OBLIGATION OF STATE PARTIES TO ENFORCE ARBITRATION AGREEMENT IN ACCORDANCE WITH THE NEW YORK CONVENTION*

Abstract

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Award (Convention) permits national courts to rely on the more favourable regime under their national laws to determine the enforceability of arbitration agreement (clause). To this end, national arbitration laws have given a liberal meaning to the phrase 'agreement in writing' pursuant to Article II (3) of the Convention in order to accommodate modern means of contractual agreements such as arbitration clause in charter party bill of lading. Using the Nigerian Arbitration and Conciliation Act (ACA) as a starting point, this article investigates the extent Nigerian courts recognize arbitration clause in charter party bill of lading with the view to determining the degree at which Nigeria has fulfilled her treaty obligation under the Convention. In the light of the foregoing, this article through case law analysis, finds that Nigeria by and large may not have breached her treaty obligation under the Convention irrespective of few judicial decisions that were delivered per incuriam. However, this article recommends a comprehensive doctrinal framework that should guide Nigerian courts in determining the enforceability of arbitration clause in charter party bill of lading. The objective is to provide clarity, coherence and predictability at common law.

Keywords: New York Convention, Charter party bill of lading, Arbitration clause, National court.

1. Introduction

Before rendition of arbitral award, the validity of arbitration agreement may be challenged in national court under different circumstances. More specifically national courts oftentimes are faced with request for stay of proceedings over a matter previously agreed by the parties that it should be settled by arbitration.[1] Those courts are obligated under the New York Convention 'pro-arbitration agreement' regime not to refuse enforcement of arbitration agreement/clause on parochial consideration except as set out under the said regime.[2] This regime provides in Article II (3) that:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Therefore, excepting where arbitration agreement is 'null and void' 'inoperative' or 'incapable of being performed' national court would be in violation of its treaty obligation if it imposes domestic substantive conditions for recognition and enforcement of arbitration agreement. Such condition may include the requirement that a forum selection clause is null and void if it violates statutory provision that donates exclusive jurisdiction to a national court. A good example of such statutory provision in Nigeria is section 20 (1) of Admiralty Jurisdiction Act (AJA). It provides in full that:

> Any agreement by any person or party to any cause, matter or action which seeks to oust the jurisdiction of the court shall be null and void, if it relates to any admiralty matter falling under this Decree, and if
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> a. The place of performance, execution, delivery, act or default is or takes place in Nigeria or
> b. Any of the parties resides or has resided in Nigeria; or
> c. The payment under the agreement (implied or express) is made or is to be made in Nigeria; or
> d. In any admiralty action or in the case of a maritime lien, the plaintiff submits to the jurisdiction of the Court and makes a declaration to that effect or the *rem* is within Nigerian jurisdiction; or
> e. It is a case in which the Federal Military Government or the Government of a state of the Federation is involved and the Government or State submits to the jurisdiction of the court; or

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[1] National courts may entertain application seeking a declaratory judgment on the validity/invalidity of arbitration agreement. They may also be asked to enjoin arbitration (anti arbitration injunction) or to issue injunction in support of arbitration (anti suit injunction). National court may also be asked to appoint arbitrator where the arbitration agreement is vague in that regard and a party consequently may argue that the agreement is invalid.

[2] See, The International Council for Commercial Arbitration ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges, pg 37< https://icac.org.ua/wp-content/uploads/ICCAs-Guide-to-the-Interpretation-of-the-1958-New-York-Convention-A-Handbook-for-Judges-2.pdf>accessed 13 February 2023.

f. There is a financial consideration accruing in, derived from, brought into or received in Nigeria in respect of any matter under the admiralty jurisdiction of the court; or
g. Under any convention, for the time being in force to which Nigeria is a party, the national court of a contracting State is either mandated or has a discretion to assume jurisdiction; or
h. In the opinion of the Court, the cause, matter or action should be adjudicated upon in Nigeria.

