

**SUPREME COURT OF NIGERIA**

10TH DECEMBER, 2010. SC. 116/2002

**CORAM:- M. MOHAMMED, C. M. CHUKWUMA-ENEH,  
J. A. FABIYI, O. O. ADEKEYE, B. RHODES-VIVOUR, JJSC**

JFS INVESTMENT LTD. ----- APPELLANT  
AND  
1. BRAWAL LINE LTD.  
2. OWNER & CHARTER OF  
MV. NDONI RIVER ----- RESPONDENTS  
3. MV. NDONI RIVER

---

APPEALS - Issues raised - Failure to relate to grounds - Whether fatal - Where briefs are properly filed and issues raised are not incompetent - The court will overlook such failure - In the process of doing substantial justice (H1)

PRACTICE & PROCEDURE - Application for demurrer - Reliance on exhibits - Propriety of - Where the exhibits have already been pleaded by plaintiff - Before being exhibited by defendants - It is proper for court to rely thereon (H2)

CARRIAGE OF GOODS BY SEA - Inward shipments - Hague Rules 1924 - Applicability - Basis - It applies to contracts of shipment into Nigeria - By virtue of incorporation in a clause - Not as a matter of statute (H3)

CONTRACTS - Bills of lading - Terms - Applicability - Application of the terms of Hague Rules 1924 to this case is proper - As it is in accordance with the terms of the bills of lading - Being a contract between the parties (H4)

ADMIRALTY - Foreign jurisdictional clause - Binding nature of - Admiralty Jurisdiction Act 1991 - By virtue of the provisions of the Act - Element of courts discretion in deciding whether to uphold such clause - Has been removed (H5)

CONTRACTS - Carriage of goods - Hague Rules 1924 - Effect of

application - Where its provisions are applicable in a transaction - Parties are not permitted to contract out of the obligations imposed (H6)

ACTIONS - Admiralty - Hague Rules 1924 - Limitation period - Article 3 rule 6 of the convention discharges the carrier and the ship - From all liability after one year - From delivery of goods or the agreed date of delivery (H7)

CONSTITUTIONAL LAW - Treaties - Domestic application - S. 12 of 1979 Constitution - Where a treaty qualifies as an existing law under the 1979 Constitution - It does not require further ratification - To apply domestically (H8)

### **FACTS**

The plaintiff/appellant sued the defendants/respondents at the Federal High Court Lagos claiming over DM50,000. (fifty thousand Dutch Marks) as damages for breach of contract of carriage of goods. It was the appellant's case that out of the total cargo of iodised sodium chloride which respondents were to have carried for him from Hamburg, Germany to Lagos, Nigeria, 62 pallets were landed short and 30 pallets were landed damaged. In its particulars of claim, appellant pleaded and relied on two bills of lading - L545 and L546 - though it did not exhibit them. In reaction to the suit, the 2nd and 3rd respondents, in reliance on Order 27 of the Federal High Court Civil Procedure Rules 1976, filed a demurrer application contending that the suit should be dismissed as time-barred. The bills of lading already pleaded by appellant were exhibited on the demurrer application.

From the documents before the court at the hearing of the demurrer application, there was evidence that appellant had knowledge of the short landing and the damage of its cargo by 24th September, 1992 but did not initiate its suit until 24th February, 1995 - two years after. The learned trial judge upheld the application and dismissed the suit as being time-barred. In coming to that conclusion, the judge had relied on the contents of the bills of lading exhibited on the application as well as on the provisions of the Carriage of Goods by Sea Act, Cap 44, Laws of the Federation of Nigeria, 1990. Aggrieved,

appellant appealed to the Court of Appeal contending that the trial court erred in relying on the exhibits. 1st respondent also filed a respondent's notice contending that the trial court ought to have relied on the provisions of the Hague Rules 1924 instead of the Carriage of Goods by Sea Act. Court of Appeal upheld the ruling of the trial court though it held that the applicable law was the Hague Rules. Still dissatisfied, appellant has come on a further and final appeal to the Supreme Court.

### **ISSUES FOR DETERMINATION**

(1) Whether the reliance on documentary evidence (the bills of lading) pleaded in the statement of claim annexed to the Motion on Notice is permissible under Order 27 Federal High Court (Civil Procedure Rules) 1976.

(2) Whether the Court of Appeal in a proper consideration of Clause 2 of the bill of lading ought to have directed a determination of the applicable enactment in the country of shipment (Germany).

(3) Whether the Court of Appeal ought to have resorted to "Hague Rules 1924" to determine the period of limitation applicable in this suit.

**HELD** (Unanimously dismissing the appeal per **ADEKEYE JSC**)

### ***Issues raised - Failure to relate to grounds - Whether fatal***

1. It is apparent that the core issue in the objection is failure of the appellant to relate each of the issues to the grounds of appeal it has formulated from in the amended Notice of appeal and not that the issues were not predicated on the grounds of appeal. The objection is clearly not against the competency of the issues. Though there is no known rule of court to support this practice, it is put in place and followed religiously by counsel for ease of reference. Where briefs are properly filed and the appeal is ripe for hearing, the issues are not incompetent, in the process of doing substantial justice, the court shall not hesitate to bend backwards to glean through the grounds of appeal and marry them with issues raised for determination in the briefs. After all, briefs of parties and the issues raised therein are meant to assist the court in quickly identifying the issues in controversy between the parties. The trend in the courts nowadays is to do substantial justice and to discourage any short-cuts in advocacy - which is what technicality is all about. (p. 2622 D)

***Application for demurrer - Reliance on exhibits - Propriety of***

2. From the foregoing averments in the pleading, the two bills of lading were already part of the facts in the case before the court through the appellant. Exhibits FA1 and FA2 attached to the affidavit of the respondents in the application for demurrer served as confirmation of the facts as to the existence of these bills of lading in the contract of carriage between the appellant and the respondents. The 2<sup>nd</sup>-3<sup>rd</sup> respondents admitted all the issues raised by the appellant - they did not contest any of them. It would be highly unjustifiable to say that the defendants could not rely on these two bills of lading of common ground to both parties in the transaction of carriage of goods entered into by them, or that the court should not look into facts that are at that stage not disputed by the respondents.

D I find the conclusion of the lower court that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not breach the provision of Order 27 Rule 2 of the Federal High Court (Civil Procedure) Rules, 1976 by relying on the bills of lading Exh. FA1 and FA2 which the appellant had pleaded impeccable - and I equally so hold. (pp. 2628 H/2629 D)

***Inward shipments - Hague Rules 1924 - Applicability - Basis***

3. It is commonly appreciated by the parties that the bill of lading formed the basis of the contract between the parties and The Hague Rules 1924 were incorporated therein - while the contract of carriage is made subject to The Hague Rules 1924. Nigeria adopted The Hague Rules and was incorporated into our domestic law since 1926. By virtue of the carriage of goods by Sea Act which makes The Hague Rules applicable by law to every contract of carriage of goods by sea covered by a bill of lading where the port of shipment is a port within Nigeria. The Hague Rules constitute the schedule to our carriage of goods by sea Act but as a matter of statute, the Rules apply only to outward voyages from a Nigerian port. In the case of inward voyages, The Hague Rules 1924 become applicable as a matter of agreement, usually by virtue of incorporation in a clause, in the Bill of Lading referred to as the clause paramount. (p. 2631 G)

***Bills of lading - Applicability***

4. Clause 2 of each of the bills of lading in the instant appeal provides

that - *“The Hague Rules contained in the international convention for the unification of certain Rules relating to bills of lading dated in Brussels the 25<sup>th</sup> August 1924 as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation in the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said convention shall apply.”* B

Gleaning through the terms of the contract, there is no indication that the enactments of the countries of shipment and destination are compulsorily applicable. This made it possible for the parties to adopt the third option when the suit was filed in Nigeria in 1995. It is however trite law that where parties enter into a contract, they are bound by the terms thereof, and the court will not allow to be read into such contract terms on which there is no agreement. (p. 2632 E) D

***Foreign jurisdictional clause - Binding nature of***

5. I cannot but take judicial notice by virtue of Section 74 of the Evidence Act, Cap 112 Laws of the Federation of Nigeria 1990, that the Admiralty Jurisdiction Act 1991 has virtually removed the element of courts discretion in deciding whether or not to uphold a foreign jurisdictional clause. Section 20 of the Admiralty Jurisdiction Act 1991 thereof provides that- E

(1) 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 the place of performance, execution, delivery, act or default takes place in Nigeria OR F

(2) Any of the parties reside in Nigeria or has resided in Nigeria. OR G

(3) The payment is made or is to be made in Nigeria. OR

(4) Under any convention for the time being in force to which Nigeria is a party. OR

(5) In the opinion of the court, the cause, matter or action should be adjudicated upon in Nigeria. H

