

CAPE TOWN CONVENTION LEGAL ACTIVITY ANALYSIS¹

Produced by the Legal Advisory Panel to the Aviation Working Group

Reference: Nigeria, case 1 [2017]		
Date of Judgment:	29 March 2017	
Case:	First Nation Airways (SS) Limited v. Castle 2003-1A LLC Castle 2003-2A LLC Aercap Holdings N.V. Nigerian Civil Aviation Authority Federal Airport Authority	
Relevant CTC/Protocol (IR Rules & Procedures)	Article 42	IR Rules and Procedures None
Relevant CTC Jurisdictions	Nigeria, England	
CTC Facts, Conclusions and Analysis		

¹ Unless otherwise indicated, Articles references in Arabic numerals are to those the Convention on International Interests in Mobile Equipment (**Convention**), and in Roman numerals are to those on the Protocol on Matters Specific to Aircraft Objects (**Protocol**). The Convention, as modified by the Protocol, is referred to as **CTC**.

I. Facts:

1. First Nation Airways (**'First Nation'**) entered into two leases with two Nigerian LLCs Castle 2001-A LLC and Castle 2003 – 2A LLC (the **'Lessors'**) who are affiliates of AerCap Holdings N.V. (**'AerCap'**) under which they leased a total of three aircraft to First Nation, a Nigerian airline, as lessee in November, 2012.
2. In 2016, First Nation, as plaintiff, filed suit, making claims connected to the leases, against Lessors, AerCap, the Nigerian Civil Aviation Authority, and the Federal Airport Authority, as defendants, before the Federal High Court Holden at Lagos, Nigeria (the **'Court'**).
3. On October 14, 2016, Lessors and AerCap (the **'Applicants'**), as defendants, filed a motion requesting an order to dismiss the suit for want of jurisdiction. This Analysis concerns the disposition of that motion to dismiss. The basis of the motion was that under each of the leases, Lessors and First Nation chose the laws of England to govern the leases and chose the jurisdiction of the High Court of England as the exclusive forum for determination of any dispute arising under the leases, and the claim of First Nation was such a dispute. The Court summarized the additional ground for the motion that Lessors 'cited Article 42 of the Cape Town Convention and argued that the Courts of a [C]ontracting State chosen by the parties to a transaction, such as the one in this suit, have exclusive jurisdiction in respect of any claim brought under Convention except the parties agreed otherwise, which is not the case in this matter.'
4. The Nigerian Civil Aviation Authority and the Federal Airport Authority did not make any filings in the case according to the ruling. The Court said that an action was being prepared by Lessors to file in the Courts of England, and, upon hearing this, First Nation had rushed to file the suit in this case with the Court before an action could be brought in England.
5. The existence and formal validity of the leases and the agreement to submit to the English courts as an exclusive forum for disputes were not disputed.
6. First Nation opposed the motion on the grounds that the Court properly had jurisdiction.

II. Conclusions:

7. The Court considered the arguments of the parties described in more detail below and ruled against the Applicants' motion to dismiss.
8. First Nation contended that the jurisdiction of the Court is competent for the following reasons: (i) the aircraft subject to the leases are registered and operated in Nigeria and subject to Nigerian regulations; (ii) most of the witnesses of First Nation are based in Nigeria and are without valid visas, which makes the Court more convenient and less costly as a venue; (iii) section 20 of the Admiralty Jurisdiction Act of Nigeria (enacted in 2004) provides that all agreements which seek to oust the jurisdiction shall be null and void; and (iv) the existence of acute foreign exchange controls in Nigeria prevents First Nation from raising funds and inhibits their ability to retain legal representation abroad.

9. Lessors argued that (i) the Convention has been domesticated and as such has the status of law in Nigeria; (ii) the Admiralty Jurisdiction Act and the case law presented by First Nation are prior to the ratification of the Convention and thus do not apply; and (iii) Nigerian case law indicates that in case of a conflict between a convention and an internal law, the Convention prevails.
10. The Court concluded that where the parties to an agreement agree to refer their disputes to a foreign court, the agreement ought to be enforced and a stay should be granted, unless a 'strong cause' is shown. The 'strong cause' exemption grants the court discretion to enforce the agreement. The Court decided that the burden of proof to show a 'strong cause' is on the plaintiff (First Nation).
11. The Court reviewed the particular circumstances of the case that should be taken into account to consider whether there is a 'strong cause' exemption whereby the Court would not enforce the choice of a foreign jurisdiction. In particular, the Court considered: (i) in what country is the evidence located, and more readily available and the importance that relative convenience and expense has; (ii) whether local law differs from the agreed law, and to what material extent; (iii) how closely parties are connected to either country; (iv) whether the defendant is only seeking to have a trial in a foreign country for procedural advantages; and (v) whether the plaintiff would be prejudiced by having to sue in the foreign court because it would: (w) be deprived of security for that claim, (x) be unable to enforce a judgement, (y) face a time bar not applicable under local laws, or (z) likely get an unfair trial for political, racial, religious or other reasons.
12. The Court stated that this test was established in the English cases and that it had been previously applied by the Nigerian Supreme Court.
13. The Court dismissed all of First Nation's arguments as to what circumstances in this case would constitute a 'strong cause' and ruled that the circumstance of the acute foreign exchange restraints, of which it took judicial notice as no proof had been submitted, did constitute 'strong cause'. The Court held that the existence of acute foreign exchange constraints which inhibit First Nation's ability to retain legal representation abroad constitute a strong cause not to uphold the choice of jurisdiction set forth in the Agreement and on that basis ruled against the motion to dismiss.