The above provision was applied by the Nigerian Court of Appeal in the cases of *MV Panormos Bay v Olam (Nig) Plc*[3] (*MV Panormos Bay*) and *Lignes Aeriennes Congolaises v Air Atlantic Nigeria Limited* (*LAC*)[4] where the Appellate Court struck down arbitration clause (standard form arbitration clause) in charter party bill of lading and Aircraft leasing agreement respectively. In both cases the court held that the arbitration clauses with choice of foreign arbitral seats violate section 20 of the Admiralty Jurisdiction Act (AJA) and they were thus held to be null and void and unenforceable.

Barring the exception clause of Article II (3) earlier cited, the thesis of this article is that any ground of refusal to recognize and enforce standard form arbitration clause whether in charter party bill of lading or aircraft lease agreement is indefensible just as the absence of doctrinal leadership in Nigerian case law regarding the foregoing is regrettable. Rather, the provision of section 1 (2) of ACA clearly suggests that such standard form arbitration clause is recognized as a contemporary form of business communication. The ACA section 1 (2) specifically allows 'any reference' in a contract to a document containing arbitration clause as also forming part of the contract. This is also known as 'incorporation by reference' even though there is no clear sign that Article II of the Convention contemplates such category of arbitration agreement.[5] Further, the Convention more favourable regime under Article VII (1) permits contracting States to impose less substantive requirements in determining the formal validity of arbitration agreement.

In addition, forum selection clause is a broad concept that includes arbitration clause and choice of jurisdiction clause. Thus, AJA makes a distinction between the effect of arbitration clause and choice of jurisdiction clause in contracts of admiralty transactions. For instance, arbitration clauses (in charter party bill of lading or aircraft lease agreement) pursuant to AJA section 10 may be enforceable for being consistent with the scope of arbitration agreement under the Convention. The enforceability of such arbitration clause also represents international standard evolved in many contracting States of the Convention during more than six decades. In contrast with standard form arbitration clause, choice of jurisdiction/court clause with respect to admiralty matter shall be declared null and void as it seeks to oust the exclusive jurisdiction of the Federal High Court pursuant to section 19 and 20 of AJA. This provision is controversial and debatable but unfortunately would not merit further examination as it is outside the remit of this article.

Following the introduction, part 2 discusses the *MV Panormos Bay* and *LAC* opinions. The similarity in the gravamens of the opinions and the subsequent decision(s) overruling those opinions will have bearing on the next parts of this paper as follows. Part 3 provides doctrinal leadership for the enforceability of standard form arbitration clause particularly those incorporated in bill of lading by reference to a charter party. Regrettably, there is as a matter of course the absence of such doctrinal guidance in Nigerian case law. Part 4 examines the effect of arbitration clause in charter party bill of lading and it addresses the question whether it is logical to argue that such clause is unfair simply because the prior consent of cargo endorsee was not obtained during the making of the charter party agreement. Part 5 contains the concluding remark.

2. The Judicial Opinions

The *MV Panormos Bay* Opinion

In *MV Panormos Bay*, the respondent claimed the sum of $100,000 USD or its Naira equivalent from the appellant as carrier of 4,535 bags of rice covered by charter party made pursuant to bill of lading which clause 7 reads that 'any dispute arising under the bill lading shall be referred to arbitration in London. The unamended centrum arbitration clause will apply.' The appellant applied for stay of proceedings contending that the charter party bill of lading in clause 7 has a provision for arbitration which provides that 'any dispute arising under the bill of lading shall be referred to arbitration in London.' The respondent argued that the arbitration agreement was one sided as he was not consulted when it was made. The court in a unanimous decision found in favour of the respondent and held inter alia per Jaladima JCA[6] that the arbitration clause was 'lopsided in favour of the

[3] [2004] 5 NWLR (Pt 865) 3.
[4] [2006] 2 NWLR (Pt 963) 49.
[5] See ICCA's Guide (n 2) 46.
[6] *MV Panormos Bay* (n 3)15 para d.

carriers ….'[7] and its 'purport … is to deny the Nigerian courts albeit temporarily of jurisdiction, especially considering the operative word 'shall' used in the said clause which has a mandatory effect'[8] and that the clause for the foregoing reason is null and void for being contrary to section 20 of the Admiralty Jurisdiction Act (AJA).