In the instant case - the default in the shipment was detected during delivery here in Nigeria. Gleaning through the statement of claim of the appellant, paragraphs one and two show that the parties reside in Nigeria. The law of the contract in the bill of lading is under the Rules for the time

being in force to which Nigeria is a party. (p. 2633 D)

***Carriage of goods - Hague Rules 1924 - Effect of application***

6. What we are called upon to interpret is the contract of carriage of goods by sea between two parties who subjected themselves to the terms of their contract as expressed in their bills of lading, Exhibits FA1 and FA2 before this court. This clause in the bill of lading determines the limitation period during which parties can be sued for negligence in the performance of the contract. The respondents accepted liability for short landing and the loss of part of the goods conveyed in their vessel from Hamburg in Germany to the Lagos Port, Apapa, Nigeria. It was a valid contract entered into by the parties. It is implied that in the transaction for carriage of goods by sea where the Carriage of Goods by Sea Act Cap 44, Laws of Nigeria 1990 applies or The Hague Rules 1924 which is applicable to inward journey to Nigeria - parties are not permitted to contract out of the obligations imposed. (p. 2635 H)

***ACTIONS - Admiralty - Hague Rules 1924 - Limitation period***

7. The relevant clause of The Hague Rules 1924 reads - Article 3 Rule 6 *"In any event, the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery of the goods or the dates when the goods should have been delivered."*

There was no evidence of the date when the goods were delivered as it was not pleaded by the appellant. The appellant pleaded the date which he wrote a letter to the respondent claiming for his loss. This date was put as 14 -1-93. Vide paragraph 9 of the statement of claim - pages 6-9 of the Record. Obviously the appellant got notice of the loss before that time. Going by that date 14 -1-93 and the date it filed an action in court - 24-2-95, is a clear period of 2 years, one month and 10 days. The lower court was right to have dismissed the claim of the appellant for being statute-barred. (p. 2636 C)

***Treaties - Domestic application - S. 12 of 1979 Constitution***

8. It was however argued by the respondents and I absolutely agree that The Hague Rules 1924, being a pre- 1960 Treaty/Convention and therefore an existing law in Nigeria at the time the 1979 Consti-

tution came into force, section 12 (1) of the Constitution cannot operate to affect its application. The reason being that by October 1<sup>st</sup> 1960 at the Nigeria Independence the Government of the Federation assumed all obligations and responsibilities of the colonial regime of the government which arose from valid international instruments such as The Hague Rules, 1924. Nigeria became a party through exchange of letters between Hague, the United Kingdom and the Government of Nigeria on October 1, 1960. The Hague Rules 1924 was extended to Nigeria as a legislation which formed part of our laws before independence, and was received as our laws after independence. It does not require any further ratification as stipulated in Section 12 of the 1979 Constitution before it can be applicable. In other words, The Hague Rules 1924, having assumed the force of law in Nigeria - thereby an existing law must be deemed to be an Act of the National Assembly by virtue of Sections 274(1) and 277 of the 1979 Constitution. (p. 2636 H)

### ***NOTABLE POINTS OF INTEREST***

#### **MOHAMMED JSC**

*1. Trial court was wrong to have relied on the bills of lading*  
It is indeed quite correct as argued by the Appellant in its brief of argument that the trial Federal High Court was in error when it dismissed the Appellant's action for being statute barred not by relying on the Writ of Summons and the Plaintiffs statement of claim alone but also on the two Bills of Lading described as FA1 and FA2 attached to the motion paper. However, it must be pointed out that there were in fact enough facts on the Writ of Summons which was clearly filed on 24<sup>th</sup> February, 1995 and paragraphs 9 (a) and (b) of the statement of claim of the Plaintiff now Appellant, showing that the cause of action arose on or before 14<sup>th</sup> January, 1993 when the Plaintiff/Appellant submitted or notified its claims for short landing of goods and damages, on which the trial Court ought to have determined that the Appellant's action was statute barred. The fact that the trial Court had a glance at the two Bills of Lading before arriving at its decision to dismissed the Appellant's action, had not resulted in any miscarriage of justice to justify disturbing the judgment of the trial Court as found by the Court below. (p. 2639 C)

**RHODES-VIVOURE JSC**

*2. Our limitation laws need reforms*

There has been no reform of limitation Laws in Nigeria. The general  
B limitation period for some actions are too short. Judges should be conferred with discretion to extend limitation periods when it is just and equitable to do so. Actions that readily come to mind are sexual offences and personal injury cases. In sexual abuse cases the victims are usually  
C too traumatized, under intolerable pressure, grief stricken and depressed for long periods. Consequently when they eventually regain their composure it is too late to file action in court because of short limitation periods provided by the Law. This also applies to personal injury cases. Injuries that occur in a Factory. The victim is usually a poor factory worker  
D drawn into endless negotiation by a boss, much aware of the limitation period. Time to file action runs out when the poor factory worker realizes he has been taken for a ride. He has a cause of action but sadly one that cannot be enforced. To my mind reforms are required with an urgency that makes delay an accessory. (p. 2645 E)

**REPRESENTATION**

Mr. B. A. Sodipo with him, N. E. Okonmah for the Appellant.  
Mr. N. I. Quakers with him, Godwin Orji for the 1st Respondents.  
F Mr. Ayo Olurunfemi for the 2nd - 3rd Respondents.

**CASES REFERRED TO**

Industries Ltd. (1994) 4 NWLR (pt. 341) pg. 733 at page 742  
Alegah v. Utin (1996) 7 NWLR (pt. 463) pg. 636 at page 677  
G Leventis Tech. Ltd. v. Petrojessica Ent. Ltd. (1999) 6 NWLR (Pt. 605) 45  
Abacha and Fawehinmi (2000) 6 NWLR (pt. 660) pg. 228 at pg. 288-289  
Ibidapo v. Lufthansa Airlines (1977) 4 NWLR ( pt. 448) pg. 124 at  
H pgs 144-145  
Owoniboy Technical Services Ltd. v. U.B.N. Ltd. (2003) 15 NWLR (pt. 844) pg. 545  
U.A.C. (Nig.) Ltd. v. Global Transport S.A. (1996) 5 NWLR (pt. 448) pg. 291 at 300



Oshevare V. British Caledonian Airways Ltd. (1990) 7 NWLR (pt. 63) pg. 507 at pg. 519

**STATUTES & RULES REFERRED TO**

Carriage of Goods by Sea Act, Cap 44, L.FN; 1990

Evidence Act, Cap 112, L.FN. 1990, s. 74

Admiralty Jurisdiction Act, 1991, S. 20

Constitution of the Federal Republic of Nigeria, 1979, ss. 12, 274 & 227

Hague Rules 1924, Art 3 rule 6

Federal High Court Civil Procedure Rules 1976, Order 27

**LEAD JUDGMENT BY ADEKEYE JSC**

This appeal is against the judgment of the Court of Appeal, Lagos Division delivered on the 10<sup>th</sup> of May, 2000. The appellant, JFS International was the plaintiff in the suit filed at the Federal High Court Lagos.

In its statement of claim, the plaintiff/appellant claimed against the defendants now respondents, Brawal Line Limited, the Owners and Charterers of M.V. Ndoni River and M.V. Ndoni River jointly and severally as follows -

(1) Judgment for the afore-stated amount of DM30,487.40 (thirty thousand, four hundred and eighty-seven Dutch Marks and forty pfennig).

In addition

The sum of N19,980.68 being the duty paid on goods undelivered. Damages for breach of contract and loss suffered. Interest on the said judgment sum from the 16<sup>th</sup> of September, 1994 till judgment thereafter till payment with costs. Vide pages 6-9 of the Record.

The particulars of claim of the plaintiff/appellant on which its case at the Federal High Court was predicated, read as follows: -  
Particulars of Claim

(1) By a bill of lading issued by the defendants (or its agents) for and on behalf of all the defendants contracted to carry on board their vessel M.V. Ndoni River, a cargo of sodium chloride iodised, duly delivered to them in good order and condition at Hamburg Germany from the said port to Lagos/Apapa Nigeria and thereto deliver the same in the like good order and condition to the plaintiff.

(2) The defendant's negligently and or in breach of the said contract and in breach of their duty as bailees did not deliver the goods in good order and condition, but presented some 62 pallets (say 1485 bags) of cargo landed short and some 30 pallets of sodium chloride (IODISED) damaged however.

B (3) The total invoice value of the entire cargo of sodium chloride delivered to the defendant in Hamburg in Germany in good order and condition is DM134,900 and the corresponding of that portion thereof delivered short and damaged in Apapa Lagos is DM30,487.40.

C (4) By reason of the afore-stated premises, the plaintiff has suffered loss and damage.

