party in a more favourable position than the other. While exclusivity is imposed on the consignee and consignor,

the carrier retains non-exclusivity. Non-exclusive jurisdiction will, in principle, provide for disputes to be heard in the courts of a particular jurisdiction but without prejudice to the right of one or other of the parties to take a dispute to the courts of any other jurisdiction if appropriate.

Manifest injustice usually exists where the choice of court agreement is concluded or the exclusive jurisdiction clause is inserted in some unfair circumstances or where one party will receive unfair treatment before the chosen court. For example, one party has a stronger bargaining power than the other. Sending a commercial party off to a distant foreign country to litigate is normally different in terms of burden than ordering an individual customer to do so. There is manifest injustice that results if the plaintiff, owing to the expenses and burdens of individual litigation, cannot afford to litigate his or her valid, but tiny, individual claim in a foreign jurisdiction. It is clearly contrary to public policy to immunize local subsidiaries of large corporations from proceedings taken in courts of convenience of their individual customers, by allowing them to oust the jurisdiction of the High Court through exclusive jurisdiction clauses. When enforced in exceptional situations such as this, such clauses seriously jeopardise the customer's rights by prohibiting any effective means of litigating. It is evident that the cost of litigation before the High Court of justice in England will in all probability exceed the value of the subject matter of the dispute between the parties to an extent that is in all probability prohibitive on the part of the respondents, so as to have the effect of denying them an effective means of litigating the dispute. The respondents would be effectively deprived of their day in court were the clause enforced.

On the other hand, when a defendant acknowledges receipt of summons but does not file a notice of intention to defend the proceedings together with an application within the specified period, he or she will be taken to have submitted to the jurisdiction of the court. The position in the event of failure to respond to the suit is that the court having satisfied itself that it has jurisdiction over the claim, it will enter a default judgment against the defendant. The court in the instant case entered a default judgment against the applicant on 1st October, 2021. Once default judgment has been entered it is too late to contest jurisdiction, unless it can be shown that service was never effected on the defendant.

That aside, a foreign court will have jurisdiction over a defendant when he or she is voluntarily present (whether temporarily or permanently) in the foreign country at the time the action was commenced (see *Adams v. Cape Industries [1990] Ch 433 (CA) at pp. 518-20 and 530*). The rationale for this rule is that a person who is present in the foreign country has the benefit / protection of the law applicable in that country, must "take the rough with the smooth, by accepting his amenability to the process of its courts." Submission to a foreign jurisdiction may be express or implied. Where a person becomes a partner in a foreign firm with a place of business within the jurisdiction of a foreign court, and appoints an agent resident in that jurisdiction to conduct business on behalf of the partnership at that place of business, and causes or permits these matters to be notified to persons dealing with that firm by registration in a public register, he or she does impliedly agree with all persons to whom such a notification is made, i.e. the public, to submit to the jurisdiction of the court of the country in which the business is carried on in respect of transactions conducted at that place of business by that agent (see *Blohn v. Desser [1962] 2 QB 116*). There is no material in the pleadings to suggest that when it entered into the contract the applicant was in some way acting as agent for A.P. Moller-Maersk, UK. It entered into the contract entirely as a company incorporated and carrying on business in Uganda.

For all the foregoing reasons, I find that the applicant, by conduct, submitted to the jurisdiction of this court; the exclusive jurisdiction clause in the bill of lading is unenforceable in the circumstances of this case, and therefore the application is devoid of merit. Consequently the application is dismissed with costs to the respondents.

Delivered electronically this 4th day of March, 2022

……Stephen Mubiru……..
Stephen Mubiru
Judge,
4th March, 2022.