In *MV Panormos Bay* opinion, the Court acknowledges that there was evidence of contract of carriage of goods between the respondent and appellant but that it would be illegal for it to grant stay of proceeding as requested by the appellant under section 4 of the ACA cognate section to Model Law Article 9. In the courts view:[9]

> Section 20 of the Admiralty Jurisdiction Decree has altered the hitherto existing position in admiralty matters thereby modifying sections 2 and 4 of the Arbitration and Conciliation Act and limiting enforceable arbitration agreements to those having Nigeria as their forum. Indeed, the intention of the lawmakers as regards section 20 of the Admiralty Jurisdiction Decree is to derogate from the hitherto existing position found in section 4 of the Arbitration and Conciliation Act …. In applying the Latin maxim of *Pacta Sunt Servanda* it is the duty of the court in construing a contract to give effect to the intention of the parties. The court can only discharge such duty where there is no statutory limitation. I have held that S. 20 of the Admiralty Jurisdiction Decree … is a statutory limitation to the enforcement of the purported arbitration agreement contained in the bills of lading herein. Therefore, by reference to the clear provisions of the said section 20 of the Degree this court could declare the arbitration agreement null and void.

The LAC Opinion

LAC case has similar substantive dimension with *MV Panormos Bay* and the Court of Appeal in both cases arrived at the same assessments of the illegality of arbitration clauses in standard form contract. In *LAC* case, parties entered into an aircraft lease agreement. Article 7 of the agreement provides that '[t]he present agreement shall be governed by Congolese Positive Law. Any dispute relating to the execution, the interpretation and/or the termination of the present agreement shall be settled in a friendly way between the parties. If they fail to do so, the dispute shall be referred to arbitration by both Presidents of Kinshasa and Lagos Bars.' The Federal Court as court of first instance did not address the appellant counsel concern regarding the implication of the arbitration agreement in the parties' contract and its effect on the jurisdiction of the court. On appeal, the Court of Appeal in dismissing the appeal held inter alia that the lease agreement comes within the scope of section 20 of AJA and it is therefore null and void.

The Doctrinal Guidance

Even though section 10 of AJA provides the doctrinal basis for enforceability of arbitration clause in charter party bills of lading, there are however more fundamental doctrinal basis for enforceability of such clause which prior and subsequent decisions that overruled *MV Panormos Bay* and *LAC* decisions did not take cognizance of. To that extent, *MV Panormos Bay* and *LAC* decisions do not represent the law in Nigeria going by the doctrine of stare decisis.[10] Before the two cases, the Supreme Court in *Owners of MV Lupex v Nigerian Overseas* Chattering *and Shipping Company* (*MV Lupex),*[11] in enforcing arbitration clause in charter party bill of lading which seat of arbitration was London held that 'the court should not be seen to encourage the breach of a valid arbitration agreement particularly if it has international flavor.'[12]

Subsequently, on 27 June 2010, the Court of Appeal in *Onward Ent Ltd v MV 'Matrix'*[13] (*Onward case*) expressly overruled *MV Panormos.* In *Onward* case, clause 40 of the charter party is governed by English law and referenced to arbitration in London. The Court held that 'where parties have agreed to refer their dispute to arbitration in a contract, it behoves the court to lean towards ordering a stay of proceedings. Thus, stay of proceedings could be granted pending reference to arbitration in a foreign country in deserving cases.'[14] What is quite instructive in *Onward* is that the Court opines that the doctrine of *stare decisis* was not applied in *MV*

[7] Ibid 15, para C.

[8] Ibid 13, para C.

[9] Ibid pp 13, para E, 14 para E-F.

[10] This doctrine is paramount in Nigerian jurisprudence because it guarantees certainty and predictability to law and demands that judges of subordinate courts are bound to follow decisions of Supreme Court where facts are similar. See *NIWA v SPDCN Ltd* [2020] 16 NWLR (Pt 1749) 165,166.