The plaintiff/appellant amplified on the particulars of claim in the statement of claim where it pleaded and relied on two bills of lading L545 and L546. There was evidence of a contract of carriage of goods between the appellant and the respondents to carry on board the 3<sup>rd</sup> respondent's vessel M.V. Ndoni River, the appellant's cargo of industrial sodium chloride from Hamburg, Germany for delivery at Lagos Port, Apapa. There was evidence that the consignments were short landed and damaged. By the 24<sup>th</sup> of September, 1992, it had received the Nigerian Ports Authority Form 38 being Notice of Cargo Landed damaged. The plaintiff/appellant initiated a suit at the Federal High Court in respect of this loss on the 24<sup>th</sup> of February, 1995 - two years after short landing and loss.

F This prompted the 1<sup>st</sup> respondent, Brawal Line Limited to file a motion on the 7<sup>th</sup> of July, 1995 in this same suit in which it asked the court to dismiss the suit on the ground that it was time-barred. The enabling statute for the application was Order 27 Rules 1 and 2 of the Federal High Court Civil Procedure Rules, 1976. The appellant G filed a counter-affidavit on 31/7/95 to which was attached short landing and discrepancies certificates as exhibits.

The 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not file their statement of defence instead they filed a demurrer application dated the 1<sup>st</sup> of February, 1996 pursuant to Order 27 of the Federal High Court Civil Procedure Rules, 1976. The respondent contended in the application that H the appellant's action should be dismissed on the grounds that the same is time-barred based on the contract of carriage of goods by sea between the parties as contained in the Bills of Lading. The bills of lading were exhibited to the application as Exhibits FA1 and FA2.

Vide pages 27-31 of the Record. The learned trial judge heard the two applications together on 16/4/96 and in his considered Ruling delivered on 5/7/96, dismissed the suit filed by the plaintiff/appellant on the ground that it was time-barred.

The plaintiff/appellant unhappy with the ruling filed an appeal on it on 27/8/96. The 1<sup>st</sup> respondent also filed a respondent's Notice to the effect that the trial court should have relied on the Hague Rules 1924 instead of carriage of goods by sea Act Cap 44, Laws of Nigeria, 1990 for its conclusion that one year time limit applied. The Court of Appeal dismissed the appeal and affirmed the decision of the trial court. The appellant aggrieved by the judgment of the court below further appealed to this court. Parties exchanged briefs. At the hearing of the appeal before this court, the appellant relied on the appellant's brief filed on 4/6/04 and appellant's reply brief to the briefs of argument of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents deemed filed on 12/10/10. The appellant distilled three issues for determination as follows -

(1) Whether the reliance on documentary evidence (the bills of lading) pleaded in the statement of claim annexed to the Motion on Notice is permissible under Order 27 Federal High Court (Civil Procedure Rules) 1976.

(2) Whether the Court of Appeal in a proper consideration of Clause 2 of the bill of lading ought to have directed a determination of the applicable enactment in the country of shipment (Germany).

(3) Whether the Court of Appeal ought to have resorted to "Hague Rules 1924" to determine the period of limitation applicable in this suit.

The 1<sup>st</sup> respondent in the brief filed on 8/6/09 adopted the foregoing issues formulated by the appellant.

The 2<sup>nd</sup>-3<sup>rd</sup> respondents in towing the line of the 1<sup>st</sup> respondent equally adopted the three issues raised for determination in this appeal. The 2<sup>nd</sup>-3<sup>rd</sup> respondents however raised a preliminary objection to this appeal and submitted that the appellant failed to relate its three issues to the specific grounds in the amended Notice of Appeal from which each issue was purportedly formulated. By so doing, this court is left to speculate as to which ground of appeal covers a specific issue for determination. The court is urged to strike out the said

issues.

The appellant by way of reply to the preliminary objection admitted that it inadvertently omitted to relate the issues formulated to the grounds of appeal set out in the amended Notice of Appeal, it contended that the Supreme Court Rules do not stipulate to that effect.

Further that the 2<sup>nd</sup>-3<sup>rd</sup> respondents failed to identify any prejudice or miscarriage of justice suffered as a result of the omission. The arguments on this issue are misconceived and lacking in merit. The appellant cited the case of Dada v. Dosunmu (2006) 18 NWLR (pt. 1010) pg. 134 and urged this court as a court of last resort to exercise its wide discretionary powers under Section 22 of the Supreme Court Act Cap 424 Laws of the Federation of Nigeria 1990 and Order 8 Rule 12 (1) of the Supreme Court Rules 1999 as amended to correct any error or defect in the appellant's brief occasioned by the alleged omission in order to determine the real issues in controversy between the parties.

I have considered the preliminary objection and the submission of counsel. ***It is apparent that the core issue in the objection is failure of the appellant to relate each of the issues to the grounds of appeal it was formulated from in the amended Notice of appeal and not that the issues were not predicated on the grounds of appeal. The objection is clearly not against the competency of the issues. Though there is no known rule of court to support this practice, it is put in place and followed religiously by counsel for ease of reference. Where briefs are properly filed and the appeal is ripe for hearing, the issues are not incompetent, in the process of doing substantial justice, the court shall not hesitate to bend backwards to glean through the grounds of appeal and marry them with issues raised for determination in the briefs. After all, briefs of parties and the issues raised therein are meant to assist the court in quickly identifying the issues in controversy between the parties. The trend in the courts nowadays is to do substantial justice and to discourage any short-cuts in advocacy - which is what technicality is all about.*** This objection is frivolous and it is hereby overruled.

I shall now consider the issues for determination seriatim.

#### Issue One

Whether the reliance on documentary evidence (the bills of lading pleaded in the statement of claim annexed to the motion on Notice) is

permissible under Order 27 Federal High Court (Civil Procedure Rules) 1976.

The appellant's submission on this issue defined demurrer under Order 27 Rules 2 and 3 of the Federal High Court (Civil Procedure Rules) 1976, as meaning that the defendant is taken to have admitted the truth of the plaintiff's allegations in the statement of claim and accordingly no evidence respecting matters of fact and no discussion on questions of fact is allowed. The appellant backed this up with cases which illustrated the application and scope of the plea of demurrer. B

F. I. Onwadike & Co. Ltd. v. Brawal Shipping (Nig.) Ltd. (1996) 1 NWLR (pt. 422) pg. 65 at pages 78-79. C

Nigerbrass Shipping Line Ltd. & Anor v. Aluminium Extrusion Industries Ltd. (1994) 4 NWLR (pt. 341) pg. 733 at page 742.

Alegah v. Utin (1996) 7 NWLR (pt. 463) pg. 636 at page 677.

The appellant submitted that the court below erred in looking at D the two exhibits - the bills of lading annexed to the motion brought pursuant to Order 27 Rule 2 of the Federal High Court Rules, 1976, though the said rule prohibited the court from looking at any other document except the Statement of Claim of the appellant. It was therefore wrong of the court to hold in its judgment that once a document has been pleaded in a statement, it forms part of the pleading and is liable to be construed. The appellant held that contrary to Order 27 Rule 2, the bills of lading were not merely exposing issues of fact and bringing them to the attention of the court - but were used to establish the facts which is the contract of carriage between the parties and the limitation period for commencement of action. Any material put forward in support or proof of pleadings amount to evidence which is not permissible under Order 27 Rule 2. Construing a document is an evaluation of evidence. The appellant urged the court to follow G the case of Boothia Maritime Inc. v. Fareast Mercantile Co. Ltd. and hold that it is not within the province of the two lower courts to rely on the exhibited bills of lading as constituting grounds for bar under Order 27 of the Federal High Court Rules, 1976. The court is urged H to resolve this issue in favour of the appellant.

The 1<sup>st</sup> respondent examined the relevant cases and the paragraphs of the Statement of Claim by the appellant considered by the lower court by coming to the conclusion that the 2<sup>nd</sup>-3<sup>rd</sup> respondents as applicants in the demurrer application, admitted every fact stated

in the plaintiff's claim-but that regardless of that, the appellant has no cause of action. That every document referred to in the statement of claim is incorporated into and forms part of the statement of claim and can be looked at for the purpose of determining the application. It is not all cases that the court cannot look at the documents attached to the application. Where the content of a document is duly pleaded, the court can look at the document if attached to the application. Fourthly and most importantly, the court is bound to take judicial notice of Article 3 Rule 6 of the Hague Rules, as the parties to inward carriage of goods cannot contract out of it. The court is also bound by the provision of the Hague Rules. The 1<sup>st</sup> respondent cited cases -

Nigerbrass Shipping Line Limited v. Aluminium Extrusion Industries Limited (1994) 4 NWLR (pt. 341) pg. 733.

D Fashanu v. Governor Western Region (1955-1956) WRNLR pg. 138.

Shell-B.P. Petroleum Development Co. of Nigeria Limited v. Onasanya (1978) 6 SC pg. 89.