III. Analysis:

14. **[Timing of the Case]**
The motion was decided in 5 months and 15 days.
15. **[Court does not enforce the express terms of the Cape Town Convention]**
The Court did not enforce the choice of forum set by the parties in the leases despite recognizing that the Convention and Article 42 is effective and enforceable in Nigeria. The Convention does not grant a "strong cause" exemption to permit a court to use its discretion to decide it may accept jurisdiction. This undermines the Convention, which has been ratified and incorporated as the law in Nigeria.
16. **[Court references to the law applicable in English courts or in the Nigerian courts as to choice of forum are not relevant to the Convention analysis]**
The Court refers to limitations on how English courts would have declined to enforce foreign choice of forum provisions in some cases and describes Nigerian cases that would be similar. This is the basis on which the Court decided that it had discretion as to whether or not to apply the Convention Article 42 choice of forum provisions in the leases. English cases should not be relevant just because the Courts of England were the chosen forum

nor should the Nigerian law be relevant. This is because the Convention principle of the choice of forum under Article 42 being effective is itself *sui generis* and becomes the applicable law for a transaction to which the Convention and the Protocol apply when the Convention and the Protocol entered into force in Nigeria. The Official Commentary states that Article 42 ‘overrides contrary national law’ (para 4.282, 3rd Edition).

17. **[Exclusive choice of courts of a Contracting State to have jurisdiction precludes courts of other Contracting States from accepting or asserting jurisdiction. The Court ignored that principle]**

Article 42 embodies the general principle of party autonomy in determining the applicable jurisdiction. The Official Commentary on the Convention points out the power of that autonomy and the language of Article 42 in regard to a choice by the parties that the courts of a Contracting State have exclusive jurisdiction in respect of a claim brought under the Convention: ‘when exclusive, the provision precludes courts of other Contracting States from accepting or asserting jurisdiction’ (para 4.280, 3rd Edition).

18. **[Contrary to the Court’s ruling, Article 42 is not discretionary and expressly applies even if the chosen forum has no connection with the parties or the transaction]**

The Court errs in considering the connections the parties have to the chosen forum or the lack thereof and the lack of availability of funds to attend or have counsel in such forum. Article 42 establishes that other connections of the parties to the forum are not relevant. It provides that the choice of forum will be upheld ‘whether or not the chosen forum has a connection with the parties or the transaction’. The Court is violating the provisions of the Convention when it concludes that Article 42 is not and is discretionary.

19. **[Article 42 Choice of Forum is fundamental to the Convention and the Protocol]**

The ability to make a choice of forum under Article 42 that the parties know is predictable and can interpret the governing law chosen for the agreement is fundamental to the Convention and the Protocol and enables the basic purposes of the Convention to be met. These purposes include in the Preamble to the Convention the purpose to ensure that ‘the interests in such equipment are recognized and protected universally’. More particularly, under Article 5(1) of the Convention in the interpretation of the Convention ‘regard is to be had to its purposes... and to the need to promote uniformity and predictability in its application.’ The exclusive choice of forum is an element of reaching uniformity and predictability as described above.

20. **[England was not a Contracting State at conclusion of lease and Article 42 of the Convention did not apply to the choice of forum]**

On the grounds of a Convention analysis only (and not as to Nigerian and English law), the Court could have denied the motion to dismiss. Per the quote of the Court’s text in paragraph 3 in this Analysis, and as Article 42 reads, ‘the courts of a Contracting State chosen by the parties to a transaction have jurisdiction in respect of any claim brought under this Convention’. However, England was not yet a Contracting State when it was chosen in 2012, and the Convention is applicable to the choice of forum. As the Official Commentary (para 4.283, 3rd Edition) states, ‘the Convention does not, of course, deal with the conferment of jurisdiction on the courts of a non-Contracting State.’