[11] [2003]15 NWLR (Pt 844) 469.

[12] Ibid 475.

[13] [2010] 2 NWLR (Pt 1179).

[14] Ibid 540.

Panormos Bay since the court ought to be bound by the earlier Supreme Court's decision in *MV Lupex Bay* briefly discussed above.

Apart from *Onward* that barely mentioned the provision of section 10 of AJA as exception to the applicability of section of 20 of AJA, both *MV Lupex* and *Onward* did not provide any further doctrinal guidance to rationalize the enforceability of arbitration clause in charter party bill of lading or arbitration clause in other standard forms. In the light of the foregoing, this article seizes the opportunity to provide the necessary doctrinal guidance in determining the question of validity arbitration clause in charter party bill of lading, the law that should apply in making that determination and the incorporation by reference principle.

(In)validity of Arbitration Clause in Charter Party Bill of Lading

The *MV Panormos Bay* Court's reliance on section 20 of AJA in determining the validity or enforceability of the arbitration clause is inconsistent with the framework which the New York Convention establishes. The Convention provides that arbitration agreement shall be enforced compulsorily except it is 'null and void', 'inoperative' and 'incapable of being performed.' In other words, the Convention obligates State parties not to recognize invalid arbitration agreement. However, neither the Convention nor arbitration laws including the Nigerian ACA provide a clue as to how to interpret these words. Notwithstanding, invalidity of arbitration agreement should be interpreted strictly and upheld by national courts in patent cases only. For example, arbitration agreement may be construed as 'null and void' under variety of scenarios. This include where there is lack of consent to arbitrate the dispute or where the consent was obtained by fraud, misrepresentation, mistake, duress and undue influence which words are classified as vitiating elements under the general principles of contract law.[15]

'Inoperative' arbitration agreement deals with cases where arbitration agreement has ceased to be in existence on grounds of abandonment, revocation, waiver etc. The words 'incapable of being performed' would cover cases where the arbitration clause is vague or inconsistent with the intention of the parties. Typical example is where parties' arbitration clause fails to designate arbitrator(s) or appointing authority or where parties operating under mutual mistake designate a nonexistent or uncooperative arbitrator or appointing authority. The foregoing notwithstanding, national courts[16] have shown 'pro-enforcement-bias' to such ambiguous arbitration clauses.
In sum, the arbitration clause in *MV Panormos Bay* does not come within the purview of invalid arbitration clauses discussed above.

The Applicable Law

Again, the New York Convention article II (3) and Model Law article 8 do not indicate under which law the issue of nullity, inoperativeness or incapability of the arbitration agreement is to be determined. However, an 'international choice of law'[17] under the Convention article V (I) (a) as applicable to award is usually applied by analogy in determining the validity of arbitration agreement in most national courts. This choice of law rule is 'the law to which the parties have subjected [the agreement] or, failing any indication thereon, under the law of the country where the award was made.'[18] Contrary approach or interpretation absent parties' agreement on applicable law would subject arbitration agreement and award to different choice of law rule which as a matter of would be inconsistent with the objective of the Convention. In the absence of parties' agreement, the law that should apply in determining the validity of the arbitration agreement is the law of the place of arbitration. Most of the times however there is the tendency for the enforcing forum to apply its own domestic arbitration law which was neither agreed by the parties nor which law have strong connection with the parties and the contract.

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[15] GB Born, 'The New York Convention: A Self Executing Treaty' (2018) 40 (1) *MJIL* 121,122; TE Carbonneau, 'American & other National Variations of the Theme of International Commercial Arbitration' (1988) 8 *GA J Int'l & Comp L* 165. See also E Onyema, 'The Doctrine of Separability under Nigerian Law' (2009) 1 (1) *AJBPCL* 73; DA Zeft, 'The Applicability of State of International Arbitration Statutes and the Absence of Significant Preemption Concerns' (1997) 22 (3) *NCJILCR* 742.