E Boothia Maritime Inc. v. Fareast Mercantile Co. Ltd. (2001) 9 NWLR (pt. 719) pg. 572.

Seatrade v. Fiogret Limited (1987-90) 3 NSCC pg. 453 at pg. 461.

U.A.C. (Nig.) Ltd. v. Global Transport S.A. (1996) 5 NWLR (pt. 448) pg. 291 at pg. 300.

F Caroline v. Nokoy (2002) 10 MJSC at pg.20.

The learned counsel to the 2<sup>nd</sup>-3<sup>rd</sup> respondents while conceding that the recent decisions of the Supreme Court in the cases of Brawal Shipping Ltd. v. F. I. Nwadike & Co. (2000) 2 NWLR (pt. 678) SC at pg. 407 and in Boothia Maritime Inc. v. Fareast Mercantile Co. Ltd. (2001) 9 NWLR (pt. 719) pg. 522 and a host of other decisions in that regard, disallow a defendant from relying on any evidence in a demurrer proceedings, submitted that the appellant's suit was dismissed on the basis of the facts as pleaded in the statement of claim and in accordance with the provision of a binding law and convention (the Hague Rules 1924) The reference by the appellant to the provision of the bill of lading is superfluous. The lower court was right to hold that Nigeria subscribed to the Hague Rules 1924 on the 2<sup>nd</sup> of December, 1930 and the terms of convention remain binding on Nigeria. The learned counsel cited other cases

Ibidapo v. Lufthansa Airlines (1997) 4 NWLR (pt. 498) pg. 124 at pages 144-145.

U.A.C. (Nig.) Ltd. v. Global Transport (1996) 5 NWLR (pt. 448) pg. 291 at pg. 300.

The court is urged by the respondents to resolve this issue in their favour. B

Before I consider the real question for determination in Issue One and having the submission of the learned counsel for the parties at the back of my mind, I regard it necessary to delve briefly into the history, scope and extent of demurrer applications and the attitude of our courts C to the procedure.

Demurrer procedure as embodied in Section 27 of the Old Federal High Court Rules, 1976 was a device used in the Maritime Industry to enable a party to litigation to short-circuit an otherwise, what would have been a lengthy trial, by raising an important defence which D would have the effect of disposing of the case. The practice grew whereby a defendant who is served with a writ immediately filed a demurrer application and the bill of Lading is clipped onto the motion paper without an same, in order to draw attention to the contents of the bill of lading in respect of the claim. The court would E automatically deliver its ruling thereafter. Vide Essays in Nigerian Shipping Law Vol. 2 in the Article entitled Demurrer Applications - The bane of Admiralty proceedings pg. 205 by L. N. Mbanefo.

This procedure has become archaic as it is now scrapped -though F it is still in existence in some States of the Federation like Anambra State. The procedure also referred to as "peremptory defence" is simply an application by the defendant that even if all that is in the statement of claim is true, the action cannot be sustained due to what a particular law or rules says in which case, the defendant does not file a state- G ment of defence but goes on to demur by making an application to strike out or dismiss the plaintiff's action.

The attributes of a demurrer application are as follows -

(1) Application by way of demurrer must be made before issues H are joined in the suit, after filing the statement of claim and before filing the statement of defence.

(2) The defendant shall base his application for a dismissal of the suit on the assumption that all the facts as alleged by the plaintiff in his statement of claim are true, admitted and established.

(3) The applicant is not under the law to contest whether directly or indirectly, the truth or otherwise of such facts pleaded in the statement, neither is he to tender evidence.

(4) It is invoked where the applicant is merely relying on a crucial point of law like locus standi, limitation of action, lack of cause of action etc. in that only the statement of claim will be looked at to decide whether or not the demurrer succeeds. Numerous decisions of court were decided based on the foregoing factors like

B Brawal Shipping (Nig.) Limited v. Onwadike Co. Limited (2000) FWLR (pt. 23) pg. 1254 (2000) 6 SC (pt. 11) pg. 133.

C Williams v. Williams (1995) 2 NWLR (pt. 375) pg. 1 at pg. 17.

Fadase v. Attorney-General of Oyo State (1982) 2 SC 1.

Mofas Shipping Line (Nig.) Limited v. N. M. A. (2000) FWLR S (pt. 23.) pg. 1153CA.

D Global Transport Oceanico S.A. v. Free Enterprises Nig. Limited (2001) FWLR (pt. 40) pg. 1706.

Ege Shipping & Trading Industry Inco v. Tigris International Corporation (1999) 14 NWLR (pt. 637) pg. 70.

Order 27 of the Federal High Court Rules 1926, reads: -

E (1) Where a defendant conceives that he has a good legal or equitable defence to the suit, so that even if the allegations of the plaintiff were admitted or established, yet the plaintiff would not be entitled to any decree against the defendant, he may raise this defence by a motion that the suit be dismissed without any answer upon questions of fact being  
F required from him.

(2) For the purposes of such application, the defendant shall be taken as admitting the truth of the plaintiff's allegations and no evidence respecting the matters of fact and no discussion of questions of fact shall  
G be allowed.

(3) The court on hearing the application, shall either dismiss the suit or order the defendant to answer the plaintiff's allegations of fact and shall make such order as to costs as the court deems just.

H The bone of contention of the appellant is that the lower court was in error to have looked at, construed and applied evaluated evidence (the bills of lading attached to a motion paper) in determining an application brought pursuant to Order 27 Federal High Court Rules, 1976.

After the statement of claim was filed, the respondents refrained from filing the statement of defence, but accepted the truth of the allega-



tions on the statement of claim. In the application filed by the respondent, two bills of lading, Exhibits FA1 and FA2, were attached as evidence of the contract between the parties and to establish that the suit of the appellant was already time barred. The appellant contended that the respondents could not produce the bills of lading while it was not in accordance with Order 27 of the Federal High Court Rules to examine the document and apply their effect in determining that the appellant's claim was statute-barred. The court even wrongly relied on them to determine the law applicable to the claim as The Hague Rules rather than reference by a choice of law to the applicable legislature enactment in the country of shipment.

There had been divergence of opinion on the use to be made of documents attached to a demurrage application - while some decisions had over the years held that once the defendant had admitted the totality of the plaintiff's pleadings including the document referred to therein, or incorporated into the statement of claim - the court can look at such document, as it has there and then formed part of the plaintiff's claim which the defendant is deemed to have admitted.

Seatrade v. Fiogret Ltd. (1987-90) 3 NSC pg. 453 at pg. 461

BGCE v. CMIS Ltd. (1962) 1 All NLR pg. 570.

S. G. C. C. v. C. M. I. S. Ltd. (1962) 1 All NLR pg. 570.

Madugha v. Bai (1987) 3 NWLR (pt. 62) pg. 635.

Lawal v. G. B. Ollivant (1972) 3 SC pg. 124

In the case of *Boothia Maritime Inc. v. Fareast Mercantile Co. Limited* (2001) FWLR (pt. 50) pg. 1713, the Supreme Court gave the criteria to be followed as

(1) The only relevant and competent document the trial court is obliged to look at is the statement of claim because the defendant is deemed to have admitted the truth of the allegations in the statement of claim.

(2) No affidavit is tolerated if sought to be tendered as annexed to the motion paper as this would offend against Order 27 of the Federal High Court Rules which allowed demurrer, but which expressly forbade such facts or evidence or any discussion of questions of fact.

(3) The prohibition to look at other documents pleaded in the statement of claim, in view of the express provisions of Order 27 of the Rules. To submit that because they are pleaded they become

incorporated into the statement of claim hence the court becomes perfectly entitled to look at them, is to deliberately mislead the court by a fallacious deduction from the judicial authorities relied upon.

(4) Rule 1 of Order 27 postulates that the plaintiff would have filed his statement of claim before the defendant brings his demurrer; otherwise it will be impossible for the defendant to conceive that he has a good legal or equitable defence to the action. As a general rule therefore, the application cannot be brought before the plaintiff files his statement of claim, but it must be brought before the filing of the statement of defence.

(5) The duty is on the defendant to prove his allegations in the demurrer and the court must be very cautious in determining a suit in limine.

The judgment which led to the instant appeal was given on the 10<sup>th</sup> of May 2000 - while judgment was delivered in Boothia's case in 2001. The respondents in this appeal did not contest the truth of the allegations in the statement of claim of the appellant by filing the two bills of lading Exhs. FA1 and FA2, as a matter of fact, they confirmed the allegations.

