CASE REVIEW: ARE WINDING UP PETITIONS SUBJECT TO FOREIGN JURISDICTION CLAUSES? - RRSAT v. DAAR COMMUNICATIONS PLC

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Introduction

The Federal High Court Lagos ("FHC"), delivered a ruling in *Suit No.: FHC/L/CP/540/2012 RRSAT Global Communications Networks Limited v Daar Communications Plc,* affirming its jurisdiction to hear a petition for the winding up of a company despite a clause in the parties' agreement to submit disputes between the parties to a foreign court.

The facts of the case

RRSAT Global Communications Network Limited ("RRSAT"), an Israeli company entered into three separate service agreements ("the Service Agreements") with Daar Communications Plc ("Daar"), for the provision of uplink services in connection with Daar's channel, to various satellites.

Under the Service Agreements, the parties agreed that "*...the agreement shall be governed by the laws of Israel and the competent courts of Tel Aviv, Israel, shall have sole jurisdiction over any dispute arising out of the agreement.*"

Upon the failure of Daar to meet its payment obligations for services rendered under the Service Agreements, RRSAT filed a Winding Up Petition ("the Petition") against Daar under section 408 (d) of the Companies and Allied Matters Act Chapter C20, Laws of the Federation of Nigeria 2004 ("CAMA"). In response, Daar filed a notice of preliminary objection challenging the jurisdiction of the FHC to hear and determine the Petition given the existence of the foreign jurisdiction clause in the Service Agreements.

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Parties' arguments

Daar's objection was premised on the effect of the foreign jurisdiction clause in the Service Agreements. Daar argued that given the said clause, (i) the Service Agreements were subject to the laws of Israel which regulate or govern the dispute between the parties; and (ii) only the courts of Tel Aviv, Israel could exercise jurisdiction on any dispute arising from the Service Agreements. Daar submitted that since the laws of Israel have not been adopted wholly or in part in Nigeria, an attempt to apply Israeli laws in Nigeria would be an affront on the sovereignty of Nigeria and should be resisted by the FHC.

On its part, RRSAT argued that based on the relevant provisions of CAMA, the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and the Companies Winding Up Rules, the FHC has the exclusive jurisdiction to hear a petition for the winding up of a company incorporated in Nigeria. Therefore, RRSAT could only validly commence winding up proceedings against Daar (a company incorporated in Nigeria) at the FHC. Given the mandatory and exclusive jurisdiction conferred on the FHC, the parties could not by agreement, confer jurisdiction on a foreign court to wind up Daar, or otherwise, divest the FHC of its power to hear the Petition.

RRSAT argued in the alternative that the Service Agreements only contemplate that the competent courts of Tel-Aviv, Israel would only have jurisdiction over conflicts or disputes arising therefrom. However, there was no dispute between the parties because Daar had unequivocally admitted the debt and just pleaded for more time to pay. Thus, the courts in Israel did not have jurisdiction to hear the Petition.

The ruling of the FHC

While acknowledging the sanctity of contracts and the duty of the court to interpret contracts within their clear meanings as expressed, the FHC agreed with RRSAT that a company incorporated in Nigeria could only be wound up in Nigeria. The court based its decision on the fact that parties were ad idem on the status of Daar (being a Nigerian company). The FHC took the view that although parties are free to adopt a

foreign jurisdiction clause, and the court is bound to give effect to it, the court must be satisfied that such choice is genuine and reasonable.

The FHC held that since Daar is a company incorporated under the laws of Nigeria and is bound by Nigeria's insolvency laws, the FHC remains clothed with jurisdiction to hear the Petition and could apply Nigerian laws in determining the Petition, despite the foreign jurisdiction clause in the Service Agreements.

Comments

Daar has appealed against the ruling at the Court of Appeal, Lagos.

However, unless the Ruling is subsequently set aside by an appellate court, it confirms the willingness of Nigerian courts to assume jurisdiction on certain matters arising from a contract notwithstanding the presence of a foreign jurisdiction clause in the contract.

Of note, is RRSAT's argument that there was no dispute which could operate to divest the FHC of jurisdiction and clothe the Israeli courts with jurisdiction in its stead, given the fact that Daar had admitted its indebtedness to RRSAT? Although it appears that this argument did not form the foundation of the FHC's Ruling, one could argue that the argument presents a fool-proof basis for the FHC's Ruling. Another basis for the FHC Ruling could also be that it smacks of an unconscionable act, for Daar to attempt to avoid its undisputed payment obligation under the Service Agreements by asserting that the FHC had no jurisdiction to determine the case.

The Ruling further reinforces the position that the FHC has the exclusive jurisdiction to hear and determine winding up petitions brought against a company which is incorporated in Nigeria. The parties cannot, by their agreement, consent to divest the FHC of its jurisdiction to hear winding-up petitions.

The FHC's Ruling also demonstrates that winding up proceedings are *sui generis* (*i.e.* in a class of their own), and differ from debt recovery proceedings. In a Winding Up proceeding, the creditor is exercising its right under a statute to wind up a debtor company based on its inability to pay its debt.

The intention of instituting a winding up proceeding is to terminate the existence of the company. A debt recovery proceeding, on the other hand, is merely based on a contractual right to recover debts owed under an agreement and does not terminate the existence of the company.

Therefore, irrespective of the agreement of parties, a Nigerian company can only be wound up in Nigeria, whereas debt recovery proceedings or any other proceedings arising out of the contract may be determined in accordance with the parties' agreed choice of jurisdiction.

Conclusion

The decision may be beneficial for creditors (Nigerian or foreign) of Nigerian companies who have agreed to a foreign jurisdiction clause for dispute resolution. In spite of such foreign jurisdiction clause, the creditors can present a Winding Up Petition against a Nigerian company who failed to pay its debts of at least ₦2,000 despite having received a letter of demand written under the hand of the creditor. If the Winding Up proceeding is successful, the debtor company will cease to exist.

Since a foreign court cannot determine a Winding Up Petition, a Nigerian company cannot object to the winding up proceedings by merely relying on the foreign jurisdiction clause in its agreement.

Nonetheless, the learning point for foreign creditors from the FHC Ruling, would be the need for them to thoughtfully select the jurisdiction to determine disputes arising from the agreement and not mindlessly select such foreign creditors' jurisdiction merely because they are in a stronger bargaining position to do so.

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