[16] *SA & Ind Co Ltd v Ministry of Finance Incorp* SA [2014] 10 NWLR (Pt 1416) 519. See the American case of *Laboratories Grossman SA v Forest Labs Inc* 295 NYS 2d 756,757 (NY App Div 1968); *In re HZI Research Ctr v Sun Instruments Japan Co,* WL 562181 (SDYN 20 Sept 1995); *Astra Footwear Indus v Harwyn Int'l, Inc,* 442 F Supp 907,910-11 (SDNY 11 Jan 1978); *Travelport Glob Distrib Sys BV v Bellview Airlines Ltd,* 2012 WL 3925856 at 1 (SDNY 12 Sept 2012); *Warnes SA v Harvic Int'l Ltd,* 1993 WL 228028 (SDNY 22 June 1993). See also the English case of *Chalbury MccOuat International Ltd v PG Foils Ltd*; *China Agribusiness Development Corp v Balli Trading* [1998] 2 Lloyd's Law Rep 76 (English High Court). See Morten Frank, 'Interpretation of Pathological Arbitration Agreements: Non existing and Inaccessible Elements' [2020] (20) (3) *Pepperdine Dispute Resolution Law Journal* 309-314.

[17] Born (n 15) 121,122.

[18] Albert Jan van den Berg, 'The New York Convention 1958: An Overview' p 11< https://cdn.arbitration-icca.org/s3fs-public/document/media-document/media012125884227890new-york-convention-of-1958-overview.pdf>accesed 15 April 2023.

Unjustifiable reliance on a country's law in interpreting parties' contract whether from the procedural or substantive point of view is an expression of *lex forism* or 'judicial *lex forism*'[19] which as a matter of fact is a breach of principle of comity and fairness in international commercial relationships. However, what is curios in *MV Panormos Bay* is that there is no issue of conflict of law because clause 7 of the bill of lading expressly provides that 'any dispute arising under this bill of lading shall be referred to arbitration in London.' Therefore, the issue of legality or fairness of the arbitration clause in the charter party bill of lading should have been determined in a British court in accordance with the English law.

Incorporation by Reference Principle

The New York Convention Article II (1) and (2) provides formal and strict requirements in determining the validity of arbitration agreement. It provides that:

1 Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2 The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
3 The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Under Article II (2) above, to qualify as enforceable arbitration agreement/clause, such agreement or clause must be in writing, signed and exchanged between the parties. This stringent requirement is not compatible with modern form of business communication such as arbitration clause in charter party bill of lading.[20] In order to avoid the stringent conditions under Article II (3) of the Convention, arbitration laws of many contracting States[21] provide a broad definition of 'agreement in writing' so as to include arbitration agreements that are incorporated into the main contract (bill of lading) by reference to a charter party or other documents. Majority of other arbitration laws[22] with respect to the meaning or definition of 'agreement in writing' expressly omit the signature and exchange requirement and those laws still meet the writing requirement under their individual national laws even though they fall outside the signature and exchange standard which the Convention Article II (2) provides. Such laws draw this support in the more favourable regime of Article VII (1) of the Convention of which there is an implicit consensus that the regime is applicable to arbitration agreement.[23]

The relevance of the more favorable regime regarding national laws that widen the scope of meaning of 'agreement in writing' under Article II (2) clearly suggests that: 'The genius of the Convention is to have foreseen the evolution of arbitration law. As per its Art. VII, the Convention sets only a minimum standard. States can always be more liberal. By definition, the Convention cannot freeze the development of arbitration law'.[24] The implication is that national court may enforce arbitration agreement on some other considerations

[19] Markus A Petsche, 'International Commercial Arbitration and the Transformation of the Conflict of Laws Theory' (2010) 18 (3) *MSJIL* 463 (classifying *lex forism* into 'judicial *lex forism*' and 'legislative *lex forism*).