In the statement of claim filed on 24/5/95, the plaintiff/appellant pleaded in paragraphs 3, 4 and 5 as follows: -

Paragraph 3

*"The plaintiff company is the holder and/or endorsee of (2) bills of lading Nos. 545 and 546 issued at Hamburg both dated 21<sup>st</sup> August 1992 and signed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants and their agents. The plaintiff shall rely on the bills of lading dated 21<sup>st</sup> August 1992 at the trial of this suit."*

Paragraph 4

*"In addition the plaintiff is the owner consignee and receiver of the 153 pallets of sodium chloride shipped under the said bills of lading. The plaintiff shall rely on the two bills of lading Nos. 545 and 546 at the trial of this suit."*

Paragraph 5

*"By the said two bills of lading, the defendants contracted to carry on board the vessel "Ndoni River" the said pallets of sodium chloride (hereinafter referred to as the goods) duly delivered to them in good order and condition at Hamburg Port to Lagos/Apapa (Nigeria) and then to deliver same in good order and condition to the plaintiff."*

***From the foregoing averments in the pleading, the two bills***

**of lading were already part of the facts in the case before the court through the appellant. Exhibits FA1 and FA2 attached to the affidavit of the respondents in the application for demurrer served as confirmation of the facts as to the existence of these bills of lading in the contract of carriage between the appellant and the respondents. The 2<sup>nd</sup>-3<sup>rd</sup> respondents admitted all the issues raised by the appellant - they did not contest any of them. It would be highly unjustifiable to say that the defendants could not rely on these two bills of lading of common ground to both parties in the transaction of carriage of goods entered into by them, or that the court should not look into facts that are at that stage not disputed by the respondents.** By way of reference earlier on in this judgment, the practice at the genesis of the demurrer procedure was to clip the bills of lading to statement of claim. It was then part of the undisputed fact before the court being admitted by the parties then. After being admitted, the appellant pleaded in the statement of claim that it was going to rely on the bills of lading in paragraphs 3 and 4 whereas, it is not the practice to attach documents pleaded to the statement of claim.

**I find the conclusion of the lower court that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not breach the provision of Order 27 Rule 2 of the Federal High Court (Civil Procedure) Rules 1976 by relying on the bills of lading Exh. FA1 and FA2 which the appellant had pleaded impeccable - and I equally so hold.** This issue is resolved in favour of the respondents.

#### Issue Two

Whether the Court of Appeal in a proper consideration of clause 2 of the bill of lading ought to have directed a determination of the applicable enactment in the country of shipment (Germany).

The appellant submitted that the lower court going by clause 2 of bill of lading, should have directed a determination at trial of the applicable enactment concerning the limitation period in the country of shipment -Germany. The lower court relied on an argument propounding a one year time bar, though the court agreed that the carriage of goods by Sea Act Cap 44, Laws of the Federation of Nigeria 1990, (COGSA) was not the applicable law to determine time bar. The clause in the bill of lading calls for the inquiry into The Hague Rules, as enacted in the country of shipment-that is the Federal Republic of Germany. The learned counsel concluded that

knowledge of foreign law cannot be imputed to a court or judge whereas the lower court should have ordered a trial if it had considered the fact that Germany as the country of shipment could have enacted The Hague Rules with some modifications particularly with respect to limitation period for the commencement of action. The laws referred to in the Bills are foreign laws to Nigeria - the trial court had a duty to proceed to trial to determine its content and applicability. The court cannot speculate or presume that the Rule as applicable in German is identical to Art. 3 Rule 6 of the convention. This court is urged to decide the issue in the affirmative and hold that a trial should be ordered to determine the effect and applicability of the laws of the country of shipment.

The 1<sup>st</sup> respondent however submitted that the Court of Appeal having found that Article 3 Rule 6 of the carriage of goods by Sea Act Cap 44 Laws of the Federation of Nigeria 1990 not applicable does not need to remit same back to the High Court to enquire into the applicable law. The reason being that the parties by agreement incorporated The Hague Rules into the bill of lading as the law applicable to the contract. The role of the court is simply to pronounce on their wish as to the contract as manifested in the words used in the contract. The court cannot enquire into the proper law applicable. The Hague Rules apply to inward carrying of goods from another country into Nigeria - and this position of law has been upheld in a number of cases. The learned counsel further submitted that where parties did not incorporate The Hague Rules into the bill of lading or their contract, the court is bound to take judicial notice of The Hague Rules as parties to a contract of carriage of goods by sea cannot contract out of their contract. The Hague Rules are superior to bills of lading or similar documents issued.

An international agreement embodied in convention like The Hague Rules are, is autonomous and above the domestic legislation of the subscribing countries - and the provisions of such convention like The Hague Rules are, is autonomous and above the domestic legislation of the subscribing countries - and the provision of such convention cannot be suspended or interrupted even by the agreement of the parties and it will be illegal to contract out of it. The learned counsel referred to the cases of

U.A.C. (Nig.) Ltd. v. Global Transport S.A. (1996) 5 NWLR

(pt. 448) pg. 291 at 300.

Caroline v. Nokoy (2002) 10 MJSC pg. 20.

The court is urged to resolve this issue in favour of the 1<sup>st</sup> respondent.

The 2<sup>nd</sup>-3<sup>rd</sup> respondents submitted that The Hague Rules 1924 was the applicable law for both inward and outward shipments before the enactment of the carriage of goods by Sea Act, Cap 44, Laws of the Federation of Nigeria, 1990 which by its section 2 only applies to outward shipments. All inward shipments are covered by The Hague Rules 1924, a pre-1960 Treaty/Convention which has continued to apply as an existing law unaffected by the provision of Section 12 (1) of the 1979/1999 Constitution. The lower court did not require an enquiry through a trial to determine the content of German laws as same is unnecessary and otiose because The Hague Rules, 1924 is compulsorily applicable in Nigeria on inward shipments and a consideration of Clause 2 of the relevant bills of lading, would not have changed the position of the appellant's case. That Nigeria as a country ratified The Hague Rules in 1930.

The learned counsel cited the cases of

U.A.C. Nig. Ltd. v. Global Transport (1996) 5 NWLR (pt. 448) pg. 291 at p. 300.

Marine Cargo Claims 3<sup>rd</sup> Edition by William Tetley pages 1130-1131.

The learned counsel concluded that because the shipment was an inward shipment - The Hague Rules are applicable and not carriage of goods by Sea Act. This court is urged to resolve this issue in favour of the respondents against the appellant.

The question to resolve in this issue is whether, as stipulated in Clause 2 of the bill of lading, the lower court ought to have directed a determination of the applicable enactment in the country of shipment. In short, the court ought to have referred hearing in this suit to the laws of the country of shipment of the goods - Hamburg, Germany according to Clause 2 of the bill of lading. ***It is commonly appreciated by the parties that the bill of lading formed the basis of the contract between the parties and The Hague Rules 1924 were incorporated therein - while the contract of carriage is made subject to The Hague Rules, 1924. Nigeria adopted The Hague Rules and was incorporated into our do-***

**mestic law since 1926. By virtue of the carriage of goods by Sea Act which makes The Hague Rules applicable by law to every contract of carriage of goods by sea covered by a bill of lading where the port of shipment is a port within Nigeria. The Hague Rules constitute the schedule to our carriage of goods by sea Act but as a matter of statute, the Rules apply only to outward voyages from a Nigerian port. In the case of inward voyages, The Hague Rules 1924 become applicable as a matter of agreement, usually by virtue of incorporation in a clause, in the Bill of Lading referred to as the clause paramount.**

“The General Clause paramount -

This is a term in the bill of lading which incorporates the Hague Rules. In other words, the contract of affreightment operates as between carrier and consignee subject to The Hague Rules. In jurisdictions where The Hague Rules have force of law, it is immaterial whether or not a bill of lading incorporates them - they apply to all bills by virtue of the law. There is also the jurisdiction clause which stipulates that disputes can only be tried in a given place.

In any transaction where the carriage of goods by Sea Act and The Hague Rules apply, it is not permitted to contract out of the obligations imposed. **Clause 2 of each of the bills of lading in the instant appeal provides that - “The Hague Rules contained in the international convention for the unification of certain Rules relating to bills of lading dated in Brussels the 25<sup>th</sup> August, 1924 as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation in the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said convention shall apply.”**

**Gleaning through the terms of the contract, there is no indication that the enactments of the countries of shipment and destination are compulsorily applicable. This made it possible for the parties to adopt the third option when the suit was filed in Nigeria in 1995. It is however trite law that where parties enter into a contract, they are bound by the terms thereof, and the court will not allow to be read into such contract terms on which there is no agreement.**

Saba v. Nigerian Civil Aviation Training Centre (1991) 5 NWLR (pt. 192) pg. 388.

Koiki v. Magnusson (1999) 8 NWLR (pt. 615) page 492 at 494.

The general rule of law is that parties to a contract have the autonomy to choose the law which will govern their transaction. It is the law chosen by the parties which will guide the court in the determination of their rights, provided the terms are not against public policy. The court of law on the other hand, must always respect the sanctity of the agreement of the parties - the role of the court is to pronounce on the wishes of the parties and not to make a contract for them or re-write the one they have already made for themselves.