[20] Neil Kaplan, 'the Effect: Enforceability of Arbitration Agreement and Arbitral Decisions, New Developments on Written Form' in the Enforcing Arbitration Awards under the New York Convention Experience and Prospects (United Nations Publication) 17. <https://digitallibrary.un.org/record/277902/files/Enforcing_arbitration_awards_under_the_New_York_Convention.pdf>accessed 15 January 2023.

[21] See German Arbitration Act 1998, s 1031 (4); Singapore International Arbitration [Amendment] Act 2009 s 2A (7) & (8); Dutch Code of Civil Procedure- Netherland art 1021; ACA s ; American Federal Arbitration Act (FAA) s 2; Russian Federation Law on International Commercial Arbitration art 7 (6); Egyptian Law on Arbitration 1994, art 10 (3); Indian Arbitration and Conciliation Act (1996), s 7 (5);

[22] See, the Switzerland's Federal Code on Private International Law (Swiss PILA) 1987, art 178 (1).

[23] See United Nations Conference on Trade and Development on Recognition and Enforcement of Arbitral Awards: The New York Convention (UNCTD) p 43<https://unctad.org/system/files/official-document/edmmisc232add37_en.pdf>accesed 24 March 2023; the ICCA Guide (n 2) 26, 27. See also Emmanuel Gaillard and Benjamin Siino 'Enforcement under the New York Convention' in J W Rowley QC, E Gaillard and GE Kaiser (eds), The Guide to Challenging and Enforcing Arbitration Awards (London: Law Business Research Limited 2019) 98; Van den Berg The New York Convention of 1958: An Overview 21.

[24] See Emmanuel Gaillard, 'The Urgency of Not Revising the New York Convention' p 692<

and not necessarily on the basis of strict formal requirements under the Convention. This has a harmonizing effect. It means that the question of whether or not arbitration clause meets the Convention standard shall be determined from the perspective of a more favourable law provision of the State where recognition or enforcement of the clause is sought**.** In other words, the Convention leaves it at the discretion of national court to determine which arbitration agreement it would enforce. For this reason, national courts may enforce arbitration agreement under the following considerations. First, national court may enforce arbitration agreement if it falls within the scope of the definition of what constitutes arbitration agreement (arbitral award) under Article I of the Convention. This by extrapolation because Article 1 of the Convention only defines arbitral award for purposes of the Convention as it does not expressly include arbitration agreement.

Nevertheless, arbitration agreement for purposes of the first sentence of Article 1 may include, arbitration agreement made in the territory of another (foreign) country and not the country where enforcement of the arbitration agreement is being sought. The second sentence of the Convention Article 1 contemplates arbitration agreement made in the territory of the enforcing forum but it is not considered as domestic arbitration agreement under the law of that forum. Third, it may also contemplate arbitration agreement made in the territory of another contracting State assuming the enforcing State has a reciprocity reservation under the Convention.[25] Some line of cases in America has applied some of the foregoing requirements in determining the enforceability of arbitration agreement under the Convention.[26] Second, some other national 'courts reason that the Convention applies if the arbitration agreement is international in nature.'[27]

Nigerian legislature in keeping with the more favourable right provision of Article VII (1) and also for the purposes of determining which arbitration agreement fall within the scope of the Convention has widened the scope of the Convention Article II in two ways. First is by enacting the incorporation by reference provision under section 1 (2) of the ACA. Section 1(2) of AA provides that 'any reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if such contract is in writing and the reference is such as to make the clause part of the contract.' Second, by the provisions of ACA section 57 (2) (b) (i) which provides in relevant part that arbitration is international if: '(b) One of the following places is situated outside the country in which the parties have their places of business- (i) The place of arbitration if such place is determined in, or pursuant to the arbitration agreement'. In other word, where the parties' agreement provides a foreign country such as London or USA as their venue or seat of arbitration, the Nigerian court should defer to the parties' choice of forum for arbitration. This is in recognition of party autonomy and principle of comity. Unfortunately, there is no case law in Nigeria that enforced standard form arbitration clause in charter party bill of lading from point of view of the rationale behind section 1 (2) of ACA and also on the implication of transactions that fall under section 57 (2) (b) (i) of the ACA respectively.