Sona Breweries Plc. v. Peters (2005) 1 NWLR (pt. 908) pg. 478.

Owoniboy Technical Services Ltd. v. U.B.N. Ltd. (2003) 15 NWLR (pt. 844) pg. 545.

S. E. Co. Ltd. v. N. B. C. (2006) 7 NWLR (pt. 978) pg. 201.

***I cannot but take judicial notice by virtue of Section 74 of the Evidence Act, Cap 112 Laws of the Federation of Nigeria, 1990, that the Admiralty Jurisdiction Act, 1991 has virtually removed the element of courts discretion in deciding whether or not to uphold a foreign jurisdictional clause. Section 20 of the Admiralty Jurisdiction Act, 1991 thereof provides that-***

***(1) 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 the place of performance, execution, delivery, act or default takes place in Nigeria OR***

***(2) Any of the parties reside in Nigeria or has resided in Nigeria.*** OR

***(3) The payment is made or is to be made in Nigeria.*** OR

***(4) Under any convention for the time being in force to which Nigeria is a party. OR***

***(5) In the opinion of the court, the cause, matter or action should be adjudicated upon in Nigeria.***

***In the instant case - the default in the shipment was detected during delivery here in Nigeria. Gleaning through the statement of claim of the appellant, paragraphs one and two show that the parties reside in Nigeria. The law of the contract in***

**the bill of lading is under the Rules for the time being in force to which Nigeria is a party.** The Hague Rules are applicable in Germany in view of the Hamburg Rules, 1980. The trial court concluded that the action should be adjudicated upon in Nigeria from the foregoing, the Court of Appeal took the right decision when it did not determine, going by clause 2 of the bill of lading, the effect and applicability of the law of the country of shipment - Germany. I resolve this issue in favour of the respondents against the appellant.

#### Issue Three

Whether the Court of Appeal ought to have resorted to The Hague Rules, 1924 to determine the period of limitation applicable in this suit.

The appellant submitted that the issue here relates to the jurisdiction of domestic courts in Nigeria with respect to International treaties. The Court of Appeal ought not to have resorted to The Hague Rules, 1924. Municipal legislation does not enact international treaties as a matter of course. At the time this suit was filed, 1979 Constitution was in force.

Section 12 provides as follows -

*“No treaty between the Federation and any other country shall have the force of law except to the extent to which such treaty has been enacted into the law by the National Assembly.”*

The Hague Rules was given the force of law in Nigeria by enacting the Carriage of Goods by Sea Act, Laws of the Federation Cap 44 1990. Special status is accorded to domesticated law. While in the case of *Abacha v. Fawehinmi* (2000) 6 NWLR (pt. 660) page 229 at pages 288-289 The Supreme Court stated the supremacy of the Constitution over treaties which The Hague Rules are. The domestic courts had no jurisdiction to construe or apply treaty, while such treaties cannot change the law of the land. If treaties are not incorporated into our Municipal law, our domestic courts would have no jurisdiction to construe or apply it. The case of *Leventis Technical Ltd. v. Petrojessica Enterprises Ltd* by this court cannot be used to enforce a contract designed to circumvent a living law by holding that the contract of the parties is based on an international treaty. The court should not have held that an international treaty - The Hague Rules, 1924 is the applicable law to determine the limitation period applicable to this case when the treaty has not been incorporated as the domestic law of the land, in accordance with



Section 12 of the Constitution of the Federal Republic of Nigeria, 1979.

The 1<sup>st</sup> respondent replied to the foregoing that The Hague Rules having been enacted by the colonial regime, by virtue of Foreign Jurisdiction Acts, 1890 and 1913 and Colonial Law Validity Act, 1863, requires no further legislative act, such as ratification or adoption to implement its provisions. The parties chose The Hague Rules as the law to guide and determine their rights. The only duty of the court in the circumstance is to give effect to the parties contract without any reservation. The contract of carriage of goods by sea entered into by the parties is not against public policy.

The learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents replied that The Hague Rules, 1924, a pre-1960 Treaty/Conventions continues to apply as an existing law unaffected by the provisions of Section 12 (1) of the 1979 Constitution now 1999 Constitution. The Hague Rules is applicable to Nigeria on inward shipments and a consideration of Clause 2 of the relevant bills of lading would not have changed the position of the appellant's case.

The learned counsel concluded that the Court of Appeal was right to have resorted to The Hague Rules, 1924 to determine the period of limitation applicable to the appellant's suit and in holding that the substantive claim of the appellant, having been brought more than one year after the accrual of the cause of action, was time barred and rightly dismissed. The court is urged to resolve this issue in favour of the respondents and on the overall dismiss the appellant's appeal.

I have a duty to cut a clear picture of the gravamen of this issue and emphasize that this court is not called upon to interpret the scope, extent and validity of The Hague Rules, 1924 as an international treaty or whether it can be recognized under our law and give effect to it at all by our domestic courts in view of section 12 of the 1979/1999 Constitution. It has become part of our municipal law, and to this effect the appellant cited the cases of

Abacha and Fawehinmi (2000) 6 NWLR (pt. 660) pg. 228 at pg. 288-289.

Higgs & Anor v. Minister of National Securities & ors.

Rather ***what we are called upon to interpret is the contract of carriage of goods by sea between two parties who subjected themselves to the terms of their contract as expressed in their bills of lading,***

**Exhibits FA1 and FA2 before this court. This clause in the bill of lading determines the limitation period during which parties can be sued for negligence in the performance of the contract. The respondents accepted liability for short landing and the loss of part of the goods conveyed in their vessel from Hamburg in Germany to the Lagos Port, Apapa, Nigeria. It was a valid contract entered into by the parties. It is implied that in the transaction for carriage of goods by sea where the Carriage of Goods by Sea Act Cap 44, Laws of Nigeria, 1990 applies or The Hague Rules, 1924 which is applicable to inward journey to Nigeria - parties are not permitted to contract out of the obligations imposed.**

**The relevant clause of The Hague Rules, 1924 reads - Article 3 Rule 6 “In any event, the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery of the goods or the dates when the goods should have been delivered.”**

**There was no evidence of the date when the goods were delivered as it was not pleaded by the appellant. The appellant pleaded the date which he wrote a letter to the respondent claiming for his loss. This date was put as 14-1-93. Vide paragraph 9 of the statement of claim - pages 6-9 of the Record. Obviously the appellant got notice of the loss before that time. Going by that date 14-1-93 and the date it filed an action in court - 24-2-95, is a clear period of 2 years, one month and 10 days. The lower court was right to have dismissed the claim of the appellant for being statute-barred.** This takes me back to consider the applicability of section 12 (1) of the 1979/1999 Constitution which reads -

**“No treaty between the Federation and any other country shall have the force of law except to the extent to which such treaty has been enacted into law by the National Assembly.”**

The argument of the appellant that the 1979 Constitution was in force at the time the appellant's suit was filed and determined at the trial court, the foregoing provision will operate to exclude the application of The Hague Rules in Nigeria save to the extent allowed by the carriage of goods by Sea Act 1990.

That only the preamble to this law gives legality to The Hague Rules. **It was however argued by the respondents and I absolutely**

**agree that The Hague Rules, 1924, being a pre-1960 Treaty/ Convention and therefore an existing law in Nigeria at the time the 1979 Constitution came into force, section 12 (1) of the Constitution cannot operate to affect its application. The reason being that by October 1<sup>st</sup>, 1960 at the Nigeria Independence the Government of the Federation assumed all obligations and responsibilities of the colonial regime of the government which arose from valid international instruments such as The Hague Rules, 1924. Nigeria became a party through exchange of letters between Hague, the United Kingdom and the Government of Nigeria on October 1, 1960. The Hague Rules 1924 was extended to Nigeria as a legislation which formed part of our laws before independence, and was received as our laws after independence. It does not require any further ratification as stipulated in Section 12 of the 1979 Constitution before it can be applicable. In other words, The Hague Rules 1924, having assumed the force of law in Nigeria - thereby an existing law must be deemed to be an Act of the National Assembly by virtue of Sections 274(1) and 277 of the 1979 Constitution.** In short, Abacha's and Hague's cases cited are applicable to all post 1979 treaties or conventions which would need to be enacted to become part of our municipal laws, but surely this is not applicable to Pre 1960 treaties and conventions. I agree with the reasoning therefore that an international agreement embodied in a convention such as Hague Rules is autonomous and above domestic legislation of the subscribing countries and the provisions cannot be suspended or interrupted even by the agreement of the parties. The position is that The Hague Rules apply to inward carriage of good by sea contracts from another Country into Nigeria and this has been upheld in a number of cases. In the case of Leventis Technical V Petrojessica Enterprises Limited (1999) 6 NWLR (pt. 605) pg. 45 at pg. 56 - this court held that:-

*"The provision of the Hague Rules Article 3 Rule 6 leave no ground for ambiguity as to limitation of action. The carrier and the ship shall be discharged from liability in respect of such loss or damages to the Cargo unless the suit in respect such loss or damages is brought within one year after delivering of the goods or date when goods should have been delivered."*

Ibidapo v. Lufthansa Airlines (1977) 4 NWLR ( pt. 448) pg. 124 at pgs 144-145.