3. Determining Consent to Arbitration Clause in Charter Party Bill of Lading

Aside the foregoing point, the pertinent question to ask is whether there should be any basis for the Court in *MV Panormos Bay* to give consideration to the respondent argument:[28]

> that the clause inserted in the bills of lading were done without any consultation whatsoever with the respondent or its predecessor in title as it is a standard form contract usually lopsided in favour of the carriers, which was not bona fide, as its sole aim is to frustrate legitimate claims having undeserved jurisdictional advantage.

The above question is apposite for the following reasons. First, the recognition of arbitration agreement under the ACA is founded under section 1 (2) and this provision is more favourable and less stringent than the formal requirements found in Article II (2) of the Convention. Second, the international nature of the transaction in *MV Panormos Bay* is captured under section 57 (2) (b) (i) of ACA so as to make the ACA relevant in determining

9 https://www.shearman.com/~/media/Files/NewsInsights/Publications/2009/06/The-Urgency-of-Not-Revising-the-New-York-Convent__/Files/View-full-article-The-Urgency-of-Not-Revising-th__/FileAttachment/IA052611UrgencyofNotRevisingNewYorkConvention.pdf>accessed 9 May 2023.

[25] See UNCTD (24) 17. The reciprocity reservation is fast becoming less significance with the increasing number of States who are joining the Convention membership.

[26] See *Smith/Enron Cogeneration Ltd. Partnership, Inc. v. Smith Cogeneration International Inc* 198 F.3d 88, 92 (2d Cir. 1999); *Lo v. Aetna International, Inc.,* No. 3:99CVI95JBA**,** 2000 WL 565465**,** at *3-4 (D**.** Conn. Mar. 29, 2000) these cases are discussed in SI Strong 'What Constitutes an 'Agreement in Writing' in International Commercial Arbitration? Conflicts between the New York Convention and the Federal Arbitration Act' [2012] (48) 47 *Stanford Journal of International Law* 68**.**

[27] ICCA Guide (n 2) 23, 24.

[28] LAC (n 4) 55.

the validity of arbitration clause in charter party bill of lading both from the formal substantive requirement under section 1 (2) and the procedural point of view under section 57 (2) (b) (i) as the case may be.

The foregoing notwithstanding, it needs to be stated more clearly that the strongest evidence of lack of consent or agreement to arbitrate is where a party alleges that he was never part of or has any benefit in the underlying contract. Where there is no such evidence: 'The term non-signatory remains useful for what might be called 'less than obvious parties' parties to an arbitration clause: individuals and entities that never put pen to paper but still should be part of the arbitration under the circumstances of the relevant business relationship'.[29] So if cargo owner accepts there was a contract of carriage of goods between himself and the charterer/shipper, he should be deemed to have also consented to the applicable law including the choice of arbitral seat mentioned in the charter party bill of lading. Such is the meaning, effect and nature of bill of lading particularly where it contains arbitration agreement/clause that is incorporated into the bill of lading by reference to a charter party.

The foregoing position is predicated on the principles of separability and Kompetenz-Kompetenz. The separability principle basically posits that arbitration clause is distinct from the main contract. By separating arbitration agreement from the main contract which parties could no longer consummate because of breach or dispute which has arisen between the parties, the separability principle would then enable the arbitral tribunal to determine its competence over the dispute and to also determine the merit of the dispute if it finds the arbitration clause valid and enforceable. Instead, the Court in *MV Panormos Bay* even though it was in order but it nevertheless gave a rather restrictive interpretation of the meaning and nature of bill of lading which according to the Court:

> Is evidence of a contract between the shippers and the ship owners on one hand and between the ship owners and the consignee or endorsee of the goods covered by the bill on the other hand. It is usually made in out in favour of the shippers or their assigns, and when endorsed in blank by shippers it passes goods covered by it by mere delivery. Thus, once endorsed for value to a bona fide third party, it becomes conclusive evidence of the agreement parties. In the instant case, as the respondent is a bona fide endorsee for value of the bills in question, the bills are conclusive evidence of the agreement or contract between the parties.