Oshevare V. British Caledonian Airways Ltd. (1990) 7 NWLR (pt. 63) pg. 507 at pg. 519.

I agree that the lower court was right to have reverted to the  
B Hague Rules 1924 to determine the period of limitation applicable to  
the appellants suit. In the final analysis the substantive claim of the  
appellant having been brought more than one year after the accrual  
of the cause of action is time barred - since the right of action is lost -  
C the cause of action becomes a lame duck. The appeal is therefore  
dismissed - the judgment of the lower court is affirmed. Costs of ap-  
D peal is assessed as N50,000.00 against the appellant.

---

D **MOHAMMED JSC**

The Appellant in this appeal was the Plaintiff before the Federal  
High Court, Lagos where it filed its action on 24th February, 1995 claim-  
ing damages for short delivery of goods under a contract of carriage of  
goods by sea. The Writ of Summons was filed together with the state-  
E ment of claim. In their response, the 1st, 2nd and 3rd Respondents in this  
appeal which were the 1st, 2nd and 3rd Defendants at the trial Court,  
without filing their statement of defence filed separate motions urging the  
Court to dismiss the action for being statute barred. The motions were  
F heard and in a considered ruling, the learned trial Judge dismissed the  
Plaintiffs/Appellant's action. This decision of the trial Court was affirmed  
on appeal when the Appellant's appeal to the Court of Appeal against the  
dismissal of its action was also dismissed to give rise to the present  
appeal in which the Appellant has raised three issues in the Appellant's  
G brief of argument for determination. They are-

*"1. Whether the reliance on documentary evidence (the bills of  
lading) pleaded in the statement of claim annexed to the motion on No-  
tice is permissible under Order 27 Federal High Court (Civil Procedure  
Rules), 1976.*

H *2. Whether the Court of Appeal in a proper consideration of Clause  
2 of the bill of lading ought to have directed a determination of the  
applicable enactment in the Country of shipment (Germany).*

*3. Whether the Court of Appeal ought to have resorted to "the  
Hague Rules 1924" to determine the period of limitation applicable in*

*this suit.*”

These issues which have been virtually adopted in the 1<sup>st</sup> and 2<sup>nd</sup> and 3<sup>rd</sup> Respondents’ brief of argument respectively, have been thoroughly dealt with and effectively determined in the leading judgment of my learned brother Adekeye, JSC with which I entirely agree. Having regard to the fact that the Appellant’s suit at the trial Court was terminated in-limine before hearing on the merit, the only issue calling for determination of the appeal, is whether the trial Court was right in law in coming to the conclusion that the Appellant’s suit could not proceed to hearing because it was statute barred and on the part of the Court of Appeal, if it was right in confirming that decision. B  
C

It is indeed quite correct as argued by the Appellant in its brief of argument that the trial Federal High Court was in error when it dismissed the Appellant’s action for being statute barred not by relying on the Writ of Summons and the Plaintiffs statement of claim alone but also on the two Bills of Lading described as FA1 and FA2 attached to the motion paper. However, it must be pointed out that there were in fact enough facts on the Writ of Summons which was clearly filed on 24<sup>th</sup> February, 1995 and paragraphs 9 (a) and (b) of the statement of claim of the Plaintiff now Appellant, showing that the cause of action arose on or before 14<sup>th</sup> January, 1993 when the Plaintiff/Appellant submitted or notified its claims for short landing of goods and damages, on which the trial Court ought to have determined that the Appellant’s action was statute barred. This is because the fact that the cause of action arose on or before 14<sup>th</sup> January, 1993 but the Appellant did not go to Court until 24<sup>th</sup> February, 1995, a period of more than two years, the fact that the trial Court had a glance at the two Bills of Lading before arriving at its decision to dismissed the Appellant’s action, had not resulted in any miscarriage of justice to justify disturbing the judgment of the trial Court as found by the Court below. The appeal is therefore without merit. It is hereby dismissed with N50,000.00 costs against the Appellant. D  
E  
F  
G

---

### **CHUKWUMA-ENEH JSC**

I have read in the draft the leading judgment prepared by my learned brother Adekeye JSC just delivered and I agree with his conclusion that the appeal should be dismissed.

This is a case in which the appellant has suffered considerable

H

- damage occasioned to it in the shipment of its cargoes to the Lagos/ Apapa Port from Hamburg Germany. Its claim in this suit has been challenged as being statute-barred having been commenced one year after the accrual of cause of action. Exhibits FA1 and FA2 are the two bills of laden which have identified the Hague Rules as the proper law of the contract and so the law governing the contract. Under its Article 3 Rule 6 actions as the instant one must be commenced within one year of the delivery of the goods or on a date the goods would otherwise have been delivered. By the simple process as laid down in *Egbe v. Adefarasin* (1985) 1 NSCC (Vol. 16) 642 the respondent has received the cargoes for shipment on 21/8/1992 and the instant action has been commenced on 24/2/1995 outside the period of one year laid down in the said Rule. And so the action is statute barred. See: *Leventis Tech. Ltd. V. Petrojessica Ent. Ltd.* (1996) 6 NWLR (Pt. 605) 45 at 54-55.
- This case being statute barred the appeal therefore lacks merit. I also dismiss it and abide by the orders contained in the leading judgment.

**FABIYI JSC**

- I have read before now the judgment just delivered by my learned brother - Adekeye, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal lacks merit and should be dismissed.

This matter relates to a maritime or admiralty claim to recover for loss or damage to goods which the appellant herein, as plaintiff at the trial Federal High Court, Lagos was under a strict obligation to sue within a prescribed time frame imposed by statute or by agreement of the parties.

- The appellant commenced its action on 24/02/95. It claimed DM30,487.40 and an additional sum of N19,980.68 from the respondents being for breach of contract of affreightment and/or breach of duty as bailees in respect of their cargo of Sodium Chloride which was carried on board the MV NDONI RIVER from Hamburg, Germany for delivery at Lagos Port Apapa, Nigeria.

On behalf of the 1<sup>st</sup> respondent, a demurrer application was filed on 7/7/95 in which it contended that the appellant's action should be dismissed on the ground that it is time - barred. The appellant filed a counter affidavit on 31/7/95 to which was exhibited Short - landing and

Discrepancies Certificates. In a similar fashion, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents also filed their own demurrer application dated 1<sup>st</sup> February, 1996. The two (2) Bills of Lading which were pleaded in paragraph 4 of the statement of claim were exhibited to the application as FAI and FAIA. They also urged that the action be dismissed for being time-barred.

The two applications were taken jointly by the trial court. By its ruling delivered on 5/7/96, the appellant's claim was dismissed for being statute-barred. The appellant felt unhappy with the stance posed by the trial court and appealed to the Court of Appeal ('the court below' for short). The court below on the 10<sup>th</sup> May, 2000 upheld the judgment of the trial court and dismissed the appeal. The appellant has further appealed to this court to try its chance; as it were.

The three (3) issues formulated by the appellant in its brief of argument and rightly adopted by the 1<sup>st</sup> respondent read as follows:-

*1. Whether the reliance on documentary evidence (the bills of lading) pleaded in the statement of claim annexed to the Motion on Notice is permissible under Order 27 Federal High Court (Civil Procedure) Rules, 1976.*

*2. Whether the Court of Appeal in a proper consideration of clause 2 of the bill of lading ought to have directed a determination of the applicable enactment in the country of shipment (Germany).*

*3. Whether the Court of Appeal ought to have resorted to "The Hague Rules, 1924" to determine the period of limitation applicable in this suit.*

On issue one (1), it was seriously contended on behalf of the appellant that the bills of lading attached to the application of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents as FAI and FAIA should not have been considered by the trial court. The appellant felt that such is not permissible under Order 27 Federal High Court (Civil Procedure) Rules, 1976.

With respect to the above stance, I need to go down into the memory lane on this point. In *Day v. Williams Hill (Park Lane) Limited* (1949) 1 AL E. R 219 at 221 it was held that 'it should be made clear that if documents are referred to in a pleading they become part of the pleading and it is open to the court to look at them without the need of any affidavit exhibiting them'. This pronouncement was duly given a stamp of approval by this court in the case of *S.G.C.C. v. C. M. I. S Limited* (1962) 1 All NLR 570 at 577. In *Lawal v. G. B. Olivant* (1972) 3 S.C. 124 at 130, this court held that 'if an agreement in writing is referred to

in a pleading, it becomes part of the pleading and it is open to the court to give the agreement its true legal effect, irrespective of the terms used in the pleadings to indicate such effect.

The above stance, in my opinion is good law apart from being logical. This has been the position of this court in the cases of *Bothia Maritime Inc. v. Fareast Mercantile Co. Ltd.* (2001) 9 NWLR (Pt. 719) 572 *Mobil Oil Plc. v. IAL 36 Inc.* (2000) 6 NWLR (Pt. 659) 146.

It goes without saying that the bills of lading attached to the motion as FAI and FAIA form part of the statement of claim as pleaded by the appellant and must be construed accordingly as done by the trial court and the court below. It was necessary to apply the true legal effect of the bills of lading to the statement of claim. Nothing under Order 27 Federal High Court (Civil Procedure) Rules, 1976 precludes same. I have no hesitation in resolving issue one (1) against the appellant and in favour of the respondents.

With respect to issue two (2) the appellant contended that the court below having found that the carriage of Goods by Sea Act, Cap. 44 Laws of the Federation of Nigeria, 1990 was not the applicable law to determine time bar, it should not have fallen back on the provision of the Hague Rules, 1924.

It is my view that the provisions of Hague Rules 1924 continue to apply to inward shipment of goods as herein. The Hague Rules 1924, otherwise known as the Brussel's Convention or Treaty is applicable in Nigeria. See: *Ibidapo v. Lufthansa Airlines* (1997) 4 NWLR (Pt. 498) 124 at 147. The Hague Rules is one of the international instruments passed onto Nigeria by the United Kingdom as at Independence on 1<sup>st</sup> October, 1960. See: also *UAC (Nig) Ltd. v. Global Transport S. A* (1996) 5 NWLR (pt. 448) 291 at 300.

Further, it must be stated clearly that since this shipment was an inward one, the Hague Rules is applicable and not Carriage of Goods by Sea Act which deals with outward shipment of goods. See: *Leventis Tech. Ltd. v. Petrojessica Ent. Ltd.* (1999) 6 NWLR (Pt. 605) 45. Even then, an international agreement embodied in a convention such as the Hague Rules, is autonomous and above domestic legislation of the subscribing countries and the provisions of such conventions cannot be suspended or interrupted even by agreement of the parties. Parties are bound by the provisions of the Hague Rules and it will be illegal for parties to contract out of the same. See: *UAC*



(Nig) Ltd. v. Global Transport S.A (supra); Caroline v. Nokoy (2002) 10 M. J. S. C. 20.

The court below was on a firm ground when it invoked Art. 3 Rule 6 of the Hague Rules 1924 to determine the point of time bar. Article 3 Rule 6 of the Hague Rules, 1924 provides:-

*“In any event, the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery of the goods or the dates when the goods should have been delivered.”*

The court below found that the appellant wrote to claim for loss on 14-01-93 but only filed its suit on 24-2-95 when it was clearly out of time. Same is extant in the record.

It is clear to me that the remote idea that the court below should have directed a determination of the applicable enactment in the country of shipment (Germany) is most unwarranted. It was not necessary or desirable in the prevailing circumstance of this matter.

The contention of the appellant on the 3<sup>rd</sup> issue is that the court cannot resort to the Hague Rules, 1924 since it has not been ratified or adopted by the Legislature by virtue of section 12 (1) of the 1979 constitution being the law in force when the cause of action arose. The appellant also cited the case of *Abachav. Fawahinmi (2000) 6 NWLR (pt. 660) 288 at 289*.

I do not for one moment feel that the provision of section 12 (1) of the 1979 Constitution can operate to affect the application of the Hague Rules, 1924 being a pre-1960 Treaty and therefore an existing law in Nigeria at the time the 1979 Constitution came into force. As at October 1<sup>st</sup>, 1960 the government of the Federation of Nigeria assumed all obligations and responsibilities of the Government of the United Kingdom which arose from valid international instruments such as the Hague Rules, 1924. See: *Ibidapo v. Lufthansa Airlines (supra)*. The Hague Rules 1924 does not require to undergo the ‘domestication test’. The case of *Abacha v. Fawehinmi (supra)* is not apposite. The treaty therein canvassed came on board after the 1979 Constitution and required to pass the ‘domestication test’.

The Hague Rules., 1924 requires no further legislative act such as ratification or adoption to implement its provision. As an existing law in virtue of section 274(4) (b) of the 1979 Constitution, the Hague Rules, 1924 is deemed to be an enactment/Act of the National As-

sembly. It did not require to undergo the ‘domestication test’. The appellant was not on a firm ground in the stance posed by it. The issue is resolved against it and in favour of the respondents.

For the above reasons and the fuller ones ably set out in the lead judgment, I too, feel that the appeal is devoid of merit and should be dismissed. I order accordingly and hereby endorse all the consequential orders made by my learned brother; that relating to costs inclusive.

C

### ***RHODES -VIVOUR JSC***

I am in complete agreement with the leading judgment delivered by Adekeye, JSC that the appeal should be dismissed for the clear reasoning that the appellant’s suit is statute barred. Exhibits FA1 and FA2 are the parties bills of Lading. Therein is the contract of the parties. The parties agreed that the Hague Rules, 1924 would be the Legislation to determine their rights.

In such a situation the court is left with no alternative but to implement fully the intention of the contracting parties. This is premised on the reasoning that where the terms of the contract are clear and unambiguous the duty of the court is to give effect to them and on no account rewrite the contract for the parties. In the absence of fraud, duress, misrepresentation, the parties are bound by the terms of the contract they freely entered into. See *Bookshop House v Stanley consultants* 1986 3 NWLR pt. 26 p. 87 *African Reinsurance Corp. v. S. Fataye* 1986 1 NWLR pt. 14 p. 113

The Hague Rules 1924 covers inward shipment of goods, and actions arising from the inward shipment of goods must commence before one year after the cause of action arose. See *Leventis Technical v. Petrojessica Enterprises Ltd.* 1999 6 NWLR pt. 695 p. 45.

When the issue for determination is whether a claim is time barred the trial judge resolves the issue, first by examining the applicable limitation period provided in the enabling statute to see the period stipulated therein for the claim before him. Secondly, the judge determines when the cause of action arose by examining carefully the writ of summons and statement of claim. Thirdly, when the judge is satisfied as to when the claimant/plaintiff had a cause of action, he

compares that date with the date the writ of summons was filed. If the time from when the cause of action arose to when the writ of summons was filed is beyond the period allowed in the enabling statute, then the action is statute barred. As the Law stands now a court has no discretion in the matter (i.e. to extend limitation periods) In *Sanni v. Okene* L.G 2005 14 NWLR pt. 944 p. 60 I explained the purpose of limitation period thus:

*“The main purpose of the limitation period is to protect a defendant from the injustice of having to face a stale claim. Put in another way a claim which he never expected to have to deal with. For example if a claim is brought a longtime after the events in question, there is a strong likelihood that evidence which was available earlier may have been lost, and the memories of witnesses may have faded.”*

In this matter the Hague Rules, 1924 applies, since the issue has to do with the inward carriage of goods by sea, i.e. from another country into Nigeria. Claims under these Rules must be brought within one year after the cause of action arose. The cause of action arose on the 14<sup>th</sup> of January, 1993, while the Writ of Summons was filed on the 24<sup>th</sup> of February, 1995. The appellant has a cause of action but sadly one that he cannot enforce for the simple reason that it was filed outside the one year period stipulated by applicable legislation. Accordingly the appellants Suit is time barred.

#### IT IS TIME FOR REFORMS

There has been no reform of limitation Laws in Nigeria. The general limitation period for some actions are too short. Judges should be conferred with discretion to extend limitation periods when it is just and equitable to do so. Actions that readily come to mind are sexual offences and personal injury cases. In sexual abuse cases the victims are usually too traumatized, under intolerable pressure, grief stricken and depressed for long periods. Consequently when they eventually regain their composure it is too late to file action in court because of short limitation periods provided by the Law. This also applies to personal injury cases. Injuries that occur in a Factory. The victim is usually a poor factory worker drawn into endless negotiation by a boss, much aware of the limitation period. Time to file action runs out when the poor factory worker realizes he has been taken for a ride. He has a cause of action but sadly one that cannot be enforced. To my mind reforms are required with an urgency that makes delay an accessory.

Once again I am in complete agreement with my Lord Hon. Justice O. O. Adekeye, JSC leading judgment. This appeal has no redeeming features. It is dismissed with costs of N50, 000.00 against the appellant.

B

C

D

E

F

G

H