The court should have widened the meaning and nature of bill of lading by way of recognizing the separability of the arbitration clause from the main contract both of which are contained in the main contract which is the charter party bill of lading. Advanced jurisdictions recognize the separability principle in any contractual document that contains arbitration clause as a matter of routine standard practice. Beyond the separability principle, civilized and advanced jurisdictions invariably determine the validity or enforceability of arbitration clause in charter party bill of lading from point of view of the manner or form of the incorporation. English courts for example invariably insist on specific or concise word that refers to arbitration and not a general clause that is presumed to also include arbitration clause. Where reference to arbitration clause in charter party bill of lading is in general form, the court will not enforce such clause.[30]

In *Thomas v Portsea Steamship co ltd*[31] endorsee of bill lading applied for stay of proceedings against an action for demurrage brought against them by the ship owners. They relied on two paragraphs in the bill of lading that contained arbitration clause made in general terms and also made pursuant to a charter party. The first paragraph states that cargo shall be delivered to 'William Malcolm Mackay or his assigns, he or they paying freight for the said goods with other conditions as per charter-party with average accustomed.' The second paragraph provides that 'deck load at shipper's risk, and all other terms and conditions and exceptions of the charter to be as per charter-party, including negligence clause.' The court in declining to enforce the purported arbitration agreement held that only specific or precise words can bring arbitration clause into the bill of lading. Also in *Federal Bulk Carriers v C Ito and co (The Federal Bulker)*[32] Lord Justice Bingham refused to enforce arbitration clause in general or omnibus form and the learned Justice rationalized his position by pointing out that:

> Generally speaking, the English law of contract has taken a benevolent view of the use of general words to incorporate by reference standard terms to be found elsewhere. But in the

[29] William W Park, 'Non-Signatories and International Contracts: An Arbitrators Dilemma' 6 <https://cdn.arbitration-icca.org/s3fs-public/document/media_document/media012571271340940park_joining_non-signatories.pdf>accessed 29 March 2023.

[30] The justification for this could be that a specific reference makes it easier for endorsee of bill of lading to be aware of the arbitration agreement and also be able to read through it as he ought to know as a sophisticated business person that bill of lading invariably contain arbitration clause.

[31] (1911) UKHL 628< https://www.casemine.com/judgement/uk/5a8ff8c860d03e7f57ecd556>accessed 29 December 2022.

[32] (1989) 1 Lloyd's Rep 103< https://vlex.co.uk/vid/federal-bulk-carriers-inc-793691417>accessed 30 December 2022.

> present field a different, and stricter, rule has developed, especially where the incorporation of arbitration is concerned. The reason no doubt is that a bill of lading is a negotiable commercial instrument and may come into the hands of a foreign party with no knowledge and no ready means of knowledge of the terms of the charter-party. The cases show that a strict test of incorporation having, for better or worse, been laid down, the courts have in general defended this rule with some tenacity in the interests of commercial certainty. If commercial parties do not like the English rule, they can meet the difficulty by spelling out the arbitration provision in the bill of lading and not relying on general words to achieve incorporation.

4. Conclusion

Even though Nigeria court enforces arbitration clause in charter party bill of lading and there are in fact subsequent decisions such as *Onward* that expressly overruled the earlier *per incuriam* opinions in *MV Panormos* and *LAC*, those decisions have done that not by developing a thorough framework of analysis but by array of practical adaptations to the accepted understanding related to the practice of international commercial arbitration. This article concludes that Nigerian courts have developed an appropriately compound body of case law that produces excellent results but the courts have failed to provide enough doctrinal guidance in doing so. This varying series of judicial analysis robs Nigeria of a policy objective that ordinarily would have been achievable by means of a comprehensive framework that promotes precision, consistency and workability. It is believed that this article has performed that task and to that extent filled the lacuna